DECENT WORK FOR ON-DEMAND WORKERS IN THE MODERN-DAY GIG ECONOMY

By

GREY STOPFORTH

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PROMOTOR: Prof DM Smit

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TABLE OF CONTENTS

CHAPTER 1: INTRODUCTION AND BACKGROUND TO THE THESIS

CHAPTER 2: CONCEPTUALISATION OF THE MODERN-DAY GIG ECONOMY AND ON-DEMAND WORK

CHAPTER 3: INTERNATIONAL PERSPECTIVES ON DECENT ON-DEMAND WORK

LIST OF APPENDICES

LIST OF FIGURES

LIST OF TABLES

LIST OF ACRONYMS AND ABBREVIATIONS

1IR	First Industrial Revolution
2IR	Second Industrial Revolution
3IR	Third Industrial Revolution
4IR	Fourth Industrial Revolution
ACCC	Australian Competition and Consumer Commission
AI	Artificial Intelligence
ASA	Administrative Services Agreement

BCEA	Basic Conditions of Employment Act
CAA	Conciliation and Arbitration Act
CC	Constitutional Court
CCCECBD	Competition and Consumer (Class Exemption – Collective Bargaining) Determination
CCMA	Commission for Conciliation, Mediation and Arbitration
CEO	Chief executive officer
Covid-19	Coronavirus disease 2019
CPA	Consumer Protection Act
CPDES	Code of Practice on Determining Employment Status
DoT	Department of Transport
DPB	Digital Platform Branch
DWCP	Decent Work Country Programme
EEA	Employment Equity Act
EMPA	Employment (Miscellaneous Provisions) Act
ERR	Employment Relationship Recommendation
ESA	Employment Services Act
ESAB	Employment Services Amendment Bill
EU	European Union
FWC	Fair Work Commission
FWO	Fair Work Ombudsman
FWSAJERA	Fair Work (Supporting Australia's Jobs and Economic Recovery) Act
GDP	Gross domestic product
GPS	Global Positioning System
ICA	Independent Contractors Act
ICESCR	International Covenant on Economic Social and Cultural Rights
ICT	Information and communications technology
ILO	International Labour Organization
IROLAB	Industrial Regulations and Other Legislation Amendment Bill
IT	Information technology
KET	Key enabling technology
LAC	Labour Appeal Court

LC	Labour Court
LRA	Labour Relations Act
LRAA	Labour Relations Amendment Act
Nedlac	National Economic Development and Labour Council
NLTAB	National Land Transportation Amendment Bill
NMWA	National Minimum Wage Act
NSW	New South Wales
OECD	Organisation for Economic Co-operation and Development
PAYE	Pay as you earn
PRSI	Pay related social insurance
QIRC	Queensland Industrial Relations Commission
SCA	Supreme Court of Appeal
SCFWW	Select Committee on the Future of Work and Workers
SCJS	Select Committee of Job Security
SDA	Skills Development Act
SDG	Sustainable Development Goal
SME	Small and Mid-size Enterprise
TES	Temporary employment services
TWU	Transport Workers' Union
UN	United Nations
US	United States
VAT	Value-added tax
WEF	World Economic Forum
WRA	Workplace Relations Act.
WRC	Workplace Relations Commission
WWW	World Wide Web

SUMMARY

Keywords: Fourth Industrial Revolution; 4IR, future of work; gig economy; on-demand work; decent work; decent pay; decent working hours; multi-stakeholder engagement; decent representation; classification of labour; platform work.

Radical technological development during the past two centuries has led to various enabling technologies changing the world of work on a global scale and, unfortunately, not always for the better. With one of the highest unemployment rates in the world, South Africa's reliance on informal forms of work is increasing, raising the question of how to ensure decent work in the modern world of work. This becomes even more troubling, seeing that millions of unemployed people are trying to enter the labour market. This is especially true for unemployed youth in South Africa, who are suited for these new forms of work due to technological advancements, the rise of complexities associated with the gig economy, and the skills required by jobs. Although the benefits of embracing the technological changes in the workplace are apparent, some technologies continue to disrupt the traditional employment model to the extent that many are excluded from labour and social protections. One of the emerging sectors brought about by the technological changes, especially the use of mobile applications, is the gig economy. The gig economy is an economy that involves the exchange of labour for payment between companies or individuals via a digital platform. The concept 'gig economy' is used interchangeably with other types of economies that are linked to platform work. This includes economies such as the digital economy, collaborative economy, sharing economy, platform economy, and on-demand economy. The gig economic model leans more towards emerging economic activities coupled with the platform economy, which is divided into two forms of platform work, crowdwork and on-demand work. In addition, platform work is characterised by irregular work arrangements, additional costs on workers providing the service, work that is paid for tasks completed, and accessibility of work facilitated by various platforms. Research suggests that non-standard forms of work continue to feature in the gig economy, and that classification of platform workers as independent contractors remains a major concern.

International perspectives and research conducted on on-demand work in foreign jurisdictions is instrumental to finding best practices for advocating decent on-demand work. Although the ILO has yet to reach an agreement on a universal approach to regulating on-demand work, it has taken progressive steps to achieve decent work for, and extend basic labour and social protection to, those working in the gig economy. However, a solution for the universal regulation of the modern-day gig economy and on-demand work remains elusive. In the absence of such, it is found that on-demand workers are rendered vulnerable in respect of basic conditions of employment, having little to no control over unilateral changes to the contractual terms that regulate their relationship. On-demand workers also lack protection at the level of both individual and collective labour rights; therefore, they experience unfair deactivation, discrimination by both clients and the platform, and poor collective bargaining power.

Taking this into account, the question needs to be asked if South Africa sufficiently advocates for decent on-demand work. The rights of on-demand workers warrant urgent regulatory intervention that could take the form of proactive steps from a platform company in the form of policy considerations from the platform company. A workable solution to the decent work deficit in the on-demand sector can therefore be proposed by either the legislator by way of legal reform, or by the platform company by means of policy measures and/or revised terms and conditions.

The current bargaining power between a platform company and an on-demand worker is skewed and favours the platform company. To address this, it is recommended that platform companies establish a clear policy that advocates for a multi-stakeholder engagement process where on-demand workers or their representatives can negotiate changes to their service agreements and fee structures. Platform companies must align their terms of service with national legislation that advocates for minimum decent on-demand work in South Africa. In this context, trade unions can play a vital role in a multi-stakeholder engagement process in South Africa, and a phased multi-party negotiation approached should be considered. Parties should consider agreeing to a statement of principles that focuses on decent classification practices, decent working hours, decent pay, and decent multi-stakeholder engagement. Decent work indicators play a vital role in determining to what degree a country is advocating or achieving decent work. An examination of the legal indicators reveals that South Africa, Ireland and Australia are on the right trajectory insofar as advocating decent

work, in general, is concerned. Applying the full set of decent work indicators is technical and cumbersome. It is thus required to consider other contributions aligned with the International Labour Organization (ILO) decent work indicators. For purposes of this research, it would not be possible to analyse all the decent work indicators. An analysis of Heeks' decent digital gig economy standards, the World Economic Forum's charter of principles for good platform work, and lastly, the Fairwork gig work principles proved a good fit for identifying minimum decent work indicators for on-demand work. This study focuses on decent work indicators that advocate for minimum decent on-demand work in South Africa. Attention is thus given to minimum decent on-demand indicators that include decent classification, decent working conditions in relation to decent working hours and decent pay, and decent multi-stakeholder engagement. It was found that South Africa is on the right trajectory but must prioritise its interventions by establishing minimum decent work standards.

Contrary to the South African position, Ireland and Australia are in the process of adopting binding and non-binding legal measures that advocate for decent on-demand work. Best binding and non-binding legal measures from foreign jurisdictions such as Ireland and Australia can serve to advocate for decent on-demand work. In particular, Ireland has made significant progress with the drafting of legislation, bills and a *Code of Good Practice* that can be extended to the on-demand sector. The Irish *Employment (Miscellaneous Provisions) Act* seeks to improve the predictability and security of those who work unpredictable working hours. In addition, the *Competition (Amendment) Act* extends limited quasi-collective bargaining rights to 'false self-employed workers' and 'fully dependent self-employed workers'. Australia, on the other hand, extends limited protections to independent contractors in terms of the *Independent Contractors Act*, which could offer limited protection to on-demand workers against unfair contracts. Much like the Irish position, Australia too prescribes a quasi-collective bargaining process by means of its *Competition and Consumer Act*.

The research culminates in formulating a draft statement of principles in respect of minimum decent work principles in the on-demand sector, in which the stakeholders to the on-demand work relationship and their representatives agree to uphold certain minimum principles for advocating decent work in the on-demand sector in South Africa.

CHAPTER 1: INTRODUCTION AND BACKGROUND TO THE THESIS

'Every problem is a gift — without problems we would not grow.' — Tony Robbins, motivational speaker and writer.[1]

1.1 INTRODUCTION

The world of work has undergone dramatic changes in the 21st century.[2] During the past decade, the crisis of modern labour law can be seen in interrelated developments in the world of work, characterised by increasingly growing informal economies[3] and the proliferation of newly emerging forms of work that do not fit the formal work model.[4] In addition, the advent of the fourth Industrial Revolution is continuing to test the boundaries of the traditional employment relationship, with new forms of work emerging globally.[5]

In South Africa, several sectors have embraced the use of advanced technology, automation of processes, artificial intelligence software, and the digitisation of processes in the hope of remaining relevant and competitive in a global market.[6] Failure to do so poses a considerable risk for businesses falling behind, exacerbating the global digital divide and lowering their global competitiveness.[7] However, job

1 Johnson 2023. "39 Inspiring Quotes About Business Growth — and Tips for Success", https://www.salesforce.com/blog/inspirational-business-quotes-2019/. Accessed on 20 February 2023.
2 Kuullmann, Zbyszewska & Blackham 2019:1.
3 Etim & Daramola 2020:1. It is estimated that roughly 60% of the global workforce is taking part in informal employment.
4 Owens 2021:189.
5 Johnston and Land-Kazlauskas 2018. "Organizing On-Demand: Representation, Voice, and Collective Bargaining in the Gig Economy", https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_624286.pdf. Accessed on 20 July 2019.
6 Sutherland 2020:233.
7 Ndungi'u & Signé 2020. "The Fourth Industrial Revolution and digitization will transform Africa into a global powerhouse", https://www.brookings.edu/research/the-fourth-industrial-revolution-and-digitization-will-transform-africa-into-a-global-powerhouse/. Accessed on 15 July 2021.

losses in specific sectors will continue due to digitisation,[8] leading to further reductions in human labour demands.[9] Not only are substantial overall job losses predicted,[10] but this holds true especially for countries such as South Africa, where unemployment has already reached a staggering 32.9 per cent in the third quarter of 2022.[11]

One of the changes that has been brought about by the above-named contributing factors is work performed in the gig economy.[12] The gig economy is rapidly growing into a global phenomenon with irregular work such as 'crowdwork', 'platform work' and 'on-demand work' gaining the attention of the ILO, policymakers and legal scholars.[13] This poses a concern for South Africa, seeing that the current South African labour legislation has been drafted to regulate the traditional employment relationship. It does not necessarily cater for new developments in a gig economy, such as on-demand work. More importantly, South Africa has one of the highest unemployment rates globally, which leaves little to no choice to the unemployed to take on various precarious forms of work to generate a main source of income. To this effect, it should also be noted that the overall scope of and reliance on non-standard employment is increasing worldwide, and South Africa is no exception to the rule.[14] This raises the question of how to ensure *decent work* in the modern world. In line with the purpose of this study, it is vital to consider what should be regarded as *decent on-demand work* in the South African context.

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8 Belluci & Otenyo 2019:204. Digitilisation must not be confused with the term digitisation. For purposes of the research digitisation refers to the technical process of converting data from analogue to digital bits. Digitilisation, on the other hand, concerns the use of digital and computer technologies in workplaces.

9 Belluci & Otenyo 2019:205.

10 Makamase "The Fourth Industrial Revolution: Impact on unemployment and inequality in South Africa", https://www.igd.org.za/infocus/12080-the-fourth-industrial-revolution-impact-on-unemployemnet-and-inequality-in-south-africa. Accessed on 8 September 2020; Kurt 2019:596.

11 STATS SA 202.1 http://www.statssa.gov.za. Accessed on 23 January 2023. It must be noted that Covid-19 in many cases fast-tracked the 4IR, leaving the law to catch up, keep up and evolve rapidly.

12 2017. "Strengthening social protection for the future of work". https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_559136.pdf. Accessed on 25 June 2019.

13 See para. 1.9 for technical terms.

14 Fourie 2018:423.

Maintaining one's livelihood and a decent life depends largely on one's ability to participate in work and earn an income. Accordingly, generating an income is a desire of millions of people globally. However, a person's access to work and participation in the formal employment sector is much more than a mere aspiration. The United Nation's Universal Declaration of Human Rights[15] regards having access to employment opportunities as a fundamental human right. The goal of full employment and decent work is also central to the goals of the International Labour Organization (ILO).[16] Closely connected to this and relevant to this research, the ILO endorses the sentiment that 'labour is not a commodity'[17] and has established several mechanisms for technical assistance, monitoring and accountability for the advancement of decent work for all.[18]

Considering the above, this thesis contributes to the current research and knowledge about the characteristics of the growing gig economy in South Africa. It identifies decent work deficits experienced by on-demand workers and available legal and policy remedies to alleviate these deficits. In exploring this area, Chapter 1 highlights the importance of this study and provides detail on the study's aims and its position within the field of knowledge. The chapter provides a contextual background to the changing work patterns in the modern world of work, the role that the classification of labour plays, and the characteristics of the gig economy and gig work.

An initial overview of international law from the ILO and the European Union (EU) provides a background to and perspectives on achieving basic labour and social protection for on-demand workers in the gig economy. As is evident from the discussion below, it is necessary to provide an outline of foreign approaches from Australia and Ireland to assist South Africa in improving its labour and social protections. [19]

15 Universal Declaration of Human Rights, 1948.
16 Universal Declaration of Human Rights 1948: Article 23.
17 See the Declaration of Philadelphia, 1944.
18 Frey & MacNaughton 2016:2.
19 The reasons for the chosen jurisdictions are explained later in the chapter. See the discussion under heading 1.2.5.1 infra for a discussion on the Australian perspectives on regulating on-demand work and heading 1.2.5.2 for the Irish legal perspectives on on-demand work.

1.2 CONTEXTUAL BACKGROUND

1.2.1 The changing world of work

South Africa experienced radical technological developmental processes during the 20th and 21st centuries with various enabling technologies.[20] In addition, it has been established that boosting capital investment to reduce the required workforce remains an ongoing trend of the Industrial Revolution, especially since the 1970s.[21]

A study conducted by the World Economic Forum (WEF) confirms that '41 per cent of all work activities in South Africa are susceptible to automation'.[22] This paints a bleak picture for unemployed work seekers of any age, seeing that South Africa already has an oversupply of low-skilled workers entering the labour market, hoping to find permanent employment.[23] It is inevitable that continued digitalisation and automation will increase job insecurity and ultimately job loss[24] because the South African labour market is based on traditional employment relations that are applied to an economic context that is substantially different from modern-day workplaces.[25] Consequently, within the context of the challenges of unemployment and the changing nature of the

20 NEDLAC 2019. "The Future of Work in South Africa", http://nedlac.org.za/wp-content/uploads/2017/10/Futures-of-Work-in-South-Africa-Final-Report-March-2019.pdf. Accessed on 20 July 2019.

21 NEDLAC 2019. "The Future of Work in South Africa", http://nedlac.org.za/wp-content/uploads/2017/10/Futures-of-Work-in-South-Africa-Final-Report-March-2019.pdf. Accessed on 20 July 2019.

22 World Economic Forum 2016. "The Future of Jobs: Employment, Skills and Workforce Strategy for the Fourth Industrial Revolution", http://www.hsrc.ac.za/uploads/pageContent/9352/WEF_Future_of_Jobs%20(002).pdf. Accessed on 20 June 2019.

23 Reddy *et al.* 2017. "Occupations in High Demand in South Africa: A Technical Report", http://www.lmip.org.za/sites/default/files/documentfiles//HSRC%20LMIP%20OIHD%20Report%20WEB.pdf. Accessed on 21 July 2019.

24 Ramaphosa 2019. "Launch of ILO Global Commission on the Future of Work report", https://www.gov.za/speeches/address-president-cyril-ramaphosa-launch-report-ilo-global-commission-future-work-fairmont. Accessed on 1 April 2019.

25 Bregiannis *et al.* 2017. "Workers in the gig economy: Identification of Practical Problems and Possible Solutions", https://www.researchgate.net/publication/318753756_WORKERS_IN_THE_GIG_ECONOMY_Identification_of_Practical_Problems_and_Possible_Solutions. Accessed on 10 July 2019.

labour market, many work-seekers pursue various work opportunities outside traditional permanent employment.[26]

The contemporary labour market is thus facing contemporary types of employment relations that are influenced by technology.[27] Like the revolutions that preceded it, the fourth Industrial Revolution (4IR) can create a space for new forms of work that do not fit within the current scope of standard or non-standard forms of employment.[28] A clear example is reflected in the work opportunities available in the gig economy, such as app-based work as a crowdworker or an on-demand worker in several established and emerging sectors.[29]

1.2.2 The gig economy and platform work

The gig economy is an economy that involves the exchange of labour for payment between companies or individuals via a digital platform that actively facilitates the matching process of providers and customers, on a short-term and payment per task basis.[30] It is divided into two forms of platform work, namely crowdwork and on-demand work.[31] Platform work is characterised by irregular work arrangements[32],

26 Barnabas 2021. "TES becomes driving force for South Africa's gig economy", https://www.iol.co.za/business-report/companies/tes-becomes-driving-force-for-south-africas-gig-economy-48fedba6-7d01-45b0-844a-dd438d639196. Accessed on 25 August 2021.

27 Bregiannis *et al.* 2017. "Workers in the gig economy: Identification of Practical Problems and Possible Solutions", https://www.researchgate.net/publication/318753756_WORKERS_IN_THE_GIG_ECONOMY_Identification_of_Practical_Problems_and_Possible_Solutions. Accessed on 10 July 2019.

28 See Barnabas 2021. "TES becomes driving force for South Africa's gig economy", https://www.iol.co.za/business-report/companies/tes-becomes-driving-force-for-south-africas-gig-economy-48fedba6-7d01-45b0-844a-dd438d639196. Accessed on 25 August 2021.

29 See Chapter 2, heading 2.4.5.1 for a detailed discussion on the different types of platform work.

30 Department for Business, Energy & Industrial Strategy 2018. "Characteristics of those in the Gig Economy", https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/687553/The_characteristics_of_those_in_the_gig_economy.pdf. Accessed on 20 June 2019.

31 Kirven 2018:258. Crowdwork refers to a type of work performed remotely on online platforms whereas on-demand work refers to traditional work activities that are available via online platforms applications (apps) that are facilitated and managed by organisations. On-demand work is limited to a specific demographical location and executed in the physical world.

32 Workers have little to no control over the tasks that are allocated to them, since the tasks are linked to the customers demand and the users' demographical area.

additional costs on workers providing the service,[33] work that is paid for tasks completed, and the accessibility of work that is facilitated by various platforms.[34] A practical example in South Africa would be the use of Uber, Uber Eats, Taxify, and Mr Delivery.[35] Research done by the ILO suggests that non-standard forms of employment feature predominantly in the gig economy, and that the misclassification of platform workers remain a major concern.[36]

Approximately 64 million individuals in the United States and the European Union are involved in some form of platform work to supplement their primary source of income.[37] It is estimated that 53 per cent of African platform workers require the minimal income received from completing their tasks to meet their basic needs.[38] Likewise, 60 per cent of the South African platform workers have indicated that their minimal income is crucial to meeting their basic needs.[39]

With South Africans suffering from chronic high unemployment, opportunities presented by the gig economy are tempting for individuals without any alternative source of income. This is especially true for unemployed youth in South Africa.[40] Moreover, the skills required to perform these types of work are drastically changing,

33 For example, the use of your own transport and additional costs associated with it.

34 Guta 2018. "20 Platforms for Workers in the Gig Economy", https://smallbiztrends.com/2017/02/gig-websites.html. Accessed on 28 June 2019. The top 20 rapidly growing gig economy platforms are: Uber, Lyft, Turo, HopSkipDrive, Airbnb, OneFineStay, OpenAirplane, ToolLocker, ParkingPanda, Closet Collective, Postmates, Amazon Flex, TaskRabbit, Dolly, HelloTech, SpareHire, Freelancer, Etsy, Feastly and Udemy. For purposes of this study, the research will focus on forms of on-demand work on the rise in South Africa.

35 Rajah & Moodley 2018. "South Africa's gig economy – a solution to addressing unemployment", https://withoutprejudice.co.za/free/article/6308/view. Accessed on 15 July 2019.

36 ILO 2019. "Non-Standard Forms of Employment", https://www.ilo.org/global/topics/non-standard-employment/lang--en/index.htm. Accessed on 3 May 2019.

37 Investec 2019. "Understanding the gig economy and its effect on companies and careers", https://www.businesslive.co.za/bd/business-and-economy/2019-02-26-understanding-the-gig-economy-and-its-effect-on-companies-and-careers/. Accessed on 29 June 2019.

38 Investec 2019. "Understanding the gig economy and its effect on companies and careers", https://www.businesslive.co.za/bd/business-and-economy/2019-02-26-understanding-the-gig-economy-and-its-effect-on-companies-and-careers/. Accessed on 29 June 2019.

39 Gillwald 2019. "Fairwork exposes exploitation in gig economy amid regulatory vacuum", https://www.businesslive.co.za/bd/opinion/2019-04-11-fairwork-exposes-exploitation-in-gig-economy-amid-regulatory-vacuum/. Accessed on 5 May 2019.

40 Statistics SA 2019. http://www.statssa.gov.za. Accessed on 5 May 2019. The youth unemployment rate (aged between 15 and 34 years) was 39.6% during the first quarter of 2019.

making the youth suited for these new forms of work.[41] Recent developments resulting from technological advancements, the rise of complexities associated with the gig economy, and the general rise in the skills required by jobs, necessitate that workers have applied competence to perform their duties.[42] It deems to be repeated that although prevalent studies on the modern-day gig economy and the precarious nature of platform work are abundant, there is little substance and developing jurisprudence about minimum decent on-demand work indicators available in the South African context. In view of this, it is necessary to consider international instruments and current research on on-demand work conducted in foreign jurisdictions, with specific views expressed in Australia and Ireland, as will be explained in the methodology.[43]

1.2.3 The on-demand worker classification dilemma

To identify the possible shortfalls associated with the regulation of on-demand work, this study considers the common law tests that are used to classify and distinguish an employee from an independent contractor.[44] The South African common law, in the context of labour law, is rooted in both English and Roman-Dutch principles[45] of which the common law contract of employment[46] lays the foundation for the existence of the employment relationship. It is still used as a valuable source in determining disputes to this day.[47] In fact, the South African courts have confirmed the importance of developing the common law to imply terms into the employment contract as a matter of public policy.[48] Courts also have a duty to promote and develop the common law,

41 ILO 2021. "Young people and the gig economy (Luis Pinedo Caro, Niall O'Higgins and Janine Berg)", https://www.ilo.org/employment/Whatwedo/Publications/WCMS_790117/lang--en/index.htm. Accessed on 25 August 2021.

42 Du Plessis & Fouché 2015:196. The term "applied competence" include: practical competence (ability to perform task), foundational competence (ability to understand) and reflexive competence (ability to integrate your understanding to perform the tasks and adapt to unforeseen circumstances.)

43 See paras. 1.5 and 1.6 more detail on the international instruments and the selected foreign jurisdictions.

44 Other forms of employment such as *mandatus* and agency do not form part of this study. The emphasis will be placed on the independent contract, which closely resembles the characteristics of platform work.

45 Grogan 2019:2.

46 Referred to as the *locatio condition operarum*.

47 Du Toit *et al.* 2015:104, 106.

48 Du Toit *et al.* 2015:107. Public policy is largely shaped by "…the Constitutional commitment to 'human dignity, the achievement of equality and the advancement of human rights and

which has led to innovative constitutional interpretations of the *naturalia* of the contract that shaped the course of our legal jurisprudence.[49] The mere existence of the contract of employment is, however, not a viable test to determine the modern work relationship.[50]

The South African courts applied and developed multiple common law tests to determine the actual employment relationship.[51] To date, the dominant impression test is the prevailing test to apply to situations where the existence of an employment relationship is not as straightforward as it seems to be.[52] With the growing reliance on non-standard forms of work such as platform work, it will become increasingly important for our courts to adopt a generous approach to applying the dominant impression test to on-demand work as a vulnerable group of workers.

The term 'employee' is defined by South African labour legislation,[53] and the *Code of Good Practice: Who is an Employee?*[54] encapsulates the different guidelines in determining whether a person is an employee or an independent contractor.[55] In addition, section 200A of the *Labour Relations Act*[56] introduces a presumption in favour of vulnerable persons who work for or render services to any other person, regardless of an employment contract between the parties, if one or more of the listed factors are present.[57] Notwithstanding the above-mentioned tests and statutory definition, the Labour Court,[58] in *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers,* ruled that there was no contractual relationship between the Uber employee and the putative employer, nor

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freedoms, and the rule of law, and is further informed by the notion of *Ubuntu*, which emphasises the importance of community, responsibility for others and humanity."

49 Du Toit *et al.* 2015:108.

50 Van Niekerk *et al* 2018:59; Grogan 2019:19.

51 Du Toit *et al.* 2015:90-91; Grogan 2019:20, 22. The tests are confirmed as the control test, the organisation/integration test, the economic test and the dominant/multiple impression test.

52 Van Niekerk *et al.* 2019:64.

53 *Labour Relations Act* 66/1995: sec 213.

54 Hereafter referred to as the "Code of Good Practice".

55 GN 1774 *Government Gazette* 2006:1774(29445).

56 *Labour Relations Act* 66/1995. Hereafter referred to as the "LRA".

57 *LRA*:sec 200A. See also *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* 2018 39 ILJ 903 LC:66.

58 Hereafter referred to as the LC.

was there an employment relationship conferred on Uber SA.[59] The question as to whether or not Uber drivers are deemed to be employees or independent contractors of Uber BV[60] was left open since it was not the legal question to be decided on.[61] As a result, South African jurisprudence is undecided on whether or not Uber drivers, as an on-demand form of platform work, should be afforded labour protection as employees of Uber. In the absence of such, this research investigates ways in which South Africa can advocate for minimum decent on-demand work by considering binding and non-binding measures. In doing so, this study discusses the interpretation of judicial tests to be applied and the factors that need to be present to establish the existence of an 'employment relationship' to affording an 'employee' labour and social protection. The question remains as to how binding and non-binding legal measures advocate for decent on-demand work.

1.2.4 International approaches to achieving decent on-demand work in the gig economy

1.2.4.1 The International Labour Organization

The *Constitution* places an obligation upon a court, tribunal or forum to promote the values that support an open and democratic society based on human dignity, freedom and equality.[62] Section 39 requires of these bodies to consider international law and allows it to consider foreign law. Moreover, section 233 states that courts must prefer any reasonable interpretation of legislation that is consistent with international law as opposed to any interpretation that is inconsistent with international law.[63] International instruments such as conventions and recommendations subsequently remain an important source of South Africa's international law obligations. It is therefore vital to

59 *Uber South Africa*:93.

60 Uber BV is the official business name of one of its biggest subsidiaries through which it runs business outside the US in 2023. Uber BV is registered in the Netherlands, where BV means "*besloten vennootschap*," which is Dutch for "private limited company."

61 *Uber South Africa*:98.

62 *Constitution of the Republic of South Africa*, 1996: sec 2. Hereafter referred to as the *Constitution of South Africa*, or the *Constitution*.

63 *Constitution of South Africa*:sec 233. See also *Association of Mineworkers & Construction Union & others v Bafokeng Rasimone Management Services (Pty) Ltd & others* 2017 38 ILJ 931 LC:91.

examine the different ILO instruments that support the idea of labour and social protection for on-demand workers; this is inclusive of 'decent' work. The next part will firstly touch on South Africa's legal obligation as a member state of the ILO, after which the current legal issues in connection with on-demand work in Australia and Ireland will follow. The reasons for choosing these countries as comparable foreign jurisdictions will be explained later.

Multiple ILO conventions set out standards to determine the degree of protection afforded to vulnerable groups of workers,[64] including on-demand workers. Equally important is the fact that the ILO has been investigating the implications of platform work and its implications on the future of work, which includes research conducted on decent work regulations for digital platform workers.[65] Evidence from the ILO World Employment and Social Outlook Report has established that the potential of the digital economy is likely to be critical to advancing sustainable development and promoting decent work for all.[66] Additionally, it is possible to extend current conventions to all workers regardless of their employment status.[67]

Considering that there is little published research on decent work for on-demand workers in South Africa, the ILO's research is crucial, as its framework for measuring decent work outlines the legal indicators required for measuring decent work on a national level.[68] To date, a considerable amount of literature has been published on the concept 'decent work'.[69] These studies have shown that productive employment and decent work regulation are vital elements in achieving fair globalisation and the

64 The conventions include the *Part-Time Work Convention* 175/1994, *Home Work Convention* 177 of 1996, *Work Health and Safety Convention* 155/1981, *Protection of Wages Convention* 95/1949, *Workers with Family Responsibility Convention* 156/1981 and the *Rural Workers' Organisation Convention* 141/1975.

65 See in this regard the ILO 2021 Flagship Report on Employment and Social Outlook. ILO 2021. "The role of digital labour platforms in transforming the world of work", https://www.ilo.org/global/research/global-reports/weso/2021/WCMS_771749/lang--en/index.htm. Accessed on 25 August 2021.

66 ILO World Employment and Social Outlook Report 2021:255.

67 ILO World Employment and Social Outlook Report 2021:248-249. See Chapter 3 for a summary of the conventions that apply to all workers irrespective of their classification.

68 See Chapter 3 for a discussion on the framework for measuring decent work.

69 ILO 2019. "Decent Work Country Profile – South Africa (Pre-publication draft)", https://www.ilo.org/integration/resources/pubs/WCMS_232765/lang--en/index.htm. Accessed on 12 July 2019.

reduction of poverty.[70] What is not yet clear is the impact of decent work deficits on on-demand workers in South Africa. The ILO's perspectives on decent work for platform workers play a crucial role to answer the question on how international approaches can counter decent work deficits experienced by on-demand workers in South Africa. The decent work deficit experienced by on-demand workers in the modern-day gig economy is a universal problem.[71]

1.2.4.2 The European Union

As a member state country, South Africa is obliged to adhere to the ILO's declarations that contain formal and authoritative statements reiterating symbolic and political undertakings by its member states.[72] However, it is noted that South Africa is not a member to the EU and is therefore not bound to give effect to its instruments.[73] The discussion of the EU is therefore limited to the Republic of Ireland's obligation as a member state.

South Africa can draw from other jurisdictions that have already adjudicated on-demand work disputes, and that have already afforded limited labour and social protection to on-demand workers. Taking everything into account, the question as to whether foreign jurisdictions assist in identifying the gaps in our legal system is limited to the decent work of on-demand workers in Australia and Ireland.[74]

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70 ILO 2019. "Decent Work", https://www.ilo.org/global/topics/decent-work/lang--en/index.htm. Accessed on 11 July 2019; Smit 2007:712.

71 ILO 2017. "Strengthening social protection for the future of work", https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_559136.pdf. Accessed on 25 June 2019.

72 ILO 2019. "ILO Declarations", https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/departments-and-offices/jur/legal-instruments/WCMS_428589/lang--en/index.htm. Accessed on 20 June 2019.

73 See para. 3.7.

74 The countries above were not selected at random. In both countries, categories of vulnerable employees, including various types of non-standard employment practices, have long been permitted under labour regulation. In both countries, this has been associated with concerns relating to the precariousness of the worker's employee classification. See paras. 1.5 and 1.6 for a discussion on the reasons for limiting this study to Ireland and Australia.

1.2.5 Foreign perspectives on decent work in the gig economy

Despite the several differences between legal jurisdictions, the prevailing challenges facing policymakers in the field of platform work are comparable.[75] Several comparable themes are highlighted. Firstly, both Ireland and Australia are member states of the ILO and have ratified conventions that apply to on-demand workers. Secondly, the classification of labour and both countries' jurisprudence on this matter could serve as a useful point of reference as South Africa pursues a similar approach. Thirdly, both countries have engaged in public consultations to find suitable solutions to the decent work deficits that on-demand workers experience.

The precarious position of on-demand workers is widely investigated in the First Interim Report on Platform Work in Australia.[76] The issue of correct classification of on-demand workers remains important in Ireland as well, as is seen in the recently introduced *Code of Good Practice on Determining Employment Status*.[77]

It is noted that some are of the opinion that one should be cautious when comparing a developing country with a developed country. However, this study identifies and analyses certain universal and principled issues relating to the decent work considerations of on-demand workers from foreign jurisdictions who are also common law based and have already made progress in this regard. By doing so, best practices for the classification of on-demand workers, and binding and non-binding measures that advocate for decent on-demand work are discussed. Thus, it is necessary to briefly elaborate on the legal status of on-demand workers in each respective jurisdiction to ensure decent work to this vulnerable category of 'new' workers in the gig economy.

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75 Doherty & Franca 2019:352.

76 The Senate 2021. "Select Committee on Job Security - First interim report: on-demand platform work in Australia.", https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024635/toc_pdf/Firstinterimreporton-demandplatformworkinAustralia.pdf;fileType=application%2Fpdf. Accessed on 25 August 2021.

77 Code of Practice on Determining Employment Status, 2021. Available at https://www.google.com/search?q=available+on+or+at+website&rlz=1C1GCEU_enZA905ZA905&oq=available+on+or&aqs=chrome.4.69i57j0i512l9.6275j0j9&sourceid=chrome&ie=UTF-8. Accessed on 25 August 2021.

1.2.5.1 The Australian approach

The *Commonwealth Constitution* establishes the Commonwealth of Australia consisting of a federation of six States[78] and two Territories. Employment and workplace relations are, in turn, regulated by federal, state and territory legislation underpinned by the common law.[79] The *Fair Works Act*[80] (*FWA*) governs the employment relationship in Australia, which is furthermore regulated by the National Workplace Relations System[81] (NWRS), comprising industry-specific modern awards and enterprise agreements applicable to specific workplaces.[82] Established under the *FWA*, the Fair Work Ombudsman (FWO) and the Fair Work Commission (FWC) act as independent government organisations charged with regulating Australia's workplace regulation systems.[83] Similar to the Commission for Conciliation, Mediation and Arbitration (CCMA), the FWC deals with multiple complaints through various binding and non-binding alternative dispute resolution methods.[84]

Australia is no exception to the growing reliance on platform work in its economy. A study within the New South Wales state has found that more than 45 000 people perform platform work and contribute more than $504 million annually to the Australian economy.[85] New research also shows that roughly 7 per cent of Australia's workforce use platform work to acquire work opportunities and that 15.5 per cent of platform

78 Australian Government 2019. "State and territory government", https://www.australia.gov.au/about-government/how-government-works/state-and-territory-government. Accessed on 09 May 2019. The six States are New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia.

79 LO 2019. "National Labour Law Profile: Australia", https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158892/lang--en/index.htm. Accessed on 10 May 2019.

80 *Fair Works Act* 28/2009.

81 The national workplace relations system is a collection of legislation that applies to most employees and employers in Australia. It includes the *Fair Work Act* 28 of 2009, the National Employment Standards, registered agreements and awards. Fair Work Ombudsman 2019. https://www.fairwork.gov.au/Dictionary.aspx?TermID=2033. Accessed 20 June 2019.

82 Fair Work Commission 2019. "National workplace relations system", https://www.fwc.gov.au/about-us/national-workplace-relations-system. Accessed on 20 June 2019.

83 Fair Work Ombudsman 2019. "The Fair Work Commission and us – what's the difference?", https://www.fairwork.gov.au/about-us/our-role/the-fair-work-commission-and-us-whats-the-difference. Accessed on 23 June 2019.

84 Fair Work Commission 2019. "National workplace relations system", https://www.fwc.gov.au/about-us/national-workplace-relations-system. Accessed on 20 June 2019.

85 Select Committee on the Future of Work and Workers 2018. "Hope is not a strategy – our shared responsibility for the future of work and workers", https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Future_of_Work_and_Workers/FutureofWork/Report. Accessed on 20 July 2019.

workers rely on the income generated by this type of work for meeting their basic needs.[86]

In 2017, the Select Committee on the Future of Work and Workers[87] was tasked to investigate 'the impact of technological and other change on work and workers in Australia'.[88] The report makes several recommendations about the future of work and the gig economy in general, and proposes amendments to labour legislation to not only strengthen the protection of specific non-standard workers[89], but also ensure that gig workers have full labour protection.[90] An analysis of the research report compiled by the Select Committee, and the submissions made by the multiple stakeholders,[91] assist in identifying modern trends and the most prominent issues associated with on-demand work. Furthermore, it serves as a basis for identifying best binding and non-binding practices that advocate for decent on-demand work in Australia.

86 Pallas 2019. "Revealing The True Size Of Australia's Gig Workforce", https://www.premier.vic.gov.au/revealing-the-true-size-of-australias-gig-workforce/. Accessed on 25 June 2019.

87 Hereafter referred to as the Select Committee.

88 Parliament of Australia 2017. "Select Committee on the Future of Work and Workers", https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Future_of_Work_and_Workers. Accessed 28 June 2019.

89 Select Committee on the Future of Work and Workers 2018. "Hope is not a strategy – our shared responsibility for the future of work and workers", https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Future_of_Work_and_Workers/FutureofWork/Report. Accessed on 20 July 2019. Recommendation 8 states, "The committee recommends that the Australian Government review the definition of "casual" work in light of the large numbers of Australians who are currently in non-standard employment." In addition, recommendation 8 provides that "The committee recommends that the Australian Government ensure legislated workplace health and safety and improved superannuation rights for workers who are not classified as employees and/or perform non-standard work."

90 Select Committee on the Future of Work and Workers 2018. "Hope is not a strategy – our shared responsibility for the future of work and workers", https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Future_of_Work_and_Workers/FutureofWork/Report. Accessed on 20 July 2019. Recommendation 10 states, "The committee recommends that the Australian Government make legislative amendments that broaden the definition of employee to capture gig workers and ensure that they have full access to protection under Australia's industrial relations system."

91 Parliament of Australia 2018. "Submissions Received by the Committee", https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Future_of_Work_and_Workers/FutureofWork/Submissions?main_0_content_1_RadGrid1ChangePage=4_20. Accessed on 1 July 2019. A total of 163 submissions were made to the Select Committee on the Future of Work in response to the future impact of technological changes to the future of work in Australia. This includes submissions made by individuals, the businesses, organisations, academics, universities, legal practitioners, and submissions by states/territory.

The FWC has dealt with several cases concerning the legal classification of on-demand workers as employees.[92] The FWC's application and interpretation of the criteria set out by the common law *multi-indicia* test to on-demand work relationships warrant an analysis.[93]

1.2.5.2 The Irish approach

It must be noted from the start that the Irish approach relates to the approaches adopted by the Republic of Ireland, and not Northern Ireland. The Irish *Constitution* includes several provisions that are relevant to the employment relationship.[94] To give effect to these constitutional provisions relating to labour relations, Ireland enacted multiple statutes, predominantly based on EU directives, which regulate almost every aspect of the employment relationship.[95] This includes statutes for the regulation of specific forms of non-standard employment.[96] Similar to the South African position, the Irish *Constitution* draws a distinction between the executive, the judiciary, and the

92 See *Mr Michail Kaseris v Rasier Pacific V.O.F* U2017/9452, *Kaseris v Rasier Pacific VOF* 2017 FWC 6610 and *Joshua Klooger v Foodora Australia Pty Ltd* U2018/2625. Although previous cases where unsuccessful in extending labour and social protection to platform workers, the Fair Work Commission (FWC) decided differently in J*oshua Klooger v Foodora Australia Pty Ltd*. However, the leading authority for the time being is *Karshan (Midlands) Ltd t/a Domino's Pizza v Revenue Commissioners* [2022] IECA 124 where the Court of Appeal found that drivers for Domino's are not employees of the company based on the contractual terms that they agreed to. See para. 5.4.2.

93 *Joshua Klooger v Foodora Australia Pty Ltd* U2018/2625:102.

94 The right to equality is included in article 40(1) of the *Irish Constitution* that prescribes that "…all citizens shall, as human persons, be held equal before the law." The right to freedom of association is reflected in article 40(6). This provision prescribes that every citizen has a right to express their convictions and opinions freely and to assemble peacefully and without arms. Article 45(2)(i) also states that "The state shall, in particular, direct its policy towards securing that the citizens (all of whom, men and women equally, have the right to an adequate means of livelihood) may through their occupations find the means of making reasonable provision for their domestic needs."

95 Examples of statutes that prescribe provision pertaining to the conditions of employment include, but are not limited to, the *Terms of Employment (information) Act* 1994-2014, the *Carer's Leave Act* 2001, the *Maternity Protection Acts* 1994/2004, *Adoptive Leave Acts* 1995 and 2005, *Organisation of Young Persons (Employment) Act* 1996, the *National Minimum Wage Act* 2000 and 2015, etc.

96 Atypical work refers to work that is not permanent in nature (permanent employment) or based on indefinite employment contracts. Within the Irish labour law context, it refers to part-time (*Protection of Employees (Part Time Work) Act* 2001), fixed-term (*Employees (Fixed-Term) Work Act* 2003) and temporary work (*Protection of Employees (Temporary Agency Work) Act* 2012).

legislator,[97] with the judiciary as the responsible branch for compliance to the various sources of labour law.[98] Established under the *Workplace Relations Act* [99] (WRA), the Workplace Relations Commission (WRC) is an independent, statutory body responsible for promoting the improvement of workplace relations, and maintenance of good workplace relations.[100] One of the many functions of the WRC involves the speedy resolution of labour disputes referred to it by way of binding and non-binding alternative dispute resolution methods.[101]

The employment relationship in Ireland is primarily governed by the provisions of a contract of employment, a combination of Irish and EU law, the *Constitution* and the common law principles. The common law has also been seen as a driving force in developing the Irish employment law principles and reminds strongly of the position in South Africa and Australia. Traditionally, the common law distinguished between an employment contract *of* service (employee) and a contract *for* service (independent contractor). As with the case in South Africa and Australia, this twofold approach was based on the traditional 'master-servant' relationship and did not fit the criteria for modern-day employment relationships.[102]

The Irish courts have developed and applied various judicial tests to determine the employment status of parties to adapt to contemporary employment relationships.[103]

97 *Constitution of Ireland*, 1935:article 6.
98 Del Rey & Mignin 2018:13; Daly and Doherty 2010:39. The primary Irish sources of labour law include the common law, statutory law, secondary legislation (regulations and orders), the *Constitution*, Codes of Practices, European Union directives and regulations, international conventions and decisions from the Court of Justice of the European Union.
99 *Workplace Relations Act* 2015.
100 WRC 2019. "About the Workplace Relations Commission", https://www.workplacerelations.ie/en/what-we-do/wrc/. Accessed on 1 July 2019.
101 WRC 2019. "How to Make a Complaint/Refer a Dispute", https://www.workplacerelations.ie/en/complaints_disputes/refer_a_dispute_make_a_complaint/. Accessed on 29 June 2019.
102 Ní Bhraonáin 2019:18.
103 Rush 2018. "The gig economy and employment law in Ireland", https://www.lewissilkin.com/en/insights/the-gig-economy-and-employment-law-in-ireland. Accessed on 29 July 2019.

The main tests include the control,[104] integration[105] and economic reality tests.[106] None of the previous tests is determinative and they are frequently used in conjunction with other tests.[107] In many cases, the applicable Irish labour legislation would refer to the existence of a 'contract of employment' that, in turn, is defined by the applicable statute.[108]

The contract of employment is subsequently seen as the traditional legal basis to determine the existence of an employment relationship.[109] In addition to the common law tests and the judicial interpretation of a contract of employment, the Employment Status Group[110] drafted a *Code of Practice on Determining Employment Status*. [111] This was mainly due to the inadequacy of the judicial tests to determine the status of modern employment relationships and the inconsistencies with the application of the judicial tests by courts and tribunals. The *Code of Practice on Determining Employment Status (CPDES)* prescribes various factors that courts and tribunals should consider when determining the true employment status of individuals.[112] This study sets out to identify best practices for the classification of labour in terms of the Irish common law principles, and similarities with regard to the judicial interpretation of statutory definitions. This assists in detecting different best binding and non-binding

104 Daly & Doherty 2010:46. This is seen as one of the first tests introduced by the courts to determine an employment relationship. The main authority for the interpretation of the test was determined in *Henry Denny & Sons Ltd v Minister for Social Welfare* 1998 IR 34.

105 The integration test is similar to the South African organisational test. In terms of the integration test, the work performed by a person is deemed to be under a contract of service and form an integral part of the business.

106 The economic reality test is also referred to as the entrepreneurial test. This test revolves around the question of whether a person provides work and agrees to be subjected to the company's control on the one hand, and whether the person performs the work "as a person in business on his/her own account".

107 Daly & Doherty 2010:44. Hardly any of the test, especially the control test, can be used as a stand-alone test to determine the contemporary forms of employment. This is largely due to changing nature of modern-day employment relationships.

108 The *Unfair Dismissals Act* 1977-2015, for example, defines an employee in section 1 as "…an individual who has entered into or works under (or, where the employment has ceased, worked under) a *contract of employment*…"

109 Daly & Doherty 2010:39. One exception to this rule is found in the *Protected Disclosures Act* 2004 that includes a definition of a "worker".

110 Eurofound 2009. "Ireland: Self-employed workers" https://www.eurofound.europa.eu/publications/report/2009/ireland-self-employed-workers. Accessed 29 June 2019. The Employment Status Group was established under the 2000-2003 social partnership agreement, namely the Programme for Prosperity and Fairness due to the concerns about the misclassification of individuals as self-employed.

111 *Code of Practice for Determining Employment* 2021. Hereafter referred to as "the Code".

112 *Code of Practice*:2-3.

approaches that South Africa could consider for advocating decent on-demand work. Such an understanding will, for example, contribute to determining international trends with the classification of on-demand workers.

Apart from the *Code of Practice on Determining Employment Status,* there is no reference to on-demand work within the Irish labour law instruments. Nevertheless, this does not mean that basic labour and social protection could not be afforded to on-demand workers soon, reminiscent of the position in South Africa. The *Employment (Miscellaneous Provisions) Act*[113] came into effect on 4 March 2019. The Act affords labour protection to individuals working under flexible working hours, and places a duty on employers to provide employees with specific terms of employment within a certain period after commencing employment.[114] Section 15 of the Act specifically prohibits using 'zero-hours working practices' in certain circumstances and prescribes minimum payments under specific conditions.[115] The Act could apply to on-demand workers in Ireland based on the many similarities that on-demand work has with other non-standard forms of employment, which include casual work and 'zero-hours contracts'. In addition to the *Employment (Miscellaneous Provisions) Act*, the *Protection of Employment (Measures to Counter False Self-Employment) Bill*[116]*, Protection of Employment (Platform Workers and Bogus Self-Employment) Bill*[117]*,* and the *Prohibition of Bogus Self Employment Bill*[118] were put forward to address the situations where workers are misclassified as self-employed. This thesis undertakes a comparative study of the laws and policy responses to providing decent work for on-demand workers. As with the Australian legal position described earlier, a discussion of the Irish bills relevant to employment classification and platform work serves as guiding documents to establish a workable framework identifying various forms of bogus employment.[119]

113 *Employment (Miscellaneous Provisions) Act* 38/2018.
114 *Employment (Miscellaneous Provisions) Act* 38/2018: sec 7.
115 *Employment (Miscellaneous Provisions) Act* 38/2018: sec 15.
116 *Protection of Employment (Measures to Counter False Self-Employment) Bill* 2018.
117 *Protection of Employment (Platform Workers and Bogus Self-Employment) Bill* 2021.
118 *Prohibition of Bogus Self Employment Bill* 2019.
119 MacMahon & Dundon 2019. "Just when you thought it was safe to sign a zero-hours contract", https://www.irishtimes.com/business/work/just-when-you-thought-it-was-safe-to-sign-a-zero-hours-contract-1.3855957. Accessed on 2 July 2019.

1.3 AIMS AND OBJECTIVES OF THE STUDY

The fourth Industrial Revolution (4IR) is influencing the traditional forms of employment. It is assumed to be one of the driving forces behind the emergence of on-demand work, which forms an integral part of the modern-day gig economy. The current labour law framework is not aptly suited to regulate on-demand work and should be re-examined on a legislative level and/or interpretive level. In the absence of specific legislation dealing with platform work, South African labour laws need to develop the common law further to fit modern employment relationships, which include on-demand work. The decent work deficit of on-demand workers is a worldwide issue that is experienced in both developing and developed countries. It is also universal in that the traditional classification of employment relationships poses a risk to the livelihood and wellness of on-demand workers. Section 23 of the *Constitution* is part of the established Bill of Rights, and section 23(1) provides that *everyone* has the right to *fair* labour practices. To give effect to its international obligations, South Africa has established various common law and judicial tests, statutory definitions and presumptions to determine the existence of an employment relationship before the rules of labour law apply to that relationship. This includes specific forms of non-standard employment.

As an ILO member state, South Africa is obliged to consider many binding conventions and non-binding recommendations in relation to decent work considerations for different non-standard forms of employment. Moreover, seeing that the aforesaid legal obligation exists, the policy approaches recommended by the ILO can assist in determining specific baseline decent work deficits to which on-demand workers are exposed. The ILO and the EU have made significant progress on regulating on-demand work that can serve as a benchmark for identifying important baseline decent work deficits.

South Africa, Australia and Ireland have recently experienced substantial growth in the gig economy, and specifically on-demand work, due to the onset of Covid-19. This, in

turn, showcased several vulnerabilities when on-demand work is concerned. A comparison of Ireland and Australia can serve as a point of reference for regulating on-demand work by way of classification or other policy approaches. Furthermore, it provides guidance and suggestions for reform in South Africa.

South Africa can sufficiently advocate for decent on-demand work in the modern-day gig economy. Furthermore, decent work regulation for on-demand workers can be achieved by introducing appropriate binding or non-binding innovative measures that advocate for minimum decent on-demand workers in South Africa. From this perspective this thesis answers the following primary research question: Do South African labour laws sufficiently advocate for decent work for on-demand workers in the modern-day gig economy?

To adequately answer the above-mentioned research question, this study proposes to:

- conceptualise the 'modern-day gig economy' and distinguishes its forms of platform work;
- investigate and analyse if the common law and statutory classification of labour could be extended to afford on-demand workers labour protections for purposes of achieving decent on-demand work;
- examine the role of the ILO to advocate for decent work for all;
- identify and discuss the international policy approaches of the ILO and the EU that counter the decent work deficit experienced by on-demand workers;
- identify and analyse the measures to achieve decent work and provide a rationale for and ways to measure minimum decent on-demand work indicators;
- investigate and examine best practices for the classification of on-demand workers in Australia and Ireland;
- identify and debate binding and non-binding measures that advocate for minimum decent on-demand work in Ireland and Australia; and

- reach a conclusion and make recommendations on a suitable binding and non-binding legal solution to advocating for minimum decent on-demand work in South Africa.

1.4 RATIONALE AND IMPORTANCE OF THE STUDY

In recent years, there has been considerable academic interest in the rise of the modern-day gig economy and its influence on national and international labour markets. This interest has sparked a debate that has gained prominence on the topic of whether or not platform workers should be classified as being in an employment relationship. International organisations and bodies have carried out most of the studies on the protection afforded to on-demand workers, but their research is limited to the regulation of on-demand workers in selected member state countries.

What is not yet clear is the impact and the legal obligations towards on-demand workers within the South African context. None of the current national instruments deals with the decent work deficit endured by on-demand workers in South Africa; therefore, it leaves a legal gap that warrants investigation. Nonetheless, existing policy documents[120] and findings from ongoing collaborative research projects[121] could make a valuable contribution to the focus of this study.

120 For example, the *National Developmental Plan 2030* emphasised the issues that could be related to on-demand work by stating, "the nature of work is changing from most people having a single employer, a standard 40-hour working week and a standard set of benefits. Today many people work for several employers, work less than 40 hours a week and do not enjoy a standard package of benefits. This is a reality that we must grapple with, seeking to expand such employment while also improving the conditions of both existing workers and casual workers." The Republic of South Africa 2012. https://www.gov.za/documents/national-development-plan-2030-our-future-make-it-work. Accessed on 24 July 2019.

121 For example, the ongoing collaborative north-south research project conducted by researchers from the University of the Western Cape, the University of Cape Town, Manchester University and Oxford University. Their research is focused mainly on digital work; however, findings from their research will undeniably add value to this study in so far it relates to the decent work deficit of on-demand workers. For more information, see the studies conducted by the Fairwork Foundation. Swingler 2018. "Project to protect workers in digital gig economy", https://www.news.uct.ac.za/article/-2018-08-28-project-to-protect-workers-in-digital-gig-economy. Accessed on 24 July 2019.

1.5 RESEARCH METHODOLOGY

This study adopts a doctrinal research design, which entails an analysis of identified literature comprising primary and secondary legal sources. These sources are identified and analysed in so far as it is concerned with the law as it is found in national and foreign legislation, international conventions, directives and recommendations, court decisions with regard to platform work in general and on-demand work specifically, and proposed bills. A study on the changing nature of legal research by the Pearce Committee defines doctrinal research as:[122]

> …research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments.

This approach is also characterised by a 'two-stage' process that involves the identification and interpretation of selected law texts.[123] The doctrinal research of this study includes both a literature review and a comparative component. The literature review study relies on a critical analysis of the previously mentioned legal sources. It focuses on establishing what the law is on decent work regulation for on-demand workers on both a national and international level. To this effect, international instruments, such as conventions and recommendations, assist in analysing South Africa's international law obligations. It is therefore vital for this study to examine the different ILO instruments that support the idea of decent work regulation for on-demand workers as well.

In addition, an examination of the decent work deficits of on-demand workers necessitates a thorough investigation of the ILO's decent work agenda and goals. This contributes to determining the adequacy of the labour and social protection offered to on-demand workers by inspecting the current labour law framework against the ILO's standards. This study will therefore have regard to the successful extension of labour

122 Hutchinson & Duncan 2012:101.
123 Hutchinson & Duncan 2012:110.

and social protection to on-demand workers in the selected foreign countries. It is important to note that the aforesaid approach entails that the study will be conducted in the context of achieving decent work for on-demand workers.

The comparative part of the study determines and conceptualises universal standards and risks in connection with the nature of the gig economy, the use of platform work, and the classification of on-demand work. This leads to identifying and applying comparative solutions presented by the ILO studies, the EU directive, and the integrated approaches in Australia and Ireland. Suggestions for reform are made after a careful review of these concepts in the Australian and Irish labour law context.

This research method is chosen based on the assumption that the decent work deficit experienced by on-demand workers is deemed to be a worldwide issue that is experienced by both developed and developing countries.[124] This is exacerbated by the fact that the traditional approaches to the classification of an employment relationship pose a threat to the future livelihood and wellness of on-demand workers. This issue subsequently requires unique solutions based on original and tailor-made solutions. The findings and recommendations produced by this study provide a unique African perspective to a contemporary western issue. By doing so, South Africa could set the standards for achieving decent work for on-demand workers for all other developing countries in Africa.

1.6 SCOPE AND LIMITATIONS OF THE STUDY

The most noticeable limitation of the study is the focus on on-demand work as opposed to platform work or crowdwork. The examination of crowdwork, as a form of platform

124 The following ILO research reports and discussion papers support this assumption: See Global Commission on the Future of Work 2018. "No.5 Job quality in the platform economy", https://www.ilo.org/global/topics/future-of-work/publications/issue-briefs/WCMS_618167/lang--en/index.htm. Accessed on 21 July 2019. See also ILO 2018. "Informality and non-standard forms of employment", https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/multilateral-system/g20/reports/WCMS_646040/lang--en/index.htm. Accessed on 21 July 2019.

work, is limited to the discussion on conceptualising the concept ‘platform work’ and delineating it from on-demand work as a form of platform work. Therefore, consideration is given to the interchangeable characteristics between the two forms of platform work. Payment methods, such as cryptocurrencies, do not fall within the ambit of this study. This study focuses on the achievement of decent work regulation and protection of on-demand workers in South Africa. This research falls within the field of labour law with limited application of other closely related fields in law, such as social security law, collective labour law and international and comparative labour law. Whilst most of the non-standard forms of employment include variable levels of precarious work, identifying comparable characteristics between on-demand work and other forms of non-standard work is explored.

The inclusion of other disciplines is restricted. Labour law is a dynamic field in law that is easily influenced by other disciplines in so far as it relates to the socio-economic considerations of workers. Aspects concerning human resources, economic and business models, tax implications, the impact of social security law as a discipline on the labour market, and aspects on behavioural sciences are beyond the scope of this study.

The EU and ILO instruments relating to the idea of decent work, and the labour and social protection afforded to platform work are singled out. It should also be noted that the discussion of the EU is limited to Ireland's obligation as a member state. Other instruments relating to protecting specific types of non-standard forms of employment in the formal and informal economy are only considered where necessary and valuable to the discussion. The ILO and EU structures and processes concerning the establishment of rules, and the monitoring and enforcement of standards are not discussed in detail and are referred to where applicable only.

This research is subsequently concerned with identifying and establishing floor/basic minimum protection for on-demand workers from an international perspective. In addition, it is not possible to provide a comprehensive analysis of all decent work

indicators. Accordingly, the study will limit the research focus to chosen decent on-demand work indicators as set out in Chapter 3. This is an important limitation to note from the onset.

A significant limitation for the research is the practical application of the comparative approach. It is essential to be mindful of the context in which the selected countries operate. Therefore, this study takes cognisance of legislation that has different underlying objectives and policy considerations that differ from the South African context. It is noted that South Africa is not as developed as Australia and Ireland. Nonetheless, it is strongly argued that South Africa is experiencing and will continue to experience many of the same difficulties caused by the gig economy as is the case in Australia and Ireland.

Lastly, the research for this study was completed on 1 January 2023. The study therefore reflects the legal position as to this date.

1.7 OVERVIEW OF CHAPTERS IN THIS STUDY

This chapter is followed by Chapter 2 under the heading, ‘A conceptualisation of the modern-day gig economy and on-demand work’. Chapter 2 considers the theoretical foundations relevant to the research topic. It contextualises the concept ‘gig economy’ and the contributing factors, including a discussion on the various types of economies associated with the gig economy, the different categories of gig businesses, and the different types of platform work.

In Chapter 3 under the heading, ‘International perspectives on decent on-demand work’, the focus is on the international policy approaches of the ILO and EU that advocate for decent on-demand work in the gig economy. Specific attention is given to the ILO’s perspective on measuring decent work, and how the decent work indicators can be narrowed down to determine certain minimum decent work indicators for the on-demand sector. The role and perspectives from the EU are considered to

the extent that they relate to the Irish binding and non-binding measures. This chapter ultimately culminates in a set of minimum decent on-demand work indicators that is used as a guideline for Chapters 4, 5, and 6.

The best practices for the classification of on-demand workers and the binding and non-binding measures that advocate for decent on-demand work in Ireland are examined in Chapter 4 under the heading, 'Perspectives on decent on-demand work in Ireland'. By using the minimum decent on-demand work indicators as a point of reference, this chapter discusses various binding and non-binding measures that advocate for decent working conditions in relation to decent working hours and decent pay, and decent multi-stakeholder engagement. This includes a brief discussion of the growth and size of the on-demand sector in Ireland.

Chapter 5, under the heading, 'Perspectives on decent on-demand work in Australia', follows a similar sequence as Chapter 4 and provides an analysis of the classification of labour in Australia. It proceeds with a discussion on the various binding and non-binding measures that advocate for decent on-demand work in Australia. The aforesaid is examined to benchmark best practices that advocate for decent on-demand work, inclusive of the classification of on-demand workers.

Chapter 6 focuses on 'Legal perspectives on decent on-demand work in South Africa'. This chapter examines the classification of labour in the South African context. Similar to Chapters 4 and 5, this chapter also discusses several binding and non-binding measures that advocate for decent on-demand work in the South African context.

Chapter 7 draws from the findings of Ireland, Australia and South Africa, and provides comparative notes on decent on-demand work in the aforesaid jurisdictions. This chapter reviews the size and growth of the gig economy and on-demand work in each country, and explores the benchmarked practices and binding and non-binding measures for advocating for decent on-demand work in all three countries. This includes notes on the classification of on-demand workers, decent working conditions in respect of pay and working hours and establishing a multi-stakeholder engagement platform for on-demand workers for their collective voice to be heard.

Chapter 8 concludes the research. This chapter includes the findings of the study and makes recommendations on long-term and short-term approaches to advocating for decent on-demand work in the modern-day gig economy. This chapter also includes final remarks on intended future research.

1.8 TECHNICAL TERMS DEFINED

It is important for this research that certain concepts be clarified at the outset. In addition, some concepts used in this study are not encountered in everyday legal discourse; this glossary is intended to elucidate some concepts connected to the modern-day gig economy, as well as the types of work it involves.

1.8.1 **Decent work** – The concept 'decent work' extends well beyond the limitations of the employment relationship. It includes aspirations of people in their working lives that directly affect their families and livelihood.[125] For purposes of this study, decent work is described as having four key elements: social dialogue and tripartite consultation, the promotion of employment and income security, the principle of a right to work, and social protection.[126] In this study, the use of and referral to 'labour and social protection' refer to the extension of *basic* labour and social protection to on-demand workers that could alleviate the current decent work deficit endured by on-demand workers.

1.8.2 **Decent work deficit** – In this study, decent work deficit is defined within the context of the established global decent work deficits, which include a lack of social protection, insufficient employment opportunities, an absence of sufficient social dialogue, and denial of rights at work.[127]

1.8.3 **Crowdwork** – Crowdwork refers to a type of work performed remotely on online platforms.[128] This type of work relies heavily on technology since most of the tasks are executed and submitted via online platforms. This form of

125 ILO 2019. "Decent Work", https://www.ilo.org/global/topics/decent-work/lang--en/index.htm. Accessed on 10 June 2019.
126 Olivier *et al.* 2013:320.
127 Fourie 2018:189; ILO 2001. "International Labour Conference to Explore 'Decent Work Deficit'", https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_007843/lang--en/index.htm. Accessed on 20 July 2019.
128 Berg 2016. "Income security in the on-demand economy: Findings and policy lessons from a survey of crowdworkers", https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_479693.pdf. Accessed on 20 June 2019.

employment involves individual tasks, rather than a continuous employment relationship. [129]

1.8.4 **Digitisation –** Digitisation refers to the process of transferring analogue data into a digital format, for example, from a hard copy or printed copy to a digital format.[130]

1.8.5 **Digitalisation –** Digitalisation is generally used to describe the business process of improving or changing business models through the implementation of technologies to develop a new source of value creation.[131]

1.8.6 **Gig economy** – The gig economy is defined as an economy that involves the exchange of labour for payment between companies or individuals via a digital platform that actively facilitates the matching process of providers and customers on a short-term and payment-per-task basis.[132]

1.8.7 **Globalisation** – This refers to the excessive social polarisation of societies and the integration of markets through trade[133], which is enhanced by technological developments that eliminate geographical obstacles such as travelling and communication costs.[134] It is regarded as a driving force that has shaped the world economy over the past fifty years.[135]

1.8.8 **Multi-stakeholder engagement** – The term 'multi-stakeholder engagement' is typically associated with collective bargaining and dispute resolution. It is a process where all stakeholders engage in negotiation, and embraces stakeholder inclusion, conflict resolution and consensus building.[136] For purposes of this research, the term 'stakeholders' refers to the parties or their representative to the immediate interactive gig relationship, meaning the platform company, on-demand worker or their representative.[137] In an employment context and on a national scale the multi-stakeholder engagement

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129 European Observatory for Working Life 2018. "Crowd employment", https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/crowd-employment. Accessed on 20 June 2019.
130 Van der Zande *et al*. 2020:32.
131 Van der Zande *et al*. 2020:32.
132 Department for Business, Energy & Industrial Strategy 2018. "The Characteristics of those in the Gig Economy", https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/687553/The_characteristics_of_those_in_the_gig_economy.pdf. Accessed on 20 June 2019.
133 Kunda & Ortlepp 2008:28.
134 McGregor 2006:151.
135 Pretorius & Blaauw 2005:73.
136 Shabangu, Meintjies and Ngcwangu 2022:121.
137 See para. 2.2.4.

process extends to the National Economic Development and Labour Council (Nedlac) and the social partners such as the government, trade unions and employer organisations.

1.8.9 **On-demand work** – For purposes of this study, on-demand work refers to traditional work activities that are available via online platform applications (apps) that are facilitated and managed by organisations. On-demand work is limited to a specific demographical location and executed in the physical world.[138]

1.8.10 **Platform work** – Platform work is a form of employment that encompasses a range of online platforms through which a variety of services are offered in exchange for money.[139] It enables organisations and individuals to access other organisations and individuals to perform specific tasks or to provide a specific service in exchange for payment.[140]

1.8.11 **Precarious work/employment** – There is no uniform accepted definition for precarious work due to its multi-dimensional nature. The International Labour Organisation [141] has, however, referred to precarious work as work performed in the formal and informal economy and is associated with high degrees of objective and subjective characteristics of uncertainty and insecurity.[142] It is also characterised by disguised employment relationships, job uncertainty as to the duration of employment, a lack of social protection, low pay and substantial legal pitfalls concerning participation in collective bargaining.[143]

1.8.12 **Social dialogue –** Social dialogue is defined by the ILO as all types of negotiation, consultation, or exchange of information to promote consensus building and democratic involvement of stakeholders in the world of work.[144]

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138 De Stefano 2016:2, 5.
139 Du Toit 2019:3.
140 European Observatory for Working Life 2018. "Platform Work", https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/platform-work. Accessed on 20 June 2019.
141 Hereafter referred to as the ILO.
142 ILO 2011. "Policies and Regulations to Combat Precarious Employment", https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/--actrav/documents/meetingdocument/wcms_164286.pdf. Accessed on 20 June 2019.
143 ILO 2011. "Policies and Regulations to Combat Precarious Employment", https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/--actrav/documents/meetingdocument/wcms_164286.pdf. Accessed on 20 June 2019.
144 ILO 2023. "Social dialogue", https://www.ilo.org/ifpdial/areas-of-work/social-dialogue/lang--en/index.htm)%20%20a#:~:text=What%20is%20Social%20Dialogue,to%20economic%20and%20social%20policy. Accessed on 4 February 2023.

The government can be an official party to the dialogue and it can take place on a national, regional or enterprise level. For purposes of this study, the term multi-stakeholder engagement will be used to refer to processes that accord with the notion of social dialogue as defined by the ILO.

1.8.13 **The fourth Industrial Revolution (4IR)** – For purposes of this study, 4IR is defined as and refers to current changes in the world of work due to rapid technological advancements.[145] This revolution is characterised by key technologies that include but are not limited to nanotechnology, biotechnology, artificial intelligence, genetics, cloud computing, robotics and automation.[146]

145 Hirschi 2018. "The Fourth Industrial Revolution: Issues and Implications for Career Research and Practice", https://onlinelibrary.wiley.com/doi/full/10.1002/cdq.12142. Accessed on 20 June 2019.

146 World Economic Forum 2016. "The Future of Jobs: Employment, Skills and Workforce Strategy for the Fourth Industrial Revolution", http://www.hsrc.ac.za/uploads/pageContent/9352/WEF_Future_of_Jobs%20(002).pdf. Accessed on 20 June 2019.

CHAPTER 2: A CONCEPTUALISATION OF THE MODERN-DAY GIG ECONOMY AND ON-DEMAND WORK

2.1 INTRODUCTION

As stated in Chapter 1, this thesis aims to consider whether South African labour laws sufficiently advocate for decent work for on-demand workers in the modern-day gig economy. Before considering the international approaches to achieving decent work for on-demand workers as outlined in Chapter 3, this chapter aims to conceptualise various terms relating to the broader gig economy, gig businesses and categories of platform work. Insofar as the South African legal framework is concerned, these terms are novel to our jurisprudence. This chapter provides the theoretical underpinning relevant to the conceptualisation of the gig economy. It will also contextualise on-demand work by describing its characteristics, advantages, and vulnerabilities.

Considering the broader themes associated with the gig economy and platform work, this chapter considers the lack of universality when referring to specific terms. Subsequently, it explores the general differences between a series of different types of economic models associated with platform work, which provide a theoretical framework to distinguish the gig economy and explain its characteristics in more detail. A substantial part of this chapter discusses concepts and terms not typically used in the scope of labour law. However, as will be explained later in the chapter, although on-demand work concerns people performing ‘work’, it does not fall within the scope and the protections of the South African labour framework. The findings of this chapter will therefore help in identifying which international instruments, standards and principles apply to the modern-day gig economy, and if they could be extended to forms of on-demand work.

For that reason, it is necessary to provide the reader with an overview of the changing patterns in the world of work. It seeks to examine how *work* is influenced by and adapting to the fourth Industrial Revolution, and whether the formal employment model is fit for purpose for emerging forms of work.

2.2 CHANGING PATTERNS IN THE WORLD OF WORK

2.2.1 Introductory remarks

Digital technology affects almost every aspect of 21st century life, from the way in which we communicate, your productivity, the way we socialise, to the way we work.[147] As technology shapes the way in which we perform work, numerous new legal challenges emerge with it. Consider, for instance, our reliance on the internet in the modern workplace. From the 1990s the internet was introduced and gradually incorporated into our lives and workplaces and soon became the new digital reality for many.[148] During the past two decades, the internet has developed into an indispensable communication and information tool that allows for online commerce.[149]

In this online environment, artificial intelligence is used to perform multiple tasks that would normally be required from humans. In addition, all the aforesaid technological advances continue to impact labour.[150] This is not limited to the manner in which we perform work, but also the way in which decisions are made. For purposes of this study, I will single out the use of the internet and mobile technology, seeing that it is relevant to the gig economy. The use of mobile technologies has redeveloped the way in which work is acquired, conducted, and facilitated.[151] More and more people, especially in the African context, use mobile technology to perform work. This is increasingly evident in the informal economy and for those who are self-employed.[152]

This said, not everything in the digital reality is without fault. As the use increases, so does the plethora of legal challenges that come with using disruptive technologies.[153]

147 NEDLAC 2019. "The Future of Work in South Africa", http://nedlac.org.za/wp-content/uploads/2017/10/Futures-of-Work-in-South-Africa-Final-Report-March-2019.pdf. Accessed on 20 July 2021.
148 Katsbian 2021:6-7.
149 Katsbian 2021:7.
150 Katsbian 2021:7
151 World Bank Group 2019:23. The aforesaid World Bank Group report is available at https://documents1.worldbank.org/curated/en/816281518818814423/pdf/2019-WDR-Report.pdf. Accessed on 20 January 2023.
152 Anwar & Graham 2021:253. See also Okoruwa, Ogwang & Ndung'u 2022:34-35.
153 For recent case law in this regard, see *Uber BV v Aslam* (2021) UKSC 5, which concerned the payment of a national minimum wage to Uber drivers, where the Supreme Court ruled that Uber

Most of the legal disputes concern the correct classification of on-demand workers. However, the underlying reason for the disputes stems from specific issues that are experiences in the work context, such as payment for per-hour workers, working hours, and the deactivation of on-demand workers from the use of the platform, which is similar to dismissal. Over the past two centuries, three distinctive industrial revolutions transformed how humans create value.[154] During each revolution, technological advancements, social institutions, and political systems interacted and developed, altering industries and the way humans work.[155] Schwab refers to a 'revolution' as something that signifies abrupt and radical change.[156]

This discussion aims to examine the impact of the industrial revolutions on labour law in general. Focusing on each industrial revolution is highly important to show that the current legal problem of classifying casual forms of work is not new to labour law, in other words, that the issue of decent work for specific types of work is not novel to 4IR and has been in existence for centuries. Retrospection of the industrial revolutions is also necessary seeing that along the lines of evolution, the gig economy also transformed continuously. This discussion therefore provides an overall picture of the technologies that made each revolution happen and how it transformed societies in the past. Mention will be made of the way in which labour law has developed. However, this will be limited to the challenge of how labour law has adapted to each of the revolutions and if it is at all possible to adapt again to accommodate on-demand work.

The section below will set out the different industrial revolutions, followed by a brief discussion on how the current revolution is impacting on the world of work.

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drivers are ‘workers’ rather than self-employed independent contractors based on the degree of control that Uber has over its drivers. This case follows a global trend of case law where on-demand workers are found to be employees or workers, rather than independent contractors. Similarly, in D*iego Franco v Deliveroo Australia Pty Ltd* (2021) FWC 2818, the Australian Fair Work Commission ruled that a food delivery driver was an employee of Deliveroo and thus entitled him to unfair dismissal protections.

154 Schwab & Davis 2018:14.

155 Schwab & Davis 2018:14.

156 Schwab 2016:12.

2.2.2 The industrial revolutions

2.2.2.1 The first Industrial Revolution

The first Industrial Revolution (1IR) started in Britain's textile industry during the mid-18th century.[157] Before the advent of the 1IR, the term employer was basically unknown, seeing that the face of capital was the owner of the servant.[158] The 1IR ensured the transition from manual labour to machine labour.[159] Furthermore, the interaction between the era's political, economic, social and technological innovations brought about the fundamental and sustained transformation coined as a 'revolution'.[160] This revolution saw the advancement of the construction of railroads and the invention of steam-powered engines, which created a new system of value production.[161] This led to an immense growth in British cities, causing a divide between rich and poor as a new business class emerged.[162] This, in turn, influenced the framework of the economic and social life of people.[163]

Ballace notes that labour law arose as a reaction to industrialisation due to the harsh conditions of factory life in 1IR.[164] The harnessing of steam power, steam tools, machinery and more effective water power[165] resulted in the establishment of factories and altered the way in which capital organised itself with regard to acquiring labour to make the production.[166] This, in turn, changed the face of capital from being an owner, to being the employer.[167] Work during 1IR was characterised by low wages, few benefits and unpredictable availability of work.[168] Working hours ranged from 12 hours to 14 hours per day, and two-thirds of workers in some factories were children.[169] The wage gap during 1IR was also high, with men receiving two to three fold higher wages than women.[170] It was clear that capital buys only the labour that it needs and for the

157 Schwab & Davis 2018:31.
158 Smit & Stopforth 2022:370; Ballace 2019:12.
159 Pozdnyakova *et al*. 2019:13.
160 Moll 2021:3.
161 Schwab 2016:6.
162 Okoye, Ome & Ogbu 2020:68.
163 Okoye, Ome & Ogbu 2020:68.
164 Ballace 2019:12.
165 Haradham 2019:2.
166 Ballace 2019:12.
167 Ballace 2019:12.
168 Smit & Stopforth 2022:371; Ballace 2019:13. See also Moll 2021:2.
169 Haradham 2019:14-15.
170 Haradham 2019:4.

time that it needs it.[171] I will argue later in this chapter that it seems as if on-demand work in the modern day gig economy is reminiscent of this characteristic and renders the on-demand worker vulnerable.[172]

All the aforementioned had a part to play with the emergence of trade union practices. After 1IR, trade unions began to play a pivotal role to advance the interests of working people in an effort to improve their livelihoods.[173] Despite the harsh realities described above, 1IR provided plentiful job opportunities, raised the standard of the middle and upper classes, increased urbanisation, expanded the rule of law, and caused the invention of innovative new technologies.[174]

2.2.2.2 The second Industrial Revolution

The second Industrial Revolution (2IR) (1860 – 1914) began in the USA and later spread to other parts of the world.[175] Capitalising on the advent of electricity and the assembly line, 2IR sparked the process of mass production.[176] It brought about the invention of several other new technologies that influenced the world of work, which include the use of the internal combustion engine,[177] the chemical industry, electronic communication technologies and science-based innovations.[178] Interestingly, though, Schwab opines that the full effect of 2IR is not yet experienced as roughly 1.3 billion people still lacked adequate access to basic necessities such as electricity.[179]

Mokyr opines that the changing production technologies also gave rise to new technological systems, with electrical power and telephones being the most

171 Ballace 2019:13.
172 See para. 2.3.5.3.2.
173 Mokyr 1999: 2; Smit & Stopforth 2022:371. See also Haradham 2019:15.
174 Haradham 2019:17.
175 Haradham 2020:20.
176 Schwab 2016:6. See also Okoye, Ome & Ogbu 2020:68.
177 Xu, David and Kim 2018:90.
178 Okoye, Ogbu & Ome 2020: 68. See also Haradham 2020:1.
179 Schwab 2016:17.

significant.[180] During this time, the living standards and the purchasing power of currency increased significantly.[181] This era saw the development of emerging financial institutions such as commercial banks and stock markets, which diversified the ways in which persons and businesses collected capital.[182] Job opportunities increased with the establishment of various departmental stores and chain stores.[183] However, at the same pace, the use of machines also decreased the demand for labour.[184]

Productivity increased in the 2IR. Labour efficiency grew,[185] factories could turn out products 24 hours a day, and industries could produce items faster at a much lower price.[186] This, however, does not mean to say that the lives and livelihoods of workers improved at the same pace.[187] Workers continued to work in unsafe and unhealthy working conditions with the overall health of the workforce declining.[188] Moll argues that the social consequences of such major industrial growth were devastating for rural workers at the time, as most workers flocked to the factory towns and big cities in search of work.[189] The wage gap between women and men continued to grow, as did the gap between the rich and the poor.[190] Urbanisation increased significantly, and many families were separated as their place of work was further from their homes.[191]

2.2.2.3 The third Industrial Revolution

Around 1950 revolutionary advancements occurred in information theory and digital computing.[192] The third Industrial Revolution (3IR), also referred to as the 'computer

180 Mokyr 1999:2.
181 Mohajan 2020:3; Haradham 2020:2.
182 Haradham 2020:13.
183 Haradham 2020:13.
184 Haradham 2020:21.
185 Pozdnyakova *et al*. 2018:13.
186 Haradham 2020:20.
187 Moll 2021:5.
188 Haradham 2020:20-21.
189 Smit & Stopforth 2022:372; Moll 2021:5.
190 Haradham 2020:21.
191 Mokyr 1999:11. See also Haradham 2020:21.
192 Schwab & Davis 2018:33.

revolution', was accelerated by the use of semiconductors, computing and the use of the internet.[193] The 3IR was characterised by the implementation of electronics and information technology to automate production.[194] The growth of labour efficiency again resulted in a reduction of blue collar positions and employees involved in production processes.[195] The iconic inventions of this era have been the Internet and the World Wide Web that served as powerful vehicles of socio-economic transformation, bringing about the new realities of globalisation.[196]

The manner in which information could be stored, processed and transmitted in digital format significantly changed the working and social lives of billions of people globally.[197] Robotics obtained a centre role of innovation in 3IR, with the first digitally programmed robot installed in 1961.[198] By the year 2000 there were approximately 750 000 industrial robots in the world,[199] and by 2017 the estimated number of operational industrial robots had increased to 1.9 million.[200] Computerisation also led to new innovative jobs in the field of biotechnology, the energy sector and satellite and space sector.[201] Network technologies also enabled large corporations to trade outside their national borders to reduce production cost and boost profits.[202] Consequently, by the 1990s, several services such as software programming and call-centres were already outsourced to underdeveloped countries.[203] Subsequently, while some countries accelerated their economic growth with the introduction of digital production systems, other underdeveloped or developing countries were marginalised, mainly due to offshoring corporations.[204]

193 Schwab 2016:6.
194 Ayentimi & Burgess 2019:643-644. See also Xu, David and Kim 2018:90.
195 Pozdnyakova *et al*. 2018:16.
196 Moll 2021:14-15.
197 Schwab & Davis 2018:33.
198 Moll 2021:15.
199 Moll 2021:15.
200 Oosthuizen 2019:18.
201 Moll 2021:15.
202 Moll 2021:15. This was done by way of offshoring or outsourcing of processes, having foreign companies perform specific operations. This resulted in low-skilled operations being migrated to Asia and Mexico and the emergence of ‘sweatshop’ type of operations in countries like India and Bangladesh.
203 Moll 2021:16.
204 Moll 2021:16. These exploitive economic relations of globalisation is seen as an integral part of 3IR. The effects thereof can be seen today with many underdeveloped countries still marginalised to date.

The 3IR signalled a noticeable shift in the way in which work was managed and organised.[205] Popkova *et al*. describe this technological mode as the global (network) production as a result of digital technologies.[206] The more flexible labour processes of 3IR required fewer, but higher skilled workers with the required expertise to manage global networks.[207] Low-level service positions were replaced by technology or outsourced to cheaper part-time workers.[208] Moll describes this as 'hollowing out work' in industrialised countries.[209] By the 1980s between 33 and 50 per cent of Organisation for Economic Co-operation and Development (OECD) countries' labour force comprised temporary positions.[210] With the slow decline of traditional workplace identity, freelancers and part-time workers such as consultants began to focus more on promoting their own skills and services.[211] As a result, trade unionism declined together with the collective identity of the working class.[212]

2.2.2.4 The fourth Industrial Revolution

The fourth Industrial Revolution (4IR) is still in its early stages, and its impact on labour and existing business models that will define the future is still emerging.[213] The term 'industry 4.0' was first introduced in 2011 during the Hannover Fair.[214] The 4IR builds on the rapid exchange of information made possible by 3IR[215] and involves the rendering of new technologies that merge the physical, digital, and biological

205 Moll 2021:17. See also Kaplinski 1989:31 for a discussion on how the transition from handicrafts to 'manufacture' to 'machinofacture' saw the substitution of human labour for machines.
206 Popkova, Ragulina & Bogovits 2018:25.
207 Moll 2021:17.
208 Moll 2021:17.
209 Moll 2021:17. The reference to 'hollowing out jobs' relates to two very different parts of the 'networked digital economy'. At the top are highly skilled individuals who earn high salaries; at the bottom are unsustainable, low paid, low skilled positions. The middle comprises the systematic decrease of mid-level, middle-income blue-collar workers.
210 Moll 2021:17.
211 Moll 2021:18.
212 Moll 2021:18.
213 Philbeck & Davis 2019:21.
214 Balliester & Elsheikhi 2018:1. The term "Industrie 4.0 (I4.0)" was established in 2013 by the German government as an initiative to ensure Germany's future competitiveness as a production location for high-tech products.
215 Philbeck & Davis 2019:18. See also Schwab & Davis 2018:27.

spheres.[216] It entails the adoption of cyber-physical systems such as the Internet of Things[217] and the Internet of Systems.[218]

4IR encompasses the next chapter in human development that is on par with the three revolutions preceding it. This time, it is driven by the availability of and interactions with a unique set of extraordinary technologies.[219] For example, artificial intelligence (AI) could fundamentally transform economic systems.[220] AI has the potential to create a market for robots to work alongside humans, for example, the use of exoskeletons for construction workers[221] and the use of cloud robotics that allows for higher levels of human-robot interaction and learning.[222] With correct integration into human workplaces, autonomous production can become more economical and productive, with humans and robots working alongside each other using smart-sensor human-machine interfaces.[223] The EU Fundamental Rights Agency asserts that 42 per cent of companies reported using AI technologies in 2020.[224] This may sound like future fiction, but in reality innovative humanoids have already arrived in 'human' workplaces in South Africa. Some examples if this include Pepper, a humanoid robot that uses AI to advise Nedbank's clients on basic products and services,[225] and Micah, Lexi and

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216 Schwab 2016. "The Fourth Industrial Revolution: what it means, how to respond", https://www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond/. Accessed on 1 April 2019.

217 Atzori, Iera and Morabito define the Internet of Things as "a conceptual framework that leverages on the availability of heterogeneous devices and interconnection solutions, as well as augmented physical objects providing a shared information base on global scale, to support the design of applications involving at the same virtual level both people and representations of objects." Atzori, Iera and Morabito 2017:137.

218 Ungureau 2019:79.

219 Schwab & Davis 2018:27.

220 Ayentimi and Burgess 2019:644; Gyulavári & Menegatti 2022:16.

221 Thilmany 2019. "Exoskeletons for Construction Workers Are Marching On-Site", https://constructible.trimble.com/construction-industry/exoskeletons-for-construction-workers-are-marching-on-site. Accessed on 20 July 2021.

222 Sutherland 2020:243. An example of cloud robotics is the use of autonomous cars, drones, and cart-carrying autonomous mobile robots. For more information on the power of cloud robotics, see Anandan 2019. "The Power of Cloud Robotics", https://www.automate.org/industry-insights/the-power-of-cloud-robotics. Accessed on 20 July 2021.

223 Smit & Stopforth 2022:373; Oosthuizen 2019:20.

224 European Commission (second-phase consultation) 2021:30.

225 Malinga 2018. "Tough lessons learnt from Nedbank's Pepper", https://www.itweb.co.za/content/Kjlyrvwdj8W7k6am. Accessed on 20 July 2021.

Ariel that are new '*employee'* robots ready to serve you at Hotel Sky in Johannesburg.[226]

It is undeniable that 4IR will have a disruptive impact on all economies[227] and could profoundly shape efforts to encourage sustainable industrial development on a national and international level.[228] In addition, 4IR will most likely have far-reaching consequences on our everyday lives, on how we communicate, how we interact, and ultimately how we work.[229] It tests not only the nature and duration of work, but also the very essence of what it means to be a human being.[230] Emerging forms of automation, which include advanced robotics and algorithmic systems supported by AI, are already displacing workers in the manufacturing sector, the accounting sector, and the legal sector.[231]

Larsson notes that the 4IR, as an 'Information Age', is distinctively different from other technological eras. This is mainly attributed to the fact that 4IR's main advances lie in the new means of communication and connectivity, and not as much on the introduction of new technologies per se.[232] Seen from a value perspective, 4IR represents a significant shift in the way that economic, social and political value is created, exchanged and distributed.[233] Consequently, the aforesaid new communication technologies enable billions of people globally to connect via the World Wide Web (WWW).[234] This said, Schwab argues that the lack of growth of 4IR technologies in many developing countries is mainly due to four billion people not

226 Kesa 2021. "Robots at your service: Sandton hotel embraces AI tech with robo-concierge", https://www.timeslive.co.za/news/south-africa/2021-01-20-watch-robots-at-your-service-sandton-hotel-embraces-ai-tech-with-robo-concierge/. Accessed on 20 July 2021.
227 Department of Trade and Industry 2019. "Future Industrial Production & Technologies", http://www.dti.gov.za/industrial_development/fipt.jsp. Accessed on 3 May 2019.
228 Department of Trade and Industry 2019. "Future Industrial Production & Technologies", http://www.dti.gov.za/industrial_development/fipt.jsp. Accessed on 3 May 2019.
229 NEDLAC 2019. "The Future of Work in South Africa", http://nedlac.org.za/wp-content/uploads/2017/10/Futures-of-Work-in-South-Africa-Final-Report-March-2019.pdf. Accessed on 20 July 2019.
230 NEDLAC 2019. "The Future of Work in South Africa", http://nedlac.org.za/wp-content/uploads/2017/10/Futures-of-Work-in-South-Africa-Final-Report-March-2019.pdf. Accessed on 20 July 2019.
231 Schwab & Davis 2018:149.
232 Larsson 2020:2.
233 Philbeck & Davis 2019:17.
234 Larsson 2020:2.

having internet access.[235] I argue that this is also an enabling technology for the growth of platform work in general, with the challenge to ensure decent work for this category of 'workers'. In this context, new information and communication technologies resulted in new business models thriving in the gig economy[236] with its accompanying deficits to be explored in this thesis.

Global labour markets too face major transformation due to constant globalisation, technological advancements, and demographical changes. During his address at the launch of the report of the ILO Global Commission on the Future of Work, President Cyril Ramaphosa[237] indicated that globalisation, rapid technological advancements and the digitisation and mechanisation of work processes are bound to have consequences on the future of work in South Africa.[238] Although 4IR holds great promises of becoming the driving force for socio-economic change, it still poses significant threats and changes to patterns of production, consumption and employment in both developed and developing countries, inclusive of sub-Saharan Africa.[239]

As occupations continue to be transformed to meet the requirements of the modern workplace, several others have already been earmarked to become redundant due to the adoption of 4IR disruptive technologies.[240] One of these examples is evident in South Africa's banking sector, which has been subject to mass retrenchments due to digitalisation.[241] It has to be kept in mind that several sectors are facing a similar future.[242] Furthermore, in the absence of formal employment opportunities, the reality

235 Schwab 2016:27.
236 Smit & Stopforth 2022:374; Chinyamurindi 2019:288.
237 In his capacity of co-chairperson for the ILO Global Commission on the Future of Work.
238 Ramaphosa 2019. "Launch of ILO Global Commission on the Future of Work report", https://www.gov.za/speeches/address-president-cyril-ramaphosa-launch-report-ilo-global-commission-future-work-fairmont. Accessed on 1 April 2019.
239 Ayentimi & Burgess 2019:643.
240 See para 2.2.1.
241 For more detail on the retrenchments that occurred in the banking sector, see Shaikh et al. "Has the 4IR Caught the Banking Sector Unawares?", https://www.businessessentials.co.za/2019/10/10/has-the-4ir-caught-the-banking-sector-unawares/. Accessed on 15 July 2021.
242 NEDLAC 2019:26. In their Report on the Future of Work, NEDLAC suggests that paper-based media, the aviation industry, restaurants, foreign tourism, meat and poultry farming, oil equipment and the mining are likely to bear the brunt of 4IR. In addition, it is important to note

is that many rely on new forms of informal work such as platform work as a main source of income.[243]

Given the adverse effects of Covid-19 and the increasing use of online platforms, it is argued that novel forms of work, such as work in the gig economy, will continue to stem from it. Although it does not fall within the scope of this thesis to discuss all aspects relevant to the future of work in South Africa in full, it is necessary to provide an overview of 4IR and its impact on the future of work. This, in turn, also assists in gaining a better understanding of the corresponding economies associated with the gig economy and categories of platform work.[244]

2.2.3 The future of work and 4IR

Global trends such as technological advancements, automation and globalisation continue to shape the way in which social protection systems need to adapt to the evolving demand.[245] The contract of employment continues to serve as a gateway to acquire a magnitude of labour rights for a great number of workers[246] but this employment model has been criticised in recent times for not adapting to the needs of the future workplace.[247]

It seems that as a country we are once more facing a legal debate on labour law's adaptability. In the past, labour law has done well to adapt to each industrial revolution's challenges in the world of work. It has been referred to as different paradigms such as ‘industrial law’, ‘workplace law’, ‘employment law’, ‘work law’ to

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that the report was finalised before the onset of Covid-19, which in turn, also contributed to the higher unemployment rate in South Africa.

243 See para. 2.3.5.3.2.4 for a discussion on the lack of social security in the on-demand sector.

244 See para. 2.3.2.6 and 2.3.5.2 for a discussion on the gig economy and the different types of platform work.

245 Behrendt *et al*. 2019:18.

246 Countouris 2019:19

247 Countouris 2019:19

'labour law' to meet the needs and demands of past workforces.[248] Each of these descriptions expresses the evolution of this field in law to reflect the historical circumstances moulded by mass industry and industrialisation, globalisation and emerging economies.[249] It seems that we are yet again at a junction where we need to reconsider and challenge labour law's traditional assumptions, and whether it is fit for purpose to meet the needs of the future world of work. The contemporary challenge centres on the role that work plays in providing meaning to individuals, families, and the community at large.[250]

In a Utopian world, 4IR has the potential to offer opportunities to improve livelihoods, enhance levels of education, and to lessen economic uncertainty.[251] That said, emerging technologies have also had an uninsurable impact on the world of work, with digital platforms accumulating wealth in fewer hands,[252] leaving workers such as on-demand workers more vulnerable and subject to unfair labour practices. Unfortunately, the 'hollowing out' pattern of 3IR continues to date with more countries in the South facing marginalisation due to offshoring, onshoring back to automated factories, or by forgetting about capable people and places who are no longer deemed valuable.[253] Schwab opines that this approach must be human-centric and goes beyond geographical and political boundaries,[254] which is also aligned with the ILO position of

248 See Collins, Lester and Mantouvalou 2018:7-10 for a detailed discussion on the paradigms of labour law through the centuries. The authors briefly outline the way in which each paradigm of 'labour law' was described to meet the social and legal practices in the past.

249 Collins 7 – 8. In determining the correct paradigm for labour law, the process for labelling the field of study involves a selection of a paradigm that is not purely descriptive but rather a normative judgement concerning what labour law ought to be doing and how the tasks should be done. In addition, this selection could also be motivated by various moral and practical considerations and an analysis of social and legal practices. One could argue that the label of 'labour law' largely concerns collective labour laws that demonstrated the notion that workers can exercise industrial democracy through collective organisation and bargaining structures. A stronger emphasis was placed on collective labour relations as opposed to individual labour relationships. The second paradigm associated with the label 'employment law' differs from 'labour law', since it places the focus on the contract of employment. The concept 'employment law' comprises legal rules for the formation and enforcement of employment contracts and modern legislation and regulations. This includes statutory provisions pertaining to the basic condition to be included in an employment contract, prohibition of discrimination, the protection of unfair labour practices, wage regulation, and health and safety regulations.

250 Schwab & Davis 2018:150.

251 Schwab & Davis 2018:37.

252 Schwab & Davis 2018:76.

253 Moll 2021:28.

254 Schwab & Davis 2018:118.

a human-centric approach for a decent future of work.[255] There is therefore a need for clear ethical frameworks and normative standards to assist organisations in the development and use of 4IR related technologies in society.[256] The same holds true for the employment context. I argue that decent work should be a priority when adopting new technologies, and the implementation of such must not be to the detriment of workers.

The employment landscape is continuously adapting to the emerging challenges of the 4IR resulting from technological advancements and the automation of processes. The emergence of new forms of work is not novel, but in recent times it is evident that a number of individuals are moving away from linear careers.[257] Employment has increasingly become more temporary.[258] The same was seen in 3IR and seems to continue.[259] Many professions have become progressively transient, and the idea of a 'lifelong job' or a 'job for life' is seen as outdated.[260]

Technology is seen as a fundamental factor in reducing worker control and has the potential to polarise the labour market.[261] It is estimated that 14 per cent of middle-class jobs are expected to perish due to automation in the next 20 years, and that 32 percent of positions are likely to change radically as tasks are automated.[262] This is concerning for South Africa, seeing that one-third of the country's workforce is employed in mid-skill positions and one-third of 14 million positions face an 80 per cent chance of becoming automatable.[263] It should also be stressed that all of the aforesaid is further intensified due to the Covid-19 pandemic.[264]

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255 ILO 2019 "A human-centred agenda needed for a decent future of work", https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_663006/lang--en/index.htm. Accessed on 15 July 2021.
256 Schwab & Davis 2018:117.
257 Brougham *et al*. 2019:22.
258 Brougham *et al*. 2019:22; Weiss 2022:32.
259 See para. 2.2.2.3.
260 Brougham *et al*. 2019:22.
261 Brougham *et al*. 2019:23.
262 Moll 2021:25.
263 Moll 2021:26.
264 Business Day TV 2020 "AI and the Future of Work after Covid-19", https://www.businesslive.co.za/bd/companies/telecoms-and-technology/2021-04-08-watch-ai-and-the-future-of-work-after-covid-19/. Accessed on 20 July 2021.

Digitalisation generates unmeasurable possibilities for future forms of work. At the same time, digitalisation is continuing to lead human society into an uncertain future with regard to the suitability of traditional forms of labour and social protection for digitalised forms of employment.[265] In Africa, the opportunities that mobile technology offers has been largely unsuccessful in creating formal job opportunities,[266] with many workers performing tasks on a casual basis. As much as the ILO can be applauded for its research done on the future of work, much uncertainty regarding deficits in decent work for these new types of work are noted, especially for developing countries such as South Africa.

Since the early 2000s the internet with its many uses has been reshaping the limits of work relationships to such an extent that the once clearly established lines between employees in traditional employment and independent contractors[267] had become blurred.[268] Although an industrial revolution takes place over decades or even a century, it is necessary for organisations to grasp the growing capabilities of technology and the way in which it will influence the workforce over the next couple of

265 Chen 2020.4.
266 Schwab & Davis 2018:133.
267 Another selling point of the gig economy is to label independent contractors as entrepreneurs or self-employed. Prassl 2019:11.
268 Prassl 2019:11. A recent example of this is the case of *Uber BV v Aslam*. (2021) UKSC 5. On 19 February 2021, the Supreme Court in the UK ruled in *Uber BV v Aslam* that drivers for Uber are 'workers' rather than self-employed independent contractors. The Court looked at several key factors in justifying its decision and found that Uber fixes the remuneration paid to drivers for their work, and the drivers have no say in it. The contractual terms on which drivers perform their services are dictated by Uber and are drivers required to accept Uber's standard form of written agreement. Uber also imposes the terms on which they transport passengers. Drivers have no say in them. Although drivers have the freedom to choose when and where (within the area covered by their PHV licence) to work, once a driver has logged onto the Uber app, a driver's choice about whether to accept requests for rides is constrained by Uber. Uber retains absolute discretion to accept or decline any request for a ride and has considerable control over how Uber drivers deliver their services. Uber also restricts communication between passenger and driver to the bare minimum. The level of control Uber had meant that the drivers were in reality 'workers' and not independent contractors. Therefore, this entitled them to rights usually given to workers, such as paid holiday and the right to be paid at least the minimum wage. In addition, a recent decision by Australia's Fair Commission (FWC) in *Diego Franco v Deliveroo Australia Pty Ltd* (2021) FWC 2818 could in future impact Uber's operation in the country. On 18 May 2021 the commission ruled that a former Deliveroo rider was an employee of Deliveroo rather than an independent contractor. The FWC emphasised the importance of standing back from the detailed picture and looking at the relationship's overall effect. Similar to the UK ruling, the FWC also noted that Deliveroo was able to implement or withdraw a significant level of control over Mr Franco, which was a decisive factor indicating the existence of an employment relationship. Having considered the facts, the FWC found the rider to be an employee of Deliveroo, and he was therefore entitled to unfair dismissal protection.

decades.[269] While some traditional forms of employment are at risk of disappearing in the near future, new emerging forms of work, like the gig economy, have come into existence.[270] Against the backdrop of the growing informality of work and the novel challenges caused by technology, many large companies opted to adapt their business models to fit the gig economy business model, which resulted in replacing their permanent workforce with 'independent entrepreneurs'.[271]

The traditional employment model of permanent fulltime employment within a single organisation is declining, shifting the responsibility of career management from organisations to the individual.[272] The result is that a significant amount of work performed as part of the gig economy falls outside the scope of labour and social security frameworks,[273] which in turn aggravates job insecurity.[274] The worker classification dilemma of on-demand workers remains a clear example of how law-disruptive technology, in the absence of a legal response to the problem, affects this vulnerable group of workers.[275] It has been mentioned several times that the classification of the employment relationship remains the gateway to wide-ranging yet decent labour and social protections at a national level. The main reason behind this is the traditional, and to some extent outdated, binary division between what is deemed ‘’employment’ against ‘independent contracting’ or ‘entrepreneurship.[276] In addition, a uniform judicial test to classify platform work could be problematic, since it would be difficult to apply the criteria for crowdworkers to on-demand workers.[277] That said, it is meaningful to highlight selected countries’ approaches to classifying or regulating the true relationship between the on-demand worker and the platform.[278]

269 Oosrhuizen 2019:19.
270 Behrendt *et al*. 2019:18.
271 Prassl 2019:11.
272 Wilhelm & Hirschi 2019:118.
273 Behrendt *et al*. 2019:18.
274 Wilhelm & Hirschi 2019:118.
275 Sowers 2019:193. Sowers defines ‘law-disruptive technology’ as a ‘new or improved technology that brings significant societal or economic impacts and does not fit into existing legal structures.’
276 Sowers 2019:194.
277 See para. 2.3.5.1.
278 Similar to many other countries, the USA also has several cases with mixed judgements. There are, however, some judgements that support the idea that the platform exercises extensive control over on-demand workers. In the landmark judgement of *Dynamex Operations W. v. Superior Court and Charles Lee, Real Party in Interest*, where the Californian Supreme Court concluded that: “… control over wages means that a person or entity has the power or authority

The need therefore arises to conceptualise the term 'gig economy' and distinguish it from other closely related economies operational in the digital realm. This sets the scene for an explanation of how the different gig business relationships vary with reference to the specific types of platform work. In the parts that follow, I elucidate different overlapping economies linked to the online ‘work’ environment in such a way as to demarcate the boundaries of the gig economy and the categories of platform work.

2.3 THE GIG ECONOMY

2.3.1 Introductory remarks

The gig economy, which is regarded as one of many law-disruptive technologies, is intensified by the ongoing classification dilemma and the acquiring of labour and social rights in employment law.[279] Of note here is that the employees and specific forms of non-standard employment enjoy the best labour and social protections provided for by labour legislation.[280]

to negotiate and set the employee’s rate of pay, and not that the person or entity is physically involved in the preparation of the person’s paycheque … Dynamex had exclusive power and authority to negotiate and set the rate of pay for the drivers who service its customers, and did so in rather elaborate contracts it required Real Parties to sign, upon terms which were not subject to further negotiation … Real Parties showed that they had no control over the price charged to Dynamex customers for pickups and deliveries, or the wages they received for those delivery services …” This judgement resulted in the establishment of the Dynamex test, also referred to as the ABC test, which forms part of the *California Labor Code*. Section 2750.3(a)(1)(A)-(C) of the *Labor Code* prescribes that: For purposes of the provisions of this code and the Unemployment Insurance Code, and for the wage orders of the Industrial Welfare Commission, a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all of the following conditions are satisfied: (A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact. (B) The person performs work that is outside the usual course of the hiring entity’s business. (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

279 Sowers 2019:193.

280 See heading 2.3.5.1 for a brief discussion about the classification of labour in the gig economy insofar as it related to the distinction of the different categories of platform work.

The gig economy is also synonymous with terminology that echo the contemporary changes in the global labour market in the 21st century.[281] It is seen as a macroeconomic structure that is highly reliant on several environmental factors, including the variations to economic landscapes, technological changes, demand, localisation, globalisation and industrial changes.[282] As technological advancements continue to improve, so is there a call for more opportunities for welfare to expand through the use of these technologies.[283] Chandler *et al*. argue that all these environmental factors facilitate the rapid growth of the modern-day gig economy.[284]

All types of gig work use an online platform to disseminate a variety of services.[285] Consequently, anyone with a smart device or computer with access to an online platform can instantaneously connect to millions of providers of services or 'gigs'.[286]

There are several reasons for persons to work in the gig economy. These include to supplement their main income, to perform gig work while searching for fulltime employment, and to perform gig work as a sole means of income.[287] It should be stressed that working in the gig economy as a means of main income is one of the most prevailing motivating factors for workers in developing countries to participate in platform work.[288] Multi-apping is also widespread in on-demand work. The term ‘multi-apping’ refers to the act of working on multiple platforms simultaneously. This practice is also a ‘phenomenon of change that new technology is bringing to the traditional arrangements for employment’.[289]

281 Ungureanu 2019:77.
282 Chandler *et al*. 2017:70.
283 Ungureanu 2019:77.
284 Chandler *et al.* 2017:70.
285 Petrosian 2018:89.
286 Petrosian 2018:89
287 Anwar & Graham 2021:246.
288 Heeks 2017:6.
289 Veen A. 2021. “Food app court case a wake-up call for gig economy”, https://indaily.com.au/opinion/2021/05/20/food-app-court-case-a-wake-up-call-for-gig-economy/. Accessed on 17 July 2022.

The gig economy consists of various types of businesses stretching over an array of tasks ranging from transportation to cleaning services.[290] As discussed in Chapter 1, it needs to be elaborated on to facilitate a true understanding of platform work, since it forms an integral part of not only the title of this thesis but is tied to all the research questions as well. It needs to be repeated that this study focuses primarily on on-demand work; hence the positioning of on-demand work within the broader framework of platform work needs to be clarified.

De Stefano categorises gig work into two specific types of work, namely crowdwork and on-demand work.[291] Both these types of gig work rely heavily on information and communications technologies (ICTs), are strongly connected to technological advancements, and require some human level of abstraction and manual dexterity.[292]

As technology improves, so do the opportunities to acquire work in the gig economy.[293] As the number of gig workers grows, so does the need to develop alternative legal systems to regulate this modern work relationship.[294] To date, a prevalent legal dispute concerning the classification of gig workers remains inconsistent and unresolved.[295] For example, a large cohort of gig workers challenges the notion that they are independent contractors. Instead, they argue that they must be classified as employees of specific gig businesses. The reasons for this notion centres on acquiring labour protection, typically afforded to employees in traditional employment relationships.[296]

The gig economy transformed persistently with the passing of each industrial revolution.[297] It has grown to such an extent that it has gained access to global

290 See the discussion in para. 2.3.3 for an overview of the gig business relationships.
291 See para. 2.3.5.
292 Messenger 2018:22.
293 Ungureanu 2019:77.
294 Ungureanu 2019:77
295 Petrosian 2018:89.
296 Petrosian 2018:89
297 Ungureanu 2019:78.

markets, including those of developing countries such as South Africa.[298] The form that the gig economy takes today is also attributable to the ongoing developments in our modern labour markets, keeping in mind the adverse effects of 4IR.[299] The first Industrial Revolution altered employment patterns with the rapid advances in steam engine technology.[300] This, in turn, generated an increase in the demand for labour in the materialistic field.[301] Today, the workforce is much more dynamic and flexible. In addition, gig businesses have increased exponentially in high urbanisation areas, mainly due to accessibility to technology, word of mouth branding opportunities and lastly, a higher population that results in a higher demand for gig workers.[302]

The gig economy[303] is associated with a flexible labour market in which freelance work prevails.[304] Different terms are used to describe it, such as the 'shared economy',[305] 'platform economy',[306] collaborative economy,[307] or the 'on-demand economy'.[308] Degryse states that considerable systematic confusion exists among these terms; however, the remaining common feature is the triangular business relationship between three distinctive parties, namely the platform, the client and the gig worker.[309] The very existence of the current gig economy is dependent on this triangular relationship, which stands in stark contrast to the traditional employment relationship that aims to protect the rights of employees and ensure decent work.

298 Chandler *et al*. 2017:72
299 See para. 2.2.2.4.
300 See para. 2.2.2.1.
301 Chandler *et al.* 2017:70.
302 Chandler *et al.* 2017:70.
303 Also referred to as the "platform economy". Du Toit 2019:1; ILO "Crowdwork and the gig economy", https://www.ilo.org/global/topics/non-standard-employment/crowd-work/lang--en/ \ index.htm. Accessed on 2 April 2019.
304 Bregiannis *et al.* 2017. "Workers in the gig economy: Identification of Practical Problems and Possible Solutions", https://www.researchgate.net/publication/318753756_WORKERS_IN_THE_GIG_ECONOMY_Identification_of_Practical_Problems_and_Possible_Solutions. Accessed on 10 July 2019.
305 Sanders & Pattison 2016:297.
306 Messenger 2018:vii.
307 Degryse 2016:28.
308 James 2018: "Inquiry into the Victorian on-demand workforce: Background Paper", https://apo.org.au/sites/default/files/resource-files/2018/12/apo-nid212101-1131081.pdf. Accessed on 15 July 2019.
309 Degryse 2016:28.

The purpose of this discussion is to provide a clear explanation of terms associated with the gig economy. To this end, the conceptualisation of various components connected to the gig economy, such as its definitions, the forms of gig businesses and gig work, will assist in better understanding the particular issues pertaining to gig work in general. When the question is investigated if South African law sufficiently advocates for decent on-demand work, a clear understanding of where on-demand work fits the gig economy is warranted. The second part below centres on the factors relating to on-demand work specifically in an effort to provide an overview of on-demand platform work and identifying its essential components. This discussion will aid in some key concepts associated with on-demand work and distinguishing it from other forms of platform work in the broader gig economy.

2.3.2 Mapping the different economies associated with on-demand work

There are different opinions regarding the scope of the gig economy. It is often used interchangeably with other types of economies, such as the digital economy, collaborative economy, sharing economy, platform economy, and the on-demand economy. The following part of the discussion intends to explain what the gig economy is and to demarcate where platform work fits within the broader economic frameworks. In addition, the unique character of each type of economy will be discussed, after which a discussion about the business relationship between the platform worker and the platform will be analysed. Understanding the aforementioned business relationship is key to answering the question if it is comparable with other forms of traditional employment relationship. It is important at this point to conceptualise the term ‘gig economy’ within the South African context in the absence of a confirmed definition. The section below will commence the discussion with an explanation of the digital economy.

2.3.2.1 Digital economy

The term 'digital economy' has developed in line with the technological advancement at a particular point in time. Early definitions centred on the use of the internet, which gradually shifted towards new technological trends such as mobile networks, cloud computing and big data.[310] The digital economy is rooted in anything powered by digital technologies,[311] information networks and the activities that consumers perform over these networks.[312] It is estimated that the digital economy accounts for 3 to 4 per cent of the gross domestic product in the global South.[313] Bukht and Heeks categorise their definition of the digital economy into three distinctive parts, namely a broad scope, narrow scope, and its core as seen in the figure below.[314]

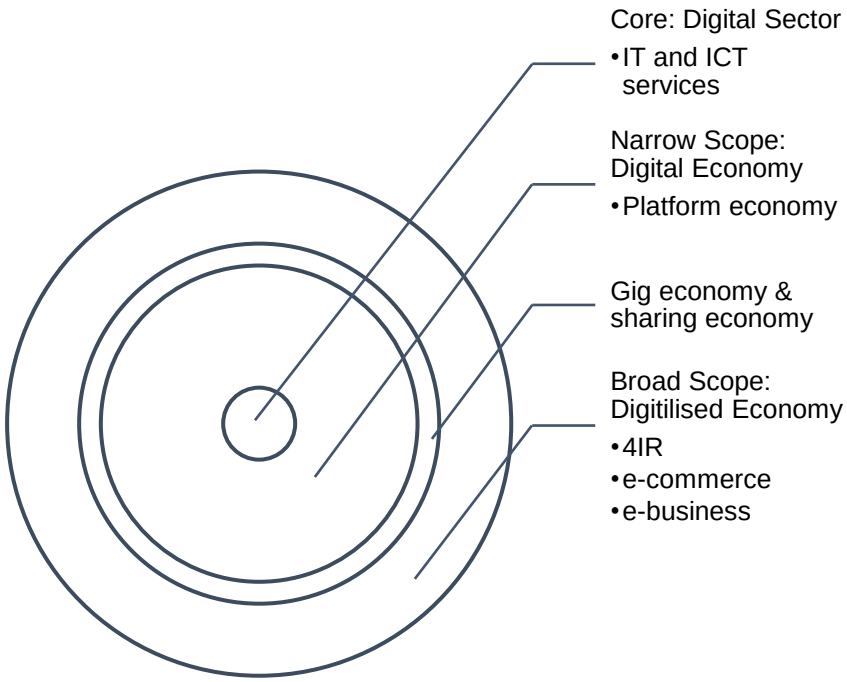

Figure 1: My adaptation of Bukht and Heeks' 'Scoping the Digital Economy' (Bukht and Heeks 2017:13).

310 Bukht & Heeks 2017:4.
311 Rinne 2017. "What exactly is the sharing economy", https://www.weforum.org/agenda/2017/12/when-is-sharing-not-really-sharing/ Accessed on 1 August 2020.
312 Dahlman *et al*. 2016:11.
313 Boateng *et al*. 2017:2.
314 Bukht & Heeks 2017:13.

Figure 1 presents an overview of the broader digital economy. It is apparent that the core digital economy concerns the production of technologies and its respective services, which include information technology services (IT) and information and communication technology (ICT) services. The broad-scope definition covers both the digitisation of data and the application of digitisation to organisational, social and economic processes. This subsequently covers 4IR, e-Commerce and e-Business.[315] However, the narrow-scope definition, which is part of the focus of this study, focuses more on the intensive[316] and extensive[317] application of ICT.[318] This encompasses new economic activities directly linked to the platform economy.[319] The economic activities of the gig economy, such as on-demand work for Uber or Bolt, are on the edge of the narrow-scope definition since they are registered as a technology company and not a transport service company.[320] This is indicative of the overlapping that takes place between the different economy models. It must, however, be noted that the digital economy is much broader that the gig economy. It includes platforms other than labour platforms, which are discussed later in this chapter.[321]

2.3.2.2 Sharing economy

The sharing economy[322] model is mainly categorised by peer-to-peer procurement of goods and services via an online platform,[323] and focused on the sharing of underutilised assets.[324] Frenken and Schor note that the participants in the 'sharing

315 Bukht & Heeks 2017:12.
316 Intensive application, in this context, aims to improve an existing economic activity. Bukht & Heeks 2017:12.
317 Extensive application refers to extension the boundaries of economic activity. Bukht & Heeks 2017:12.
318 Bukht & Heeks 2017:12.
319 Bukht & Heeks 2017:12-13. The platform economy, in this context, refers to both solely digital companies (for example, Facebook) and digital companies selling tangible goods (for example, AliExpress).
320 Bukht & Heeks 2017:12.
321 See paras.2.3.2.1 and 2.3.2.6.
322 The term 'sharing economy' is commonly associated with various other description given to the gig economy. Görög points out that the most prevalent definitions associated with the sharing economy are collaborative economy, collaborative consumption, in-demand economy, on-demand services, gig economy, digital economy, and the platform economy. Görög 2018:5.
323 Dosen & Graham 2018:2.
324 Rinne 2017. "What exactly is the sharing economy", https://www.weforum.org/agenda/2017/12/when-is-sharing-not-really-sharing/

economy' exercise a discourse of trendiness, technological sophistication, progress and innovation.[325] The aforesaid, to some extent, embodies the positive perception of the value of sharing. Sharing in this context refers to a social exchange between individuals without any profit derived from the arrangement.[326] However, this is not true for most of the on-demand work conducted in the sharing economy. Whereas the sharing economy concerns the sharing of underutilised assets, the gig economy focuses on performing tasks, or gigs, for money. Payment of a sum of money is, in my opinion, a distinctive characteristic of the gig business relationship.

Frenken defines the sharing economy as '*consumers granting each other temporary access to idle capacity,*[327]*possibly for money*.'[328] In other words, it amounts to consumers sharing goods that would otherwise be unused.[329] Riso summarises Frenken and Schor's interpretation of the 'sharing economy' further by stating that:

> …the sharing economy is characterised by peer-to-peer interaction, temporary access and physical goods, and it is distinct from other platform-based practices, namely on-demand personal services (on-demand economy), peers selling goods to each other (second hand market) and renting goods from a company via business-to-consumers platforms (product-service economy).

Eckhardt criticises the idea of 'sharing' whenever a platform company has an intermediary role to play between two consumers who do not know each other.[330] Lobel labels the 'sharing economy' as '*a gentler, fairer digital economy … where platforms cosmetically rely on the romantic notion of a sharing economy*'.[331] In other words, the majority of the on-demand work we see today does not conform to the strict

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Accessed on 1 August 2020.

325 Frenken & Schor 2017:4.

326 Degryse 2016:28.

327 'Idle capacity' in this context refers to underutilised assets. Frenken and Schor argue that the notion of idle capacity is central to defining the sharing economy, since this distinguishes the practice of sharing of goods from on-demand work. Frenken & Schor 2017:5.

328 Frenken & Schor 2017:2.

329 ING 2015. "International Survey – What's mine is yours – for a price. Rapid growth tipped for the sharing economy.", https://think.ing.com/reports/special-report-sharing-economy-2015. Accessed on 20 January 2023.

330 Degryse 2016:28.

331 Lobel 2017:55.

definition of the sharing economy. Consumers using sharing platforms do so to exchange unutilised assets with someone else at no cost.

It is argued that Uber and Uber-like on-demand companies are not part of the sharing economy, since its focus is to make available market resources that were not previously used, in other words, creating market resources based on a demand.[332] More importantly, companies like Uber and Airbnb have been criticised for being too interested in lowering cost as opposed to fostering social relationships with other companies and consumers.[333] Boateng highlights the fact that Africa is reported to have a 68 per cent rate of willingness to participate in sharing economy as compared to North America and Europe.[334] This includes commercial platforms and labour platforms. The inclusion of major platforms such as Uber and Airbnb could assist with access to both goods and services.[335] The willingness to participate is, however, not synonymous with decent work, seeing that the services that are performed as part of the sharing economy are still unregulated.[336]

2.3.2.3 Collaborative economy

The emergence of the collaborative economy significantly disrupted access to different goods and services[337] with commercial, institutional and legal consequences.[338] The European Commission defines the collaborative economy as a business model where collaborative platforms facilitate different online activities in an open marketplace where private individuals offer temporary usage of goods or services.[339] Owyang describes the collaborative economy as 'an economic model where commonly

332 Degryse 2016:28-29.
333 Degryse 2016:29.
334 Boateng *et al*. 2017:9.
335 Boateng *et al*. 2017:10.
336 See para 2.3.5.3.2.
337 Ertz & Boily 2020:87. The most significant disruptions are evident in the food, transportation and accommodation services.
338 Idiakez 2019:78.
339 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions. A European agenda for the collaborative economy: 3.

available technologies enable people to get what they need from each other.[340] More formal, Qwyang defines the collaborative economy as:[341]

> …an economic model where ownership and access are shared between corporations, start-ups, and people. This results in market efficiencies that bear new products, services, and business growth.

Qwyang's definition of the collaborative economy calls one's attention to the collaborative sharing of assets. However, the author extends the scope of the definition to include corporations, start-ups and individuals. Moreover, what stands out is that a business or commercial side is emphasised, thus suggesting a closer correlation to the platform economy.

Hatzopoulos states that the origin of the collaborative economy is constructed in the private initiatives and entrepreneurship of individuals to make better use of their idle capacity.[342] In addition, Rinne notes that the collaborative economy is focused 'on collaborative forms of consumption, production, finance and learning'.[343] The collaborative economy is also seen as a system that enables the unutilised value of various kinds of assets, which include skills, utilities and time, via models and marketplaces that enable greater efficiency and access.[344] The ever-changing nature of the collaborative economy makes it prone to manifesting itself in an array of different sectors in an economy.[345] The respective transactions in the collaborative economy are, however, underpinned by different motivations.[346] It should be noted, however,

340 Sarkar 2016. "The Rise of the Collaborative Economy – An Interview with Jeremiah Owyang", https://www.marketingjournal.org/the-rise-of-the-collaborative-economy-an-interview-with-jeremiah-owyang/. Accessed on 1 August 2020.
341 Owyang 2013:4.
342 Hatzopoulos 2018:158.
343 Rinne 2017. "What exactly is the sharing economy", https://www.weforum.org/agenda/2017/12/when-is-sharing-not-really-sharing/. Accessed on 1 August 2020.
344 Botsman 2014. "Sharing's Not Just for Start-Ups", https://hbr.org/2014/09/sharings-not-just-for-start-ups. Accessed on 3 August 2020.
345 Idiazek 2019:93.
346 Dredge & Gyimóthy: 2017:28.

that the exact definition of the collaborative economy is highly dependent on the perspective of an individual in relation to their discourse.[347]

2.3.2.4 Platform economy

Platform work is a term frequently used in literature, but to date there is no consensus about what it entails precisely.[348] The 'platform economy' can be divided into two categories, namely commercial or privately owned platforms (the commercial sector), and collectively owned platforms (the collective sector).[349] What is striking about this distinction is that it refers to both goods and services and thus introduces an element of labour. This is important, seeing that it is distinct from the previous economies that refer to services and not labour specifically.

Du Toit describes the 'platform economy' and more specifically 'platform work' as a multifaceted basis for organising the production of goods and services that have the potential to undermine the existing business models.[350] The platform economy is also conceptualised by Acquirer *et al*. as the ‘Intermediation of decentralised exchanges among peers through digital platforms’, which is one of the three cores of the sharing economy illustrated in the figure below.[351]

347 Dredge & Gyimóthy: 2017:309. For example, consultants and sharing economy specialists would focus on the innovative and disruptive elements of the collaborative economy, whereas economists and business consultants might define the collaborative economy more in line with the elements associated with demand and consumption.
348 Steward and Stanford 2017:422. Platform work is also referred to as ‘labour platforms’ (organise the performance of tasks/jobs) or “capital platforms” (facilitate income derived from the renting/sale of assets).
349 Du Toit 2019:3.
350 Du Toit 2019:3.
351 Acquirer *et al*. 2017:4.

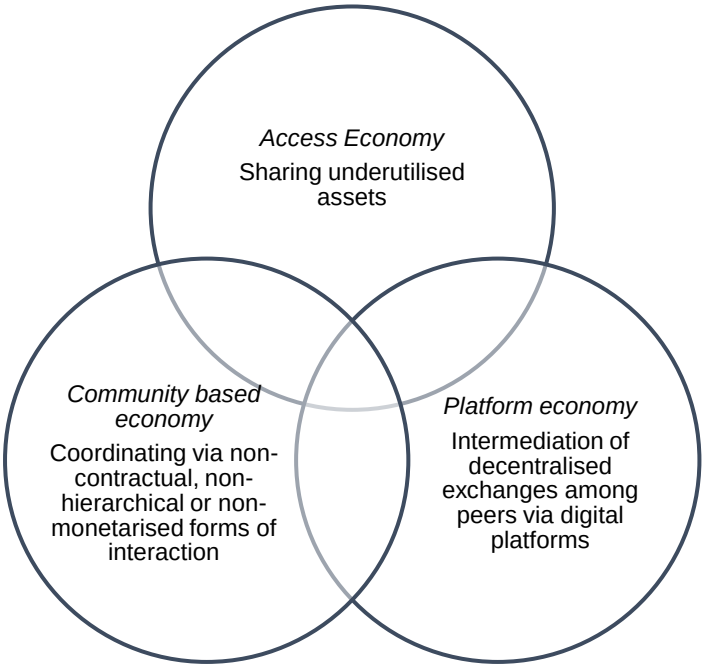

Figure 2: My adaptation of Acquier, Daudigeos and Pinkse's 'Promises and paradoxes of the sharing economy: An organising framework' (Acquier, Daudigeos and Pinkse 2017:4)

From a human resource perspective, the platform economy is altering different economic relationships and the social contracts that define what it means to be a consumer, an employee or worker, and an employer.[352] Platforms consist of a network structure and a matching mechanism, which connects consumers through a technology enabled system and algorithm.[353] The platform economy, within the context of online labour platforms, is characterised by a platform provider that intermediates the supply and demand of the other two parties.[354] Schmidt categorises the broad markets that form part of the platform economy into markets for assets, services (labour), money, and overlapping categories for communication, entertainment, and information.[355] This division of markets is illustrated as follows:

352 Scully-Russ & Torraco 2020:68.
353 Scully-Russ & Torraco 2020:71.
354 Schmidt 2017:5.
355 Schmidt 2017:6.

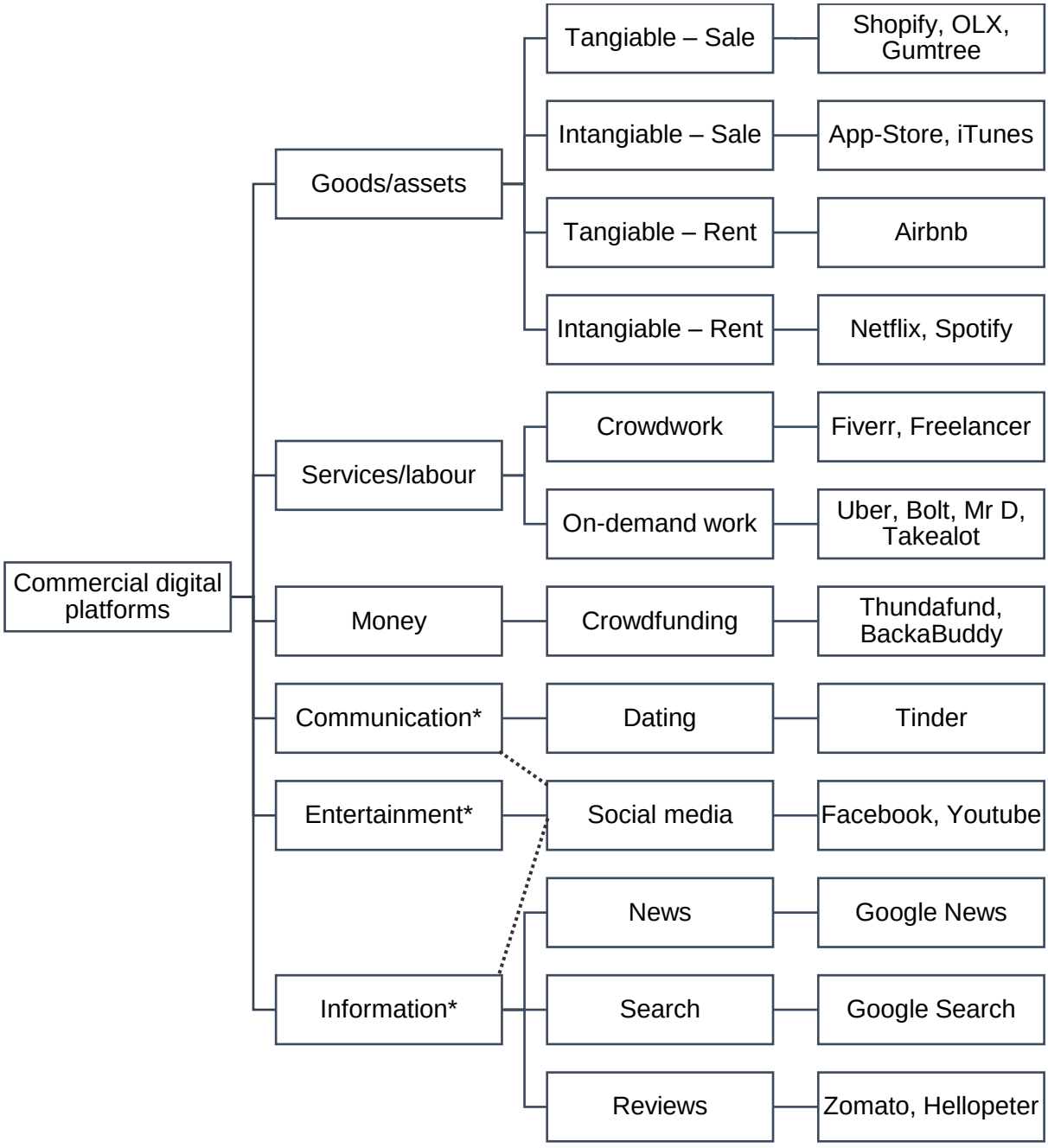

Figure 3: My adaptation of Schmidt's categorisation of digital labour markets in the platform economy. (Schmidt 2017:6)

*The communication and information categories overlap with the entertainment platform as far as social media is concerned.

What is clearly seen in Figure 3 is the broad coverage of the different types of commercial platform uses. In addition, what is striking is that the gig economy is seen as a sub-division of the platform economy. However, the broader application of this economy provides for goods and services that fall outside the scope of labour. This

includes platforms relevant to the selling and hiring of tangible and intangible goods, financial platforms, and social media platforms.[356] I argue that the gig economy should be seen as a sub-division of the platform economy. However, the use of the terms 'platform economy' and 'platform work' is still misleading, seeing that the term platform economy and its scope is too broad for purposes of this study. It is for this reason that the use of the term 'gig economy' is preferred in the research. In addition, as mentioned earlier, the platform economy must not be confused with platform work. A detailed discussion on the categories of platform work is provided later in this chapter.[357]

Despite the fact that there are similarities in the manner in which the work is performed and the types of platforms used to organise them, it is problematic to reduce this type of work into a single definition.[358] Aloisi and De Stefano argue that labour platforms epitomise a model of both hierarchical and relational outsourcing.[359] Rinne summarises the focus of the platform economy to anything powered by tech-centric platforms.[360]

It is estimated that in the European Union, one to five percent of the adult population have participated in paid work in the platform economy.[361] Moreover, close to 10 per cent of the adult population have used online platforms for providing online labour services in 14 EU member states.[362] In addition, roughly 10.3 million United States (US) adults earned an income from online platforms from 2012 to 2015.[363] It is

356 See figure 3.
357 See heading 2.3.5.
358 2018: "Inquiry into the Victorian on-demand workforce: Background Paper", https://apo.org.au/sites/default/files/resource-files/2018/12/apo-nid212101-1131081.pdf. Accessed on 15 July 2019.
359 Aloisi & De Stefano 2020:54. The authors argue that the online labour platforms act in such a way that it closely resembles employment relationships. These actions include goal setting, work supervision and evaluation, and certain consequences if the worker's performance is not up to standard.
360 Rinne 2017. "What exactly is the sharing economy", https://www.weforum.org/agenda/2017/12/when-is-sharing-not-really-sharing/. Accessed on 1 August 2020.
361 Behrendt *et al*. 2019:22.
362 Behrendt *et al*. 2019:22.
363 Scully-Russ & Torraco 2020:71. The participation in online platform work also increased by 47% during from 2012 – 2015.

estimated that 45 million people have participated in platform work on a global scale.[364] Behrendt *et al*. state that the platform economy consists mainly of two types of work, namely local app-based platform work and online-web based platform work.[365] It should, however, be noted that the term 'platform economy' is used inconsistently as a synonym to 'platform work', which typically focuses on labour platforms and excludes other capital platforms, sales platforms and non-commercial platforms.[366]

2.3.2.5 On-demand economy

The on-demand economy is used synonymous with the concept 'gig economy' and its associated types of work.[367] De Stefano explains that it can also be seen as a sub-division of the broader gig economy due to its focus on co-location of the client that uses the application and the physical provision of the services or goods.[368] The term is also seen as an umbrella term that applies to a variety of businesses.[369] The work performed in the on-demand economy involves location-specific work, such as transportation services, food delivery services or cleaning services that are more familiar to the general public and most likely used by public households.[370] For purposes of this study, the on-demand economy is regarded as a sub-division of the gig economy, which is discussed below.

2.3.2.6 Gig economy

A remarkable feature of the gig economy is that it is highly reliant on gigs. Originating in the music industry, the term 'gig' is used in this economy to indicate tasks or work

364 Scully-Russ & Torraco 2020:71.
365 Behrendt *et al.* 2019:21. Online-web based platform work is also referred to as crowdwork, which is discussed in para. 2.3.5.2. Local app-based platform work is synonymous with on-demand gig work. A detailed discussion is available in para. 2.3.5.3.
366 Riso 2019:10.
367 Aloisi 2016:653.
368 De Stefano 2016:9.
369 Todoli-Signes 2017:6.
370 Black 2020:73. See Figure 3.

that are performed in various industries.[371] This, in my opinion, lays the foundation for what we see today and strikes at the core of this thesis, which aims to conceptualise what the gig economy is. This, in turn, lends itself to distinguishing the two main categories of work in this economy, namely on-demand work and crowdwork. The following part of the discussion focuses on the general framework of the gig economy and calls into question its place in the modern-day economy. It must, however, be noted that this discussion, much like those of previous types of economies, is limited to its main characteristics and the categories of work for which it provides.

The 'gig economy' refers to an economic model that is highly dependent upon environmental factors, such as globalisation, technological advancements, localised demands, industrial change and changes in the economic landscape.[372] It represents a broad assortment of platform-facilitated arrangements[373] and is founded on a system where flexibility in work arrangements and the employment of independent contractors is key to its success.[374] A study conducted by the ADP Research Institute estimates that the broader gig economy accounts for a third of the world's working population.[375] Mastercard and Kaiser Associated predicted that the gig economy was worth approximately US$350 million in 2021, with the majority of the growth value coming from ridesharing services and asset sharing platforms.[376]

The Australian gig economy workforce is estimated to be more than 250 000 platform workers, of whom the majority are over-represented in specific vulnerable segments, namely youth workers, students and the previously unemployed.[377] Likewise, studies suggest that there are roughly 200 000 workers in Ireland engaged in temporary or

371 Tan *et al*. 2021:2.
372 Chandler *et al*. 2017:70.
373 Black 2020:72.
374 Dosen & Graham 2018:2.
375 Chang 2021. "40 Gig Economy Statistics You Must Learn: 2021 Market Share & Data Analysis", https://financesonline.com/gig-economy-statistics/. Accessed on 25 July 2021.
376 Mastercard and Kaiser Associates 2019. "The Global Gig Economy: Capitalizing on a $500B Opportunity", https://newsroom.mastercard.com/wp-content/uploads/2019/05/Gig-Economy-White-Paper-May-2019.pdf. Accessed on 25 July 2021.
377 Actuaries Institute 2020. "The Rise of the Gig Economy and its Impact on the Australian Workforce", https://actuaries.asn.au/Library/Opinion/2020/GPGIGECONOMYWEBtest.pdf. Accessed on 25 July 2021.

contingent employment arrangements, with gig work making out a smaller percentage of it.[378] It is estimated that South Africa has roughly 130 000 workers in the gig economy of whom 30 000 are performing tasks as on-demand workers and 100 000 are involved in crowdwork.[379]

Dosen and Graham explain that the gig economy can be specified as a labour market within the wider sharing economy.[380] Similarly, Aloisi notes that the term 'gig economy' is used interchangeably with the 'on-demand economy'.[381] Malik *et al*. describe the gig economy as one of the corollaries of the broader platform economy.[382] It therefore consists of both labour platforms[383] and asset-based platforms.[384] For purposes of this study, the discussion focuses on the labour platforms.

Heeks draws a distinction between the digital gig economy and the physical gig economy, which can be illustrated as follows:[385]

378 Quirke and Winder 2021:49. See also Burke-Kennedy 2020. "Gig economy: What is it? Who works in it? Why is it in the news?", https://www.irishtimes.com/business/economy/gig-economy-what-is-it-who-works-in-it-why-is-it-in-the-news-1.4346555. Accessed on 25 July 2021.

379 Fairwork 2021:8. See Chapter 6, para 5.3 for a discussion on the size and growth of the gig economy in South Africa.

380 Dosen & Graham 2018:2.

381 Aloisi 2016:654.

382 Malik *et a*l. 2021:1.

383 Tan *et al*. 2021:4. Labour platforms consist of two or multi-sided markets where the platform acts as intermediary between the client and the supplier.

384 Tan *et al*. 2021:4. Asset-based platforms and e-commerce platforms consist of markets that form part of the broader sharing economy.

385 Heeks 2017:3.

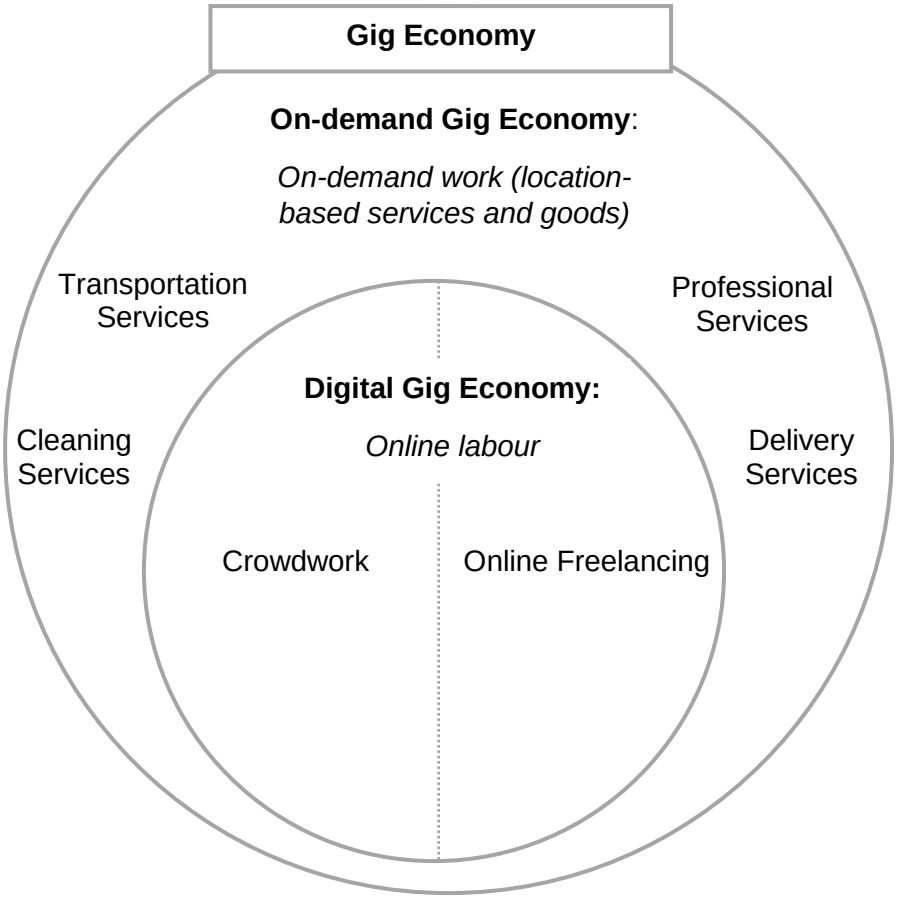

Figure 4: My adaptation of Heeks' Categorising the Gig Economy (Heeks 2017:3)

What stands out in Figure 4 are the main differences in terms of the services that are offered in the gig economy. Heeks draws a direct distinction between services that are digital and localised services. As previously discussed, both categories of platform work form part of sub-themes of the previously discussed economies. What makes the gig economy unique, is the fact that it describes the two main categories of work that are applicable to this research best. This, in turn, also assists with the delineation between on-demand work and crowdwork, which is discussed later.

The gig economy is an economic model in which irregular and flexible jobs (also referred to as 'gigs') are made available.[386] It is subsequently focused on a form of workforce participation and income generation by way of gigs, meaning once-off tasks

386 The Parliament of Victoria 2018. "Labour rights in the gig economy – an explainer", https://www.parliament.vic.gov.au/publications/research-papers/send/36-research-papers/13869-labour-rights-in-the-gig-economy-an-explainer. Accessed on 15 July 2019.

or projects for which a worker[387] is hired to perform.[388] It is important to note that the 'hired labour' is referred to as a worker and not an employee, with the legal ramifications to be discussed as sub-divisions in Chapters 4, 5, and 6.

The term 'gig economy' is subsequently preferred because it is merely descriptive in general and more prescriptive to the irregular work that is performed. Anwar and Graham note that the gig economy in low- and middle-income countries, like South Africa, is perceived to be an alternative to formal employment opportunities of which the gig worker hardly had a chance to benefit from.[389] The gig economy also introduces major issues for achieving decent work due to the precariousness of the work performed. As mentioned before, these issues relate mostly to the instability of working hours, low pay, and a complete lack of labour and social protection.[390] The different labour and social protections are discussed later in this chapter. In addition, a detailed overview of the decent work indicator that concerns social security is presented in Chapter 3.

Koutsimpogiorgos *et al.* go on to explain that the gig economy consists of distinctive characteristics that are divided into four main dimensions, namely online platform as opposed to offline intermediation, paid versus unpaid work, the issue of classification between independent contractor and employee status, and lastly, the delivery of a service set against the delivery of goods.[391] Workers can have multiple 'gigs' at the same time that may differ in kind from multiple clients or contractors.[392] As stated earlier in this chapter, on-demand workers are able to seek tasks on multi-platforms simultaneously. Consequently, measuring decent work on all platforms could be challenging.

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387 It can be either a crowdworker or an on-demand worker in this context.
388 Rinne 2017. "What exactly is the sharing economy", https://www.weforum.org/agenda/2017/12/when-is-sharing-not-really-sharing/. Accessed on 1 August 2020.
389 Anwar & Graham 2019:3.
390 Zorob 2019:10.
391 Koutsimpogiorgos *et al*. 2020:4.
392 Bregiannis *et al.* 2017. "Workers in the gig economy: Identification of Practical Problems and Possible Solutions", https://www.researchgate.net/publication/318753756_WORKERS_IN_THE_GIG_ECONOMY_Identification_of_Practical_Problems_and_Possible_Solutions. Accessed on 10 July 2019.

In short, the gig economy entails 'people using apps to sell their labour'.[393] The use of the term 'people' is noteworthy as I argue that on-demand workers are not regarded as either a worker or an employee of the platform as yet. It is established that people engaged in this type of work rely on a significant degree of flexibility, which is typically exercised by independent contractors. As a result, these jobs are more appropriate for a contemporary, mobile and flexible working force.[394] There is, however, some degree of control from the online platform. Wood sees the intermediation of the online platforms as a vital component of the gig economy,[395] and that the rating systems and algorithmic management systems fundamentally distinguish online platform intermediation from previous older offline intermediations.[396] I agree with Wood's assumption, seeing that online platforms exercise a high degree of control over the tasks that are performed and the way in which they must be conducted.

Work in the gig economy centres on completing a specific task, rather than continuous employment. The work or tasks are not necessarily done during predetermined hours.[397] In addition, individuals usually undertake work[398] but there are instances where jobs are organised through online platforms managed by companies that charge users for their service.[399] For example, Bolt charges a booking fee of four per cent, which is added to the total price that the client pays.[400]

393 Taylor *et al.* 2017. "Good Work: The Taylor Review of Modern Working Practices", https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf. Accessed on 1 July 2019.

394 Bregiannis *et al.* 2017. "Workers in the gig economy: Identification of Practical Problems and Possible Solutions", https://www.researchgate.net/publication/318753756_WORKERS_IN_THE_GIG_ECONOMY_Identification_of_Practical_Problems_and_Possible_Solutions. Accessed on 10 July 2019.

395 Wood *et al*. 2019:70.

396 Koutsimpogiorgos *et al*. 2020:4.

397 For example, "zero-hours working practices" in Ireland. See page 17.

398 The Parliament of Victoria 2018. "Labour rights in the gig economy – an explainer", https://www.parliament.vic.gov.au/publications/research-papers/send/36-research-papers/13869-labour-rights-in-the-gig-economy-an-explainer. Accessed on 15 July 2019.

399 Steward & Stanford 2017:422.

400 Bolt. 2023. "Booking fees in South Africa", https://support.taxify.eu/hc/en-us/articles/360004204273-Booking-fees-in-South-Africa#:~:text=Cash%20trips%3A%20The%20booking%20fee,price%20and%20collected%20by%20Bolt. Accessed on 6 February 2023.

Returning to the research question of what the modern-day gig economy entails, it is now possible to state that the gig economy forms an integral part of the digital economy. In addition, the discussion has revealed that the digital economy, collaborative economy, sharing economy and the platform economy encompass a greater degree of services that fall outside the scope of labour, and thus the focus of this research. Previous studies by Heeks also confirm that both categories of platform work in the gig economy include the rendering of a personal service by people. Both of the aforesaid categories thus involve a unique gig business relationship, each with specific legal obligations. In the section that follows, I will explore which type of gig business relationship applies to on-demand work by distinguishing the three main types of relationships, namely the gig-classified business relationship, the gig-employer business relationship, and the interactive gig business relationship.

2.3.3 The different categories of gig businesses within the context of the gig economy

2.3.3.1 Introductory remarks

The incipiency of new tech-enabled business models is changing the very nature of employment relationships, making them even more precarious.[401] Farrell and Greig draw a distinction between two very distinctive platforms, namely labour platforms and capital platforms.[402] Labour platforms, of which on-demand gig work forms an integral part, are aimed at connecting a client with a gig worker to perform a specific task.[403] The various capital platforms, on the other hand, connect customers with individuals who use the platform to rent assets or to sell good peer-to-peer.[404] This distinction will be illustrated further in the discussion on the different gig businesses.

Businesses are regarded as gig businesses if they are utilising an online platform to instantly connect two parties or more, depending on the type of gig work to be done,

401 Zorob 2019:7.
402 Farrell & Greig 2016:20.
403 Farrell & Greig 2016:20. See Figure 3 for examples of labour platform businesses.
404 Farrell & Greig 2016:20. Examples of prevalent capital platforms include Airbnb and eBay.

on-demand through the Internet.[405] Gig businesses are categorised into three main types of businesses, namely gig-classifieds, interactive gig businesses, and gig-employers.[406] Petrosian notes that these categories serve as a useful guideline to determine the liabilities of each business.[407] Steward and Stanford outline three overarching task-orientated categories, namely matching platforms,[408] platforms used for sorting and analysis,[409] and platforms that allow for value to be added to the product.[410]

Any of the aforesaid categories can be structured into a specific online platform to provide one or several of the task-oriented services, for example the reviewing and rating of services that are used by Airbnb and Uber.[411] Although each gig-business differs with regard to the industry in which they are operating, they share three characteristics: a client in need of a service or a product, a person offering the requested service or product, and an online third-party platform[412] that serves as an intermediary service to connect the client and the worker.[413]

In the previous part, the various types of economic frameworks were explained. Central to this was the discussion on the sharing of goods and services. Similarly, the gig business relationship differs depending on the type of service that is facilitated by the online platform. Furthermore, it is important to heed the legal obligations that flow from each of these gig business relationships. As will be discussed later in this chapter, I argue that the on-demand work relationship closely resembles that of a typical triangular relationship that is acknowledged in South Africa, namely temporary employment services.[414] However, given that the current status of on-demand workers

405 Petrosian 2018:91.
406 Petrosian 2018:90.
407 Petrosian 2018:30.
408 This type of platform is used to connect sellers and buyers of goods and services.
409 This type of platform is used to provide various reviews and referrals. TripAdvisor is a good example of this type of platform.
410 Steward & Stanford 2017:422.
411 Productivity Commission Research Paper on Digital Disruption 2016:140. Research paper available at https://www.pc.gov.au/research/completed/digital-disruption/digital-disruption-research-paper.pdf. Accessed on 25 February.
412 The use of 'online' platform also refers to a web-based platform interchangeably.
413 Petrosian 2018:92.
414 Hereafter referred to as TES.

in South Africa is in limbo, it becomes crucial to examine and identify the business relationship that is best suited for on-demand work. The section that follows will first distinguish the three forms of gig business relationships as described above. The second part of the discussion consists of an overview of the Uber business model that serves as a practical illustration of what an interactive gig business model entails.[415]

2.3.3.2 Gig-classifieds business relationship

A gig-classifieds business provides an online platform where the platform, as the type of gig business, plays a purely intermediary role in assisting the prospective gig worker to obtain gig work.[416] The online platform serves as a matching platform, which subsequently matches market participants and lowers search costs, for example Airbnb.[417] Unlike other gig-businesses, these businesses are not involved other than providing an advertising space on their respective online platform, for which they charge a service fee for the use of their platform.[418]

Craigslist is not actively involved in facilitating the transaction between the client and the gig worker, however, it charges its user an advertising fee to list a job post on its platform.[419] Thumbtack follows a similar route in that they do not facilitate the transaction. Instead, they charge a gig worker (or 'expert', as they refer to them) a fee to acquire credits, which you can use to pay for job leads.[420] For both Craigslist and Thumbtack the gig worker and client contact each other directly and not through the platform as a party to their agreement. Airbnb, on the other hand, operates slightly

415 It must be kept in mind that the Uber model is used to illustrate the gig business relationship and that other platforms could include online labour other than ridesharing services.
416 Petrosian 2018:115.
417 Productivity Commission Research Paper on Digital Disruption 2016:140.
418 Craigslist 2021. "Terms of Use", https://www.craigslist.org/about/terms.of.use/en. Accessed on 25 July 2021. For example, the clause dealing with fees provides that "When you make a paid posting, … you authorize us to charge your account. Any tax is additional. Fees are non-refundable, even for posts we remove, delay, omit, re-categorize, re-rank, or otherwise moderate. We may refuse any posting."
419 Strickland "How Craigslist works", https://money.howstuffworks.com/craigslist.htm. Accessed on 25 July 2021.
420 Anonymous "Paying for leads", https://help.thumbtack.com/article/pay-for-leads. Accessed on 25 July 2021.

differently. Airbnb is more involved in facilitating the booking and payment of the services available on its online platform. Prospective clients book their accommodation directly on the platform and Airbnb charges a service fee for facilitating the process.[421] In relation to the aforesaid gig businesses, it is important to note that the platform is used as an intermediary to connect a gig worker with gig work.[422] It is key to know that a true work relationship exists between the client who obtains a service and the gig worker who is hired to perform the service. The gig worker is subsequently neither regarded as an independent contractor nor an employee of the gig business.

It is thus evident from the above discussion that the gig-classified business relationship is directed at advertising goods and services as opposed to facilitating the entire process, meaning exercising control over the quality of the service as with on-demand work. It is also clear that the gig-classified platform focuses more on commercial transactions where, in some instances, labour is not involved.

2.3.3.3 Gig-employer business relationship

A gig-worker and gig-employer relationship allows for extensive flexibility regarding the gig worker's work schedule; however, the majority of work relationships correlate with that of an employment relationship.[423] Petrosian notes that this type of working relationship closely resembles an employment relationship, and that flexibility regarding working hours should not be seen as a determining factor to classify them as independent contractors.[424] Examples of businesses that allow gig workers immense flexibility with their work schedule, but classify them as employees, are UPS Logistic Group and Air Couriers.[425]

421 Airbnb 2023. “Terms of Service”, https://www.airbnb.co.za/help/article/2908. Accessed on 10 February 2023.
422 Petrosian 2018:115.
423 Petrosian 2018:116.
424 Petrosian 2018:118.
425 Petrosian 2018:116.

2.3.3.4 Interactive gig business

As previously stated, the working relationship between the online platform and the gig worker is controversial because it resembles characteristics of both an employment relationship and work performed by an independent contractor.[426] An interactive gig business relationship consists of three parties to the agreement, namely the online platform (the interactive gig business), the gig worker, and a client.[427] The following figure illustrates the triangular relationship between the interactive gig business, the client, and the on-demand worker:

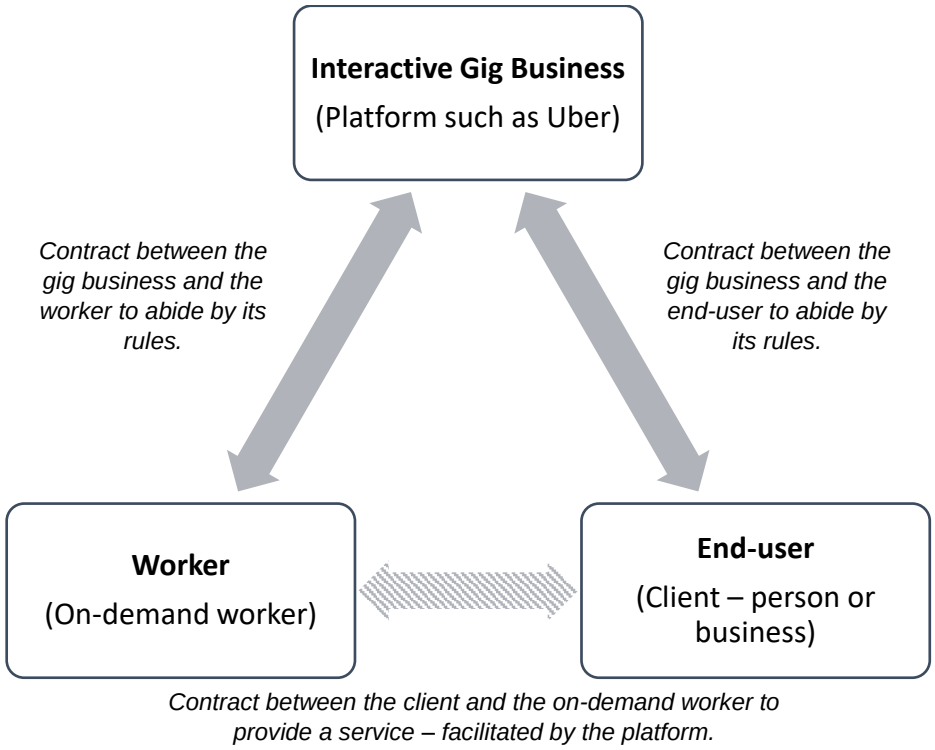

Figure 5: My adaptation of Steward and Stanford's triangular relationship of the gig economy (Steward and Stanford 2017:425.)

426 Petrosian 2018:118.
427 See para. 2.3.3.4.

The first interactive relationship illustrated above (top left arrow) is between the on-demand worker and the platform. In this contractual agreement, the on-demand worker agrees to the terms and conditions, which grant the platform specific rights to discipline or discharge the worker,[428] with little or no corresponding rights of recourse against the platform. The on-demand worker thus carries most of the risks associated with providing tools of the trade and equipment needed to perform functions, even interruptions on the platform itself.[429] The second relationship illustrated above (top right arrow) exists between the platform and the end-user of its services. These terms and conditions must be accepted by the end-user when they log in and typically limit the obligations and responsibilities of the platform for any problems that may occur, either in production or delivery.[430] In essence, the platform is protected to the detriment of the end-user and the worker, attributable to the commercial character of these contracts.[431]

Steward and Stanford hold the opinion that the third relationship (illustrated by the bottom arrow) that exists between the on-demand worker and the client is more ambiguous and depends on the interactive business model adopted by the platform.[432] To my mind, this type of relationship is reminiscent of a temporary employment service (TES) relationship. However, unlike the limited labour protections that TES workers in South Africa are entitled to, on-demand workers are left without sufficient labour and social protections and are thus left vulnerable. A detailed discussion on the advantages and the categories of vulnerability are presented later in this chapter.[433]

428 Stewart & Stanford 2017:425.
429 Stewart & Stanford 2017:424.
430 Stewart & Stanford 2017:425.
431 Stewart & Stanford 2017:424.
432 Stewart & Stanford 2017:425.
433 See headings 2.3.5.3.1 and 2.3.5.3.2.

Some examples of interactive gig businesses operations in South Africa include Uber,[434] NoSweat,[435] Upwork,[436] GetTOD,[437] and SweepSouth.[438] Schmidt states that the terms of services concluded by the parties to an online labour platform relationship, which correlates with an interactive gig business relationship, have effectively evolved into a work contract, seeing that it involves performing a service.[439] It also shares a striking resemblance to the triangular relationships that we know in temporary employment agencies.[440]

Cognisance must be taken of the fact that, much like other forms of work in the informal economy, work in the gig economy remains outside the scope of the labour statutes. Given the current economic climate, I also argue that the legislature is unlikely to extend labour protections in the absence of a court judgement to this effect. As mentioned earlier, this is not a situation unique to South Africa, as several countries are grappling with the issue of determining the true relationship between a platform and the 'worker'.

In the following part of the discussion, the Uber model will be used as an example to provide an overview of some of the realities of the interactive business model. This also serves as a basis for the discussion on on-demand work later in the chapter.

434 Uber www.uber.com. Accessed on 20 July 2021.
435 NoSweat https://nosweat.work/. Accessed on 20 July 2021.
436 Although all the given examples resemble on-demand employment, Upwork is included in this list for its precarious work performed by cloudworkers. It still remains an interactice gig business relationship. See more detail in the discussion on 'Crowdwork'.
437 GetTOD https://www.gettod.com/. Accessed on 20 July 2021. See also Majola 2021. "GetTOD is SA's top scorer in gig working fairness", https://www.iol.co.za/business-report/economy/gettod-is-sas-top-scorer-in-gig-working-fairness-1d772008-cc2d-464b-9718-8014d4b30123. Accessed on 20 July 2021.
438 SweepSouth https://sweepsouth.com/. Accessed on 20 July 2021.
439 Schmidt 2017:11.
440 Benjamin 2020. "Can a platform be a temporary employment service?", https://law.uwc.ac.za/entities/centrow/news-labour-law/can-a-platform-be-a-temporary-employment-service. Accessed on 24 July 2021.

2.3.4 The Uber business model as a case study to illustrate the practicalities of an interactive gig business relationship

A series of different on-demand tasks are conducted through the use of multiple on-demand platforms that cater for your every need. The most prevalent businesses to embrace the 'on-demand gig culture' in South Africa are ridesharing companies, food delivery companies, and domestic services businesses.[441] To better understand the practicalities of each of these interactive gig businesses, the following discussion will explain the characteristics of the interactive gig business by providing an overview of the Uber business model.

Uber and its sister ventures need no introduction. It is deemed one of the most renowned on-demand platforms and it has dramatically changed the way in which many persons commute, and how others choose to perform work.[442] Uber operates easily through the use of a mobile application.[443] The company is registered as a technology company that aims to connect independent registered Uber drivers with their clients (riders making use of their services).[444] Martin notes that it is often referred to as the 'disruptive innovator' based on the way in which it has modernised traditional business models and the way in which we organise communities.[445] Moreover, Uber is a good example of how platforms designed for transportation evolve into platforms for delivering groceries and food.[446] With its affiliate food delivery platform, Uber Eats, Uber is seen as the leading 'technology' company penetrating various industries at the same time.[447] It is therefore not a surprise that the Uber business model has opened

441 Kavese, Mbali and Anyikwa 2022:21.
442 Martins 2019:55.
443 Uber www.uber.com. Accessed on 20 July 2021.
444 Dans 2019. "There Are Tech Companies And Then There Are Uber-Tech Companies...", https://www.forbes.com/sites/enriquedans/2019/04/12/there-are-tech-companies-and-then-there-are-uber-tech-companies/?sh=5e2aa8754be6. Accessed on 20 July 2021.
445 Martins 2019:55.
446 Rangongo. 2018. "These suburbs can order their groceries via Uber — but there's a 7.5% catch", https://www.businessinsider.co.za/these-joburg-suburbs-can-now-order-their-groceries-through-uber-eats-and-have-it-delivered-within-20-minutes-2018-8. Accessed on 18 July 2020.
447 Various other online platforms follow suit, for example Bolt, a rival ridesharing platform in South Africa, introduced Bolt Food in April 2020. Bolt. 2020. https://blog.bolt.eu/en-za/bolt-food-is-here-get-100-contact-free-grocery-delivery-in-cape-town/. Accessed on 15 July 2020.

a complex new reality through legal cases involving the Uber business model in several countries across the globe. These cases involve a variety of legal fields, including labour law (classification disputes), commercial law (unfair competition practices), administrative law (issuing of permits), competition law (accusations of colluding and influencing prices), tax law (VAT disputes), and company law (issues regarding mismanagement practices).[448]

The Uber process starts by a user downloading the Uber app on their mobile device. After creating a personal account, a user can request the nearest available Uber driver, using a GPS pinpoint location of the Uber driver's position. Uber BV does not own nor operate any vehicles in South Africa. It operates its business through the use of the Uber App, which in turn enables clients to request transportation services. The request is then accepted by the independent transport operator, namely the Uber driver.[449] Once the clients reach their destination, they can conveniently pay by debit card, credit card, in cash, or via the Uber Cash platform.[450]

A prospective Uber driver is required to accept the terms and conditions which govern the access and use of 'applications, websites, content, products, and services (the 'Services') made available by Uber BV.[451] It is important to note that the terms and conditions stipulate that the agreement is a contractual agreement and does not amount to an employment contract. More specifically, clause 2 describes the service relationship as follows:

> The Services constitute a technology platform that enables users of Uber's mobile applications or websites provided as part of the Services (each, an 'Application') to arrange and schedule transportation and/or logistics services with independent third-party providers of such services, including independent third party

448 Martins 2019:57. Other fields in law include intellectual property rights and criminal law.
449 Uber 2021. "How does Uber work?", https://help.uber.com/riders/article/how-does-uber-work?nodeId=738d1ff7-5fe0-4383-b34c-4a2480efd71e. Accessed on 24 July 2021.
450 Kahla. 2020. "Uber introduces contactless payments in South Africa", https://www.thesouthafrican.com/technology/online/uber-contactless-payments-south-africa-june-2020/ Accessed on 18 July 2020.
451 Section 1 of Uber BV Terms and Conditions. Uber BV owns and operates the Uber App. Uber SA is a subsidiary of Uber BV.

transportation providers and independent third party logistics providers under agreement with Uber or certain of Uber's affiliates ('Third Party Providers').

The Uber business model recognises three distinctive relationships, namely that of the 'partner driver', a 'driver only', and a 'partner only'. The 'partner driver' refers to a registered vehicle-owning partner of Uber BV.[452] In addition, the 'partner driver' is registered with Uber BV on the Uber App and is subsequently the authorised person to use the application.[453] In return for the use of the Uber App, the 'partner driver' pays a fee to Uber BV.[454] A 'driver only' category involves a person who does not own a vehicle, but performs his rides via a registered Uber BV partner's account. The driver must agree to the Uber BV terms and conditions and must be registered with Uber BV before the registration and activation of the Uber profile can be done.[455] This category differs from that of a 'partner driver' in that the driver is paid by the Uber partner and not from Uber BV.[456] The last category is that of a 'partner only'. A 'partner' refers to a person who owns one or more vehicles that are registered with Uber BV on the Uber App; however, the vehicles are driven by the driver as mentioned in the previous category.[457]

Uber drivers in South Africa need to complete an online registration before they are activated to use the Uber App. To finalise the process, the driver must upload specific required documentation,[458] complete a safety screening, pass a driving evaluation, attend a driver competency test provided by a third-part service provider, and attend a training session.[459] Uber uses a customer satisfactory feedback system to rate their drivers. Poor satisfactory ratings could result in a deduction from the payments by

452 *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* 2018 39 ILJ 903 LC:22. See also Van Eck & Nemusimbori 2018:475.
453 *Uber South Africa:*22.
454 *Uber South Africa:*22. Uber BV deducts this fee from the face collected by the 'partner drive'. The remainder of the fare is paid to the 'partner driver'.
455 *Uber South Africa:*23.
456 *Uber South Africa*:23. The 'remuneration' paid to the driver is regulated and prescribed in terms of a separate agreement between the driver and the registered partner. Van Eck notes that the driver is subsequently bound by Uber BV's terms and conditions, but is paid by a third-party, namely the registered Uber partner. Van Eck & Nemusimbori 2018:475
457 *Uber South Africa*:24.
458 This includes the submission of a valid South African driver licence and a professional drivers permit. Part of the permit includes a criminal background check.
459 Uber www.uber.com. Accessed on 20 July 2021.

Uber or a 'discontinuation' of the service agreement.[460] It bears repeating that on-demand workers are left vulnerable, seeing that they are not sufficiently protected against unfair deactivation.[461]

As already noted, the drivers are classified as independent contractors. As such, workers enjoy immense flexibility with regard to choosing their own working hours, and subsequently achieving a work/life balance. However, the flexibility comes at a price because the 'business relationship' between the partner and Uber skilfully limits the company's responsibilities in various ways. The parties agree that the relationship between them is solely that of a principle and independent contractor. Uber is therefore excluded from the rights and duties as an employer under the restrictions of various labour laws, including minimum wages, limitations on working hours, and a plethora of health and safety regulations.[462] Uber does not guarantee the drivers a minimum of rides.[463] In South Africa, Uber drivers subsequently remain responsible for generating their own income and managing their own expenses.[464]

Moreover, partner drivers are at risk of 'deactivation' of their services on the grounds of multiple contraventions of the service agreement and community guidelines.[465] Some of the noticeable grounds include failure to maintain user account information, which includes practising account security, transfer of your Uber account to any third

460 Leighton 2016:863.

461 See para. 2.3.5.3.2.2 for more detail relating to the unfair deactivation of on-demand workers' profiles by the platform.

462 See para. 2.3.5.3.2.4 for more detail relating to the unfair deactivation of on-demand workers' profiles by the platform.

463 Clause 5 of the Service Agreement states that: '… Uber makes no representation, warranty, or guarantee regarding the reliability, timeless, quality, suitability or availability of these services or any other services or goods requested through the use of the service, or that the services will be uninterrupted or error-free … You agree that the entire risk arising out of your use of the service, and any service or good requested in connection herewith, remains solely with you, to the maximum extent permitted under applicable law.'

464 Solomons 2021." Driven to the brink: e-hailing drivers say they're being taken for a ride, demand regulation of fees", https://www.news24.com/news24/southafrica/news/driven-to-the-brink-e-hailing-drivers-say-theyre-being-taken-for-a-ride-demand-regulation-of-fees-20211120. Accessed on 20 February 2022.

465 The official Uber Community Guidelines are aligned with the clauses of the Service Agreements. The guidelines for Europe and Sub-Saharan Africa reflect principles related to safety, law abiding practices and respect for all. The full set of community guidelines are accessible on https://www.uber.com/legal/en/document/?name=general-community-guidelines&country=south-africa&lang=en.

party, using the service to participate in any unlawful activities, causing a nuisance, annoyance or inconvenience to any person, and causing damage to property.[466] One major concern is that Uber can immediately terminate the agreed terms, add supplemental terms and amend terms related to the agreement at any time of the business relationship.[467] Aloisi argues that this is one of the leading factors for drivers and partner drivers to refuse to contest the changes to the terms of service for fear of being excluded from the platform.[468] Personal transportation services are the most pronounced in the gig economy. Following suit, various other transportation service companies use a similar business and internet-based method.[469]

Drivers have full access to every detail concerning their earnings via the Uber Driver App.[470] They are able to view their earnings by trip, day, or week with the 'Pay Summary' that also shows the weekly earnings. The Uber platform serves as an intermediary service that facilitates the payment received from the client to the driver.[471] Like most things in a business relationship, this service is not free. Uber charges an Uber fee of a percentage that is calculated for each completed trip.[472] They justify the Uber fee by stating that 'the fee helps cover costs including technology, development of app features, marketing, and payment processing for driver-partners.'[473] Uber drivers are paid for their services by either setting-up a weekly direct deposit to their bank account, which is stored on their Driver Profile, or by requesting a direct deposit outside the normal schedule.[474]

466 As per clause 5 of the Service Agreement.
467 Clause 1 of the Service Agreement.
468 Aloisi 2016:676.
469 Leighton 2016:863.
470 Uber. 2020."Uber Help", https://help.uber.com/driving-and-delivering/article/where-can-i-see-my-trip-earnings-?nodeId=ceebe501-e329-4891-98dd-f1cc026137ad. Accessed on 18 July 2020.
471 Clause 4 of the Terms of Service.
472 Uber. 2020."Uber Help", https://help.uber.com/driving-and-delivering/article/what-is-the-uber-fee-?nodeId=5704e643-6df8-47ce-bcb2-a3968a445bcc. Accessed on 18 July 2020. At the time of writing this thesis, the fee was twenty five per cent.
473 Uber. 2020."Uber Help", https://help.uber.com/driving-and-delivering/article/where-can-i-see-my-trip-earnings-?nodeId=ceebe501-e329-4891-98dd-f1cc026137ad. Accessed on 18 July 2020.
474 Uber. 2020. "Uber Help", https://help.uber.com/driving-and-delivering/article/how-do-i-receive-my-earnings?nodeId=42973e65-45a8-4aaf-90d5-d3e97ab61267. Accessed on 18 July 2020.

Of importance here are two aspects: The discussion above referred to the intricacies of the business relationship in the Uber model. Uber was therefore used as a practical account of the on-demand business relationship, Secondly, the classification dilemma and other issues experienced with the on-demand model will be discussed later in this chapter.

2.3.5 The different types of platform work

2.3.5.1 Introductory remarks

The meaning of ‘gig economy’ and an overview of the types of gig business relationships were discussed in the previous part. In the section that follows, I first demarcate and discuss each category of platform work. This is important because, as you will see, there are several similarities between crowdwork and on-demand work that need to be highlighted. Secondly, I explore on-demand work’s strengths and weaknesses with a discussion on the advantages of on-demand work as opposed to the vulnerabilities that on-demand workers face. These vulnerabilities lay the foundation for the decent work indicators that are discussed in Chapter 3.

Platform work's main categories will be distinguished and discussed by distinguishing between crowdwork and on-demand work. Crowdwork as a type of gig work will be discussed; however, the issues, characteristics and related material pertaining to on-demand workers will be emphasised since it remains the focus of this study.

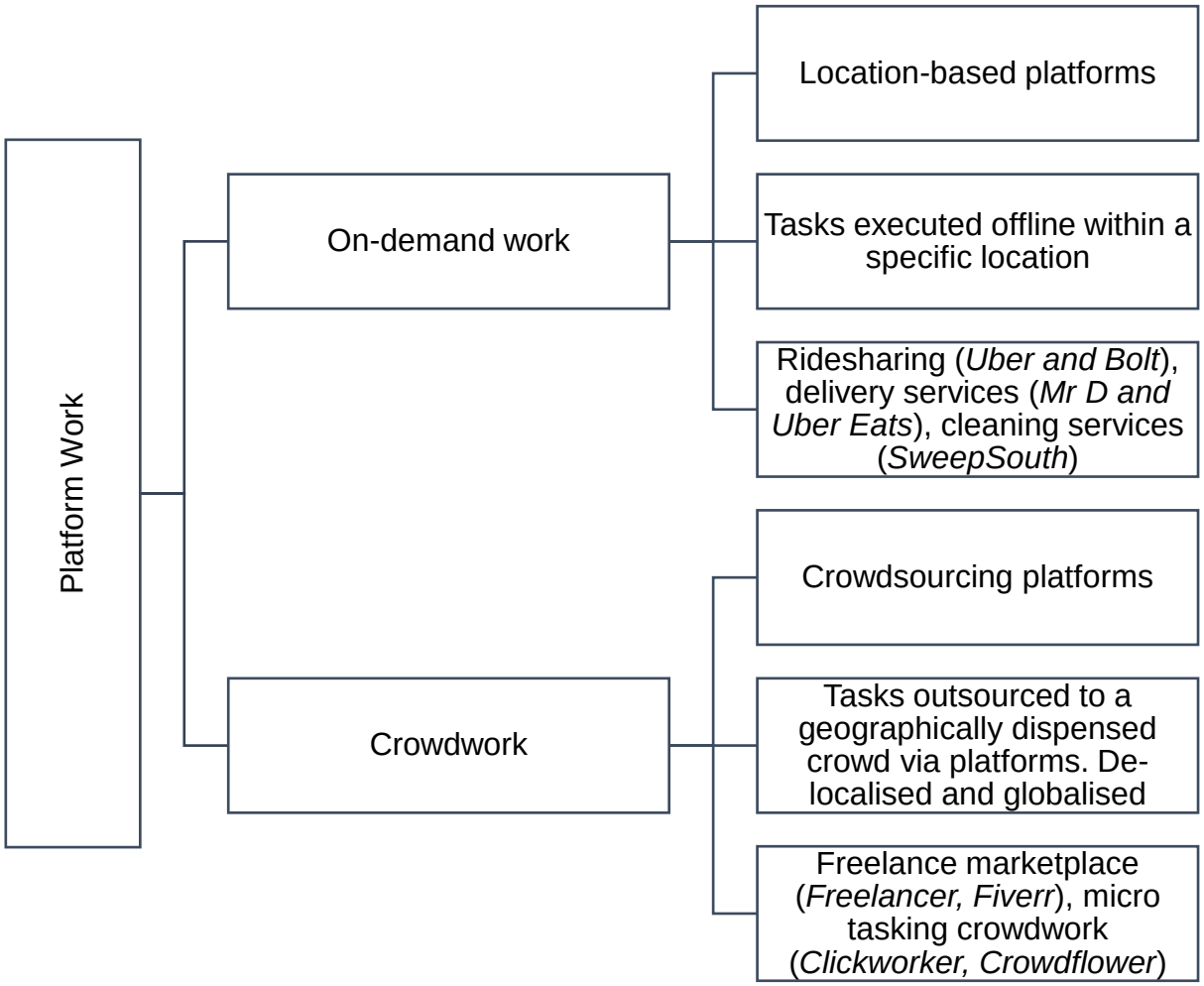

Figure 6: My adaptation of Schmidt's categorisation of digital labour markets in the platform economy. (Schmidt 2017:7)

In this study, the term ‘platform work’, as referred to in the figure above, is used in its broader sense to include forms of employment that encompass a range of digital platforms through which a variety of services are offered in exchange for money.[475] The characteristics of the gig business relationship and its divisions were discussed in the preceding discussion. Schmidt suggests the following taxonomy: if a gig job is localised, but can be done over the internet, it is cloud work.[476] If a gig job is assigned to an undefined group of platform workers and not a specific individual, it is crowdwork.[477]

475 Du Toit 2019:3.
476 Schmidt 2017:5.
477 Schmidt 2017:5.

Crowdwork and on-demand work share several distinct features and could therefore be treated jointly, despite their many dissimilarities.[478] Both platforms are enabled by IT and accessible via the internet. It reduces transaction costs, friction of markets[479] and labour costs.[480] Equally important, gig economy platforms make it possible for more individuals to access work opportunities that could make it a feasible option for a sole source of income.[481] There are subtle differences that could make a uniform legal and regulatory response problematic. All the aforementioned differences can amount to legal intervention if one considers the application of contractual obligations and liabilities. In addition, aspects relating to the acceptance of contracts may trigger consequences on the applicable legislation.[482]

2.3.5.2 Crowdwork

Heeks describes crowdwork as a form of online labour which forms part of the 'digital' gig economy.[483] Heeks goes further to define online labour as '… contingent intangible work delivered digitally and done for money, organised via online outsourcing platforms that are marketplaces bringing together buyers and sellers.'[484] In addition, online labour is categorised by the digitisation of both work and work organisation.[485] Online labour can, in turn, be sub-divided into two different types, namely crowdwork and online freelancing.[486] For purposes of this discussion, crowdwork will be used to refer to both forms of online labour. The main difference between the two types of online labour revolves around the number of individuals involved in completing the task. With crowdwork, tasks are divided into different micro-tasks[487] and the process

478 ILO 2019. "Non-Standard Forms of Employment", https://www.ilo.org/global/topics/non-standard-employment/lang--en/index.htm. Accessed on 3 May 2019.
479 De Stefano 2016:3.
480 De Stefano 2016. "Crowdsourcing, the Gig-Economy and the Law", http://www.labourlawresearch.net/sites/default/files/papers/Crowdsourcing%20the%20Gig-Economy%20and%20the%20Law-2.pdf. Accessed on 4 May 2019.
481 Quick and Baskerville 2017. "New Research: London's Transport Gig Economy Grows by 82% since 2010", https://neweconomics.org/2017/12/londons-transport-gig-economy. Accessed on 4 May 2019.
482 De Stefano 2016:3.
483 Heeks 2017:3.
484 Heeks 2017:3.
485 Heeks 2017:4.
486 See figure 6.
487 For example, units of piecemeal tasks to be competed for.

of acquiring these tasks are contest-based. Schmidt explains that piecemeal work for equal small amounts are regarded as micro-tasking crowdwork.[488] On the other hand, if the task cannot be divided and it is completed by a single crowd, in other words only one result is paid for, it is regarded as contest-based work.[489]

A crowdwork platform concerns a bidding system for and completing work through open websites.[490] Crowdwork is regarded as work performed using online platforms via the internet that connects workers to an indefinite number of organisations, businesses, and individuals.[491] The platforms can be internal, which connects users to a company's in-house operations and the workers of a company can complete the tasks, or it can be external, through which work opportunities are posted globally.[492]

The nature of the crowdwork gigs can differ greatly. It usually involves 'micro-tasks'[493] such as tasks pertaining to interpretation and analysis, information finding, validation and verification of information, content creation, surveys and content access.[494] Berg points out that most of the 'micro tasks' are quick and do not require much supervision.[495] Crowdwork utilises a decentralised payment system, whereas the work-on-demand platform uses a centralised payment system.[496] In some cases with crowdwork, no relationship exists between the platform worker and the client. Platform workers are paid by the crowdwork platform, which in turn delivers the result to the client.[497] With crowdwork, the platform functions as a matching system with the end purchasers of their services.[498]

488 Schmidt 2017:5.
489 Schmidt 2017:5.
490 Steward & Stanford 2017:422.
491 De Stefano 2016:2.
492 Berg 2016:2.
493 De Stefano 2016:2.
494 Berg 2016:2.
495 Berg 2016:2.
496 Steward & Stanford 2017:442.
497 De Stefano 2016:3.
498 Steward & Stanford 2017:422.

Most research from the ILO has been focused on regulating platform work, which includes both on-demand work and crowdwork. Unfortunately, it is not possible to investigate the decent work deficits of crowdworkers for purposes of this research as it would make this work too extensive and bulky. It has been stated that this research focuses on advocating for decent work for on-demand workers only as a narrow focus. In line with this focus, the following part presents an explanation of on-demand work.

2.3.5.3 On-demand work

Short-term 'on-demand' work is not a new phenomenon, considering that the self-employed, independent contractors, freelancers, and casual workers have long provided their services for decades.[499] What is new, however, is the way in which the relationship is organised and facilitated via online platforms, which gives a new dimension to the relationship between the various parties. On-demand work represents a small percentage of the gig economy overall; however, it is rapidly growing in size and profit.[500] While the global size and scale of the on-demand economy is not yet determined, the gig economy sector has grown significantly in both developing and developed countries.[501] It is estimated that there are approximately 30 000 on-demand workers in South Africa, with the majority of these workers performing gigs as on-demand drivers, delivery workers, and domestic workers.[502]

On-demand platforms have become possible due to the widespread use of mobile devices with built-in global positioning system trackers.[503] Unlike crowdwork, on-demand work necessitates more commitment from a worker, since the on-demand worker needs to show qualities of good customer service.[504] In addition, on-demand work requires a human touch, since the work conducted on the platform is more personal, people know with whom they are dealing and they meet each other in

499 Tan *et al*. 2021:2.
500 Zorob 2019:9.
501 Behrendt *et al.* 2019:21.
502 Zorob 2019:9.
503 Schmidt 2017:18.
504 Schmidt 2017:19.

person.[505] Failure to do so will affect the on-demand worker's rating, which can result in fewer tasks.[506] If a task has to be done at a specified time and location, and a specific person is tasked to perform the said task, it is known as gig work or location-based digital labour.[507] On-demand work is referred to as work performed in the 'physical gig economy'.[508] It is similar to traditional work to be completed in a localised area.[509] Several of well-known on-demand gig businesses are based on the Uber business model.[510] Although these jobs are organised through online platforms as well, the intermediaries take more responsibility associated with the supervision of the platform worker.[511] The on-demand platforms integrate both labour and physical capital into their value chain.[512]

The work provided on on-demand applications can be easily regulated and monitored by national authorities, as opposed to crowdwork. Nonetheless, it should be noted that the classification of on-demand workers and the protection afforded to this vulnerable group of workers is yet to receive universal coverage.[513] The majority of on-demand gig workers' terms of service state that they are classified as 'independent contractors'. As such, they are instantly excluded from several labour and social protection prescribed in terms of labour laws.[514]

The misclassification of on-demand workers and the decent work deficits experienced by these workers are universal problems.[515] Steward argues that there is a correlation between platform work and various other forms of precarious work with many overlapping characteristics, such as income unpredictability, casualisation, and

505 Schmidt 2017:19.
506 Duggan *et al.* 2019:120.
507 Schmidt 2017:5.
508 Heeks 2017:4.
509 De Stefano 2016:1.
510 Examples of South African on-demand gig business include Sweep South, NoSweat, OrderIn, Mr Delivery and Bolt.
511 Steward & Stanford 2017:442.
512 Schmidt 2017:11.
513 Behrendt *et al*. 2019:22.
514 See, for example, the definition of an employee in terms of section 213 of the LRA.
515 ILO 2017. "Strengthening social protection for the future of work", https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_559136.pdf. Accessed on 25 June 2019.

disguised employment relationships.[516] Much of the current research suggests that labour-related issues in relation to the gig-economy should be considered within the broader dialogue on how to secure decent working conditions for non-standard workers,[517] seeing that the use of casual workers has always existed in both developed and developing countries during the 20th century.[518] The question raised by this research is to what extent is on-demand work different from recognised forms of work, such as casual or part-time work? To my mind, on-demand work must be seen as a novel form of non-standard work, seeing that the work that is done is facilitated by an online platform company. What is clear, is that this new form of work is here to stay, and that there are several positive and negative aspects linked to it. The specific advantages and vulnerabilities of on-demand work will be discussed in the next section.

On-demand work apps are by no means standardised due to types of services offered through different apps.[519] Schmidt states that on-demand gig platforms[520] are disruptive since they affect a larger percentage of a workforce and increased capital in the form of physical assets within a specific local legal framework.[521] Proponents of the on-demand gig economy argue that flexibility is seen as the most important benefit of on-demand work. Independent contractors are seen as being 'on-demand' as part of an ever-growing contingent workforce, which can easily and instantly be hired for a specific 'gig' only to be 'let go' afterwards.[522] On-demand workers can subsequently choose when to work, for whomever and for how much or as little as they want.[523] The clients can therefore change after each task is performed. However, the on-demand worker can choose to continuously work for the same platform provider, which in turn exercises a significant influence on how the work should be done.[524] This, in turn, raises several issues with regard to the misclassification of their relationship.

516 Steward & Stanford 2017:422.
517 De Stefano 2016:12.
518 De Stefano 2017:9.
519 De Stefano 2016:3. This include cleaning requests, repair work and transportation services.
520 Within the meaning of location-based gig work as he defines it.
521 Schmidt 2017:8.
522 Schmidt 2017:13.
523 Schmidt 2017:13.
524 Schmidt 2017:13.

Prassl illustrates this by referring to the following statement made by the CEO of Crowdflower, Lukas Biewald:[525]

> Before the internet, it would be really difficult to find someone, sit them down for ten minutes and get them to work for you, and then fire them after those ten minutes. But with technology, you can actually find them, pay them a tiny amount of money, and then get rid of them when you don't need them anymore.

Schmidt notes that regulatory measures can be put in place much faster because, unlike crowdwork, on-demand work is usually restricted to a specific region with its own regulatory framework.[526] Given the adverse effects of Covid-19 and the increasing use of online platforms it is argued that on-demand work is here to stay, at least for the foreseeable future.

2.3.5.3.1 Advantages of on-demand work

A flexible, on-demand workforce has certain advantages over the traditional full-time staffing model.[527] One of the first and foremost advantages of on-demand work centres around access to work opportunities.[528] As independent contractors, on-demand workers are able to set their own work schedule.[529] The World Development Report notes that the flexibility inherent to gig work empowers women to participate in the gig economy.[530] In line with the core notions of the sharing economy, online platforms enable businesses to take advantage of underused physical and human capacity to generate a form of income.[531] On-demand workers are regarded as self-employed or independent contractors. As such, they have the flexibility to have several gigs at once.[532]

525 Prassl 2018:4.
526 Schmidt 2017:18.
527 World Bank Group 2019:2.
528 World Bank Group 2019:2.
529 World Bank Group 2019:40.
530 World Bank Group 2019:40.
531 World Bank Group 2019:40.
532 World Bank Group 2019:vii.

There is evidence that the globalisation of gig work has brought new work opportunities to the global South.[533] The process to acquire work via gig platforms is seen as rapid and convenient.[534] From a business perspective, the use of an information and communications technology (ICT) application minimises the transactional costs associated with outsourcing work.[535] In addition, gig businesses can assemble a group of casual workers relatively easy and expeditiously, and depend more on outside suppliers.[536]

The use of on-demand work offers the possibility of new working arrangements that are facilitated by technological advancements.[537] The rise of on-demand work in low- and middle-income countries is perceived to generate a renewed wave of employment opportunities for alleviating poverty.[538] The flexibility of on-demand work provides opportunities for anyone who is unemployed to earn an income in a manner that is essentially commitment-free.[539] However, there are weaknesses to on-demand work that increase the vulnerability of workers. Each of the weaknesses, in the form a vulnerability, is discussed below.

2.3.5.3.2 Vulnerabilities of on-demand workers

The ILO has described 'vulnerability' as: "… the sum of the employment status of own account workers and contributing family workers." They are less likely to have formal work arrangements and are therefore more likely to lack decent working conditions, adequate social security and 'voice' through effective representation by trade unions and similar organisations. Vulnerable employment is often characterised by inadequate earning, low productivity and difficult working conditions of work that

533 Heeks *et al*. 2020:3.
534 Aloisi & De Stefano 2020:53.
535 Aloisi & De Stefano 2020:53. The outsourcing process typically involves the sharing and obtaining of information, determining the price, and negotiating the contractual terms that apply to the contractual relationship.
536 Aloisi & De Stefano 2020:54.
537 Andoyan 2017:164.
538 Anwar & Graham 2019:5.
539 Zorob 2019:10.

undermines workers' fundamental rights.'[540] This notion of vulnerability by the ILO is crucial as it will inform the discussion below.

The exploitation of a vulnerability in the sense of on-demand workers will fit the description tendered by Wolff[541] in that a group of people, in this case on-demand workers in the gig economy, find themselves at a common structural disadvantage that renders them all exploitable. This surely cannot be in line with the ILO's sustainable growth goals and decent work for all for 2030.[542] We have to draw attention to the fact that 4IR is here to stay and that platform work may be the best avenue for employment opportunities for the youth.[543] Furthermore, it is these vulnerabilities that exclude on-demand workers from enjoying decent work in the gig economy.[544]

The World Bank Group Report on the Changing Nature of Work examines the effects of the rapid technological advancements on the employment sector. It advises that the rise of the gig economy could lead to increased inequality in this developing sector.[545] Subsequently, this could leave an on-demand worker vulnerable and without decent work.[546] The question therefore arises to what degree South Africa is advocating for decent work in the gig economy.

Although personal and social vulnerability such as class characteristics, gender, and race are not the topic under discussion, we acknowledge that vulnerability may exist in class structures.[547] The exploitation of a vulnerability in the sense of on-demand

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540 ILO 2010. "Vulnerable employment and poverty on the rise, Interview with ILO chief of Employment Trends Unit", https://www.ilo.org/global/about-the-ilo/newsroom/features/WCMS_120470/lang--en/index.htm. Accessed on 31 May 2021.

541 Wolff 2018:181.

542 ILO 2021. "Decent work and the 2030 Agenda for sustainable development", https://bit.ly/3i2eQ8Z. Accessed on 31 May 2020.

543 See para. 2.2.3.

544 See paras. 3.4 and 3.4.1 for a discussion about the ILO perspectives on decent work. Decent on-demand work is discussed further in para.3.6.

545 World Bank Group 2019:2.

546 Different social structures place workers in varied positions of vulnerability. In South Africa, the vulnerability of specific groups of individuals is created by racial exclusions, gender inequality, and marginalised groups' socio-economic dispositions. The vulnerability of these factors has systematically and historically been exploited. Mantouvalou 2018:195-196.

547 Mantouvalou 2018:195.

workers will fit the description tendered by Collins[548] in that a group of people, in this case on-demand workers in the gig economy, find themselves at a common structural disadvantage that renders them all exploitable. Consequently, it becomes crucial to provide an overview of specific categories of vulnerability that on-demand workers face in South Africa. This categorisation of vulnerabilities will also serve as a foundation for the discussion on baseline decent work considerations that will be discussed in Chapter 3. This lays the theoretical basis on the on-demand work sector to determine what decent work deficits on-demand workers experience.

The growth of on-demand platform work presents an array of fascinating legal issues that are yet to be resolved. They will only become more salient as interactive gig businesses become more established in South Africa. In addition, in the absence of a universal solution to the misclassification of gig workers, the legal issues surrounding on-demand workers' vulnerabilities will reach an increasing number of cases to be subjected to judicial interpretation in the very near future, many of which will be concerned with the welfare of the on-demand workforce.

Most of the aspects contributing to the categories of vulnerability of on-demand workers can be linked to the legislative restrictions themselves. The traditional function of labour law, as discussed earlier in this chapter, is to ensure labour and social protection to those fortunate enough to be in an employment relationship.[549] Thus, the various legislative interventions in the employment context serve as a portal to both minimum conditions of employment and an established framework to engage in collective bargaining.[550] I am of the opinion that not much can be done regarding the legislative amendments prescribing the various classifications of employment and work, but it may need to be revisited in the advent of 4IR. An outline of each category of vulnerability is discussed below.

548 Mantouvalou 2018:181.
549 Van Niekerk *et al*. 2019:4. Labour law serves as a balancing measure in two distinctive ways by establishing minimum standards of employment and by prescribing various procedural requirements aimed at counterbalancing the bargaining rights of employees against the economic powers of employers.
550 Van Niekerk *et al*. 2019:5.

2.3.5.3.2.1 Minimum statutory conditions of employment and minimum wage

On-demand workers are bound by the terms and conditions of the contract they enter into. Their relationship is purely contractual and does not rely on labour law to regulate their relationship, neither is there labour law protection for on-demand workers, but they can tap into existing social security laws. The conditions of employment as well as the wage or payment are thus agreed to voluntarily between consenting parties. Within the gig economy, workers typically lack the minimum safety nets afforded to full-time employees. They are solely responsible for their economic survival. Independent contractors enjoy immense flexibility about choosing their working hours and subsequently maintaining a work/life balance. However, the flexibility comes at a price because the "business relationship" between the partner and gig business skilfully limits its responsibilities in various ways.[551] The parties agree that the relationship between them is solely that of a principal and independent contractor. Therefore, the platform business is excluded from the rights and duties as an employer under the restrictions of various labour laws.[552]

Workers who are managed by platforms have little understanding of how they function and may reject tasks that are deemed unsatisfactory. The very design of platforms may exclude workers from certain countries and groups from performing jobs, with very little recourse.[553] In addition, users of the platform spend hours setting up accounts that are not paid, often working seven days a week with extended hours and not taking breaks as it would decrease earnings, because it is difficult to establish

551 Uber 2021. "Uber Community Guidelines – Europe and Sub-Saharan Africa", https://www.uber.com/legal/en/document/?name=general-community-guidelines&country=south-africa&lang=en. Accessed on 31 May 2021.

552 Uber 2021. "Uber Community Guidelines – Europe and Sub-Saharan Africa", https://www.uber.com/legal/en/document/?name=general-community-guidelines&country=south-africa&lang=en. Accessed on 31 May 2021. Uber, for example, does not guarantee the drivers a minimum of tasks. Clause 5 of the Service Agreement states that: '… Uber makes no representation, warranty, or guarantee regarding the reliability, timeless, quality, suitability or availability of these services or any other services or goods requested through the use of the service, or that the services will be uninterrupted or error-free … You agree that the entire risk arising out of your use of the service, and any service or goods requested in connection herewith, remains solely with you, to the maximum extent permitted under applicable law.' The on-demand worker subsequently remains responsible for generating their own income and managing their expenses.

553 Rani & Furrer 2020:216-217. It should also be noted that many of the gig platforms managing on-demand workers are done via sophisticated algorithmic control systems.

"what counts as work."[554] They fall into the trap of excessive working hours and on average work longer hours than those in formal employment relationships.[555] Subsequently, the flexibility that on-demand workers enjoy blur the lines between formal and casual employment.[556] Working flexibility raises concerns about income instability and associated protection in relation to those afforded to workers employed in a traditional employment relationship.[557]

Low remuneration and non-payment, which can be perceived as a form of exploitation,[558] can also be an issue in that the voting system that is often deployed could reject the work that has been done without reasons given. Design errors and pre-screening for jobs related to a requirement that they have to belong to a specific demographic category, often lead to non-payment of jobs completed.[559] Platform glitches[560] contribute to the vulnerability seen in on-demand work. The fact that workers are sometimes paid by vouchers that they cannot access, raises concerns over ethical issues[561] not typically found in the traditional employer-employee model.

The race for ratings and the acquisitions of tasks lead to 42 per cent of on-demand workers working on several platforms simultaneously.[562] This in itself calls for an innovative solution as an employment relationship has one employer and the employees work for mainly one employer.[563] It has been found that 91 per cent of platform workers would like more tasks and spend long hours searching for these, up to 17 minutes for every hour worked.[564] Forty-four per cent of workers work for seven days a week and also during the night (56 per cent).[565] In a traditional employee-employer relationship, this would not be tolerated by the *Basic Conditions of*

554 Rani & Furrer 2020:217.
555 Balliester & Elsheikhi 2018:20.
556 World Bank Group 2019:40.
557 World Bank Group 2019:40.
558 Wolff 2018:180; Gyulavári & Menegatti 2022:16.
559 Rani & Furrer 2020:225.
560 Rani & Furrer 2020:225.
561 Amazon pays out earning directly to workers and not paying by vouchers that have no use in home countries or cannot be accessed. See also Rani & Furrer 2020:15.
562 Rani & Furrer 2020:224.
563 Rani & Furrer 2020:224
564 Rani & Furrer 2020:224.
565 Rani & Furrer 2020:224.

Employment Act (*BCEA*) in South Africa. This situation is not unique to South Africa, prompting several innovative reactions in Chile, France, and India.[566] In Chile, a recent 2020 bill aims to guarantee self-employed platform workers the right to an hourly pay rate that is consistent with the country's minimum wage.[567] The 'right to disconnect' is also an innovative approach for those engaged in platform work. In 2017, France became the first country to introduce *le droit à la déconnexion*[568] (the right to disconnect) that was later extended to platform workers in the transportation industry in 2019.[569] In short, the standard enables on-demand workers in the ridesharing industry to 'disconnect' from platforms without having it negatively influence their rating and continued use of the platform.[570] In addition, French law also prescribes that a platform's social charter should include procedures to enable a self-employed worker to obtain a decent price.[571] In India, the Indian Motor Vehicle Aggregators Guideline provides that digital intermediaries must comply with several criteria before a licence can be issued.[572] Most noteworthy for this discussion is the provisions relating to remuneration[573] and working time.[574] However, the pursuit to be allocated a task by algorithms and the lure of payment negatively affect these types of workers.

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566 ILO World Employment and Social Outlook 2021:235.
567 ILO World Employment and Social Outlook 2021:235.
568 Yeung 2021. "'If you switch off, people think you're lazy': demands grow for a right to disconnect from work" https://bit.ly/3xf7JxK. Accessed on 31 July 2021.
569 ILO World Employment and Social Outlook 2021:235.
570 ILO World Employment and Social Outlook 2021:235.
571 ILO World Employment and Social Outlook 2021:235.
572 ILO World Employment and Social Outlook 2021:235.
573 Sections 13(1)-(4) of the Guidelines prescribes that "(1) The city taxi fare indexed by WPI for the current year shall be the base fare chargeable to customers availing Aggregator service. (2) The base minimum fare chargeable to customers availing Aggregator services shall be, for a minimum of three kilometers to compensate for dead mileage and distance travelled and fuel utilized for picking up the customers. (3) The Aggregator shall be permitted to charge a fare 50% tower than the base fare and a maximum Surge pricing of 1 .5 times the base fare specified under Clause 13(1) hereinabove. This will enable and promote asset utilization which has been the fundamental concept of transport aggregation and also substantiate the dynamic pricing principle, which is pertinent in ensuring asset utilization in accordance with the market forces of demand and supply. (4) The Driver of a vehicle integrated with the Aggregator shall receive at least 80% of the fare applicable on each ride and the remaining charges for each ride shall be received by the Aggregator. The State Government may by way of a notification direct 2% over and above the fare towards the state exchequer for amenities and programmes related for Aggregator operated vehicles, which have been helpful in reducing traffic congestion to a great extent and subsequently reducing pollution. These amenities and programmes may include but not be limited to, state sponsored driver welfare programmes, road safety awareness workshops and activities, pollution control programmes, allotment of parking spaces in certain proportion of large parking areas for vehicles integrated with an Aggregator, electric charging infrastructure for electric vehicles and related matters."
574 ILO Report "The role of digital labour platforms in transforming the world of work". 2021:235. Section 7(2)(d)-(e) of the Guidelines states that "(2) The Aggregator shall ensure compliance with the following conditions, relevant to Drivers, during operations: (d) Ensuring that the Driver

Most on-demand workers in the ridesharing and delivery industries work excessively long hours and have high work intensity.[575] In developing countries, long working hours of approximately 65 hours per week in the ridesharing sector seems to be the most significant concern.[576] This can be noted as a significant concern which is not easily manageable from a practical perspective and is not in line with work in South Africa. The maximum normal hours of work per week is 45 hours, with a strong drive to lessen them to 40 hours. On-demand businesses also implement gamification techniques aimed at incentivising long working hours. Using these techniques, on-demand platforms force workers to increase their working hours to be eligible for increased earning opportunities or bonuses.[577] In some instances, the algorithm controls on-demand workers' break times to such an extent that an on-demand worker can be penalised for staying offline for too long.[578]

2.3.5.3.2.2 Individual labour rights and protections

On-demand workers fall outside the scope of the labour laws' unfair labour practices and dismissal provisions.[579] This is seen as a vulnerability. Like dismissal provisions, on-demand workers are at risk of the "deactivation" of their services on the grounds of multiple contraventions of the gig business' service agreement and community guidelines.[580] Moreover, gig businesses such as Uber use a customer satisfaction feedback system to rate their drivers. Aloisi argues that this is one of the leading

shall not be togged in for an aggregate of twelve (12) hours on a calendar day. A mandatory break of ten ('10) hours for the Driver shall be imposed subsequent to a login extending twelve (12) hours (e) The Aggregators to develop a mechanism on their respective App to ensure that Drivers engaged with more than one Aggregator do not drive beyond a cumulative period of 12 hours either on their or another Aggregators App so as to safeguard the Driver, passenger as well as road users."

575 ILO World Employment and Social Outlook 2021:168.
576 ILO World Employment and Social Outlook 2021:168.
577 ILO World Employment and Social Outlook 2021:168.
578 ILO World Employment and Social Outlook 2021:168.
579 See in this regard section 186 of the *LRA*. A detailed discussion is available in Chapter 6.
580 The official Uber Community Guidelines are aligned with the clauses of the Service Agreements. The guidelines for Europe and Sub-Saharan Africa reflect principles related to safety, law abiding practices and respect for all. Uber 2021. "Uber Community Guidelines – Europe and Sub-Saharan Africa", https://www.uber.com/legal/en/document/?name=general-community-guidelines&country=south-africa&lang=en. Accessed on 31 May 2021. See also Gyulavári & Menegatti 2022:16.

factors why drivers and partner drivers refuse to contest the changes to the terms of service since they fear being excluded from the platform.[581] One primary concern is that a platform can immediately terminate the agreed terms, add a supplemental term, and amend terms related to the agreement at any time of the business relationship.[582] Dispute resolution will then have to follow the agreed route or civil action could be taken, but the fora created for traditional labour disputes could not be assessed in the absence of being found to be an employee, or at least stand in an employment relationship.[583]

In most countries, including South Africa, independent contractors may not access bargaining rights and processes accorded to employees.[584] The problem is intensified due to the cross-border dimension[585] of on-demand work. Work performed in the on-demand economy weakens the worker's bargaining position,[586] since many of the collective bargaining structures cater for traditional forms of employment only. Baliester and Elsheikhi argue that a weakened bargaining position is primarily due to the inability of on-demand workers to organise in the absence of a fixed, physical workplace.[587] This is a view with which I agree. Barratt argues that a labour platform's extension of labour market intermediation restricts a worker's agency potential, and he cannot be faulted, in my opinion.[588] This, in turn, isolates workers from each other, reducing trade unions' workability and forming a disassociation between the gig worker and the labour platform.[589]

There are multiple difficulties in adopting a collective bargaining structure to platform work using existing legal frameworks due to the limitations imposed on a domestic level.[590] Many jurisdictions, inclusive of South Africa, do not extend collective

581 Aloisi 2016:676.
582 Clause 1 of the Service Agreement. 2021. “Uber Community Guidelines – Europe and Sub-Saharan Africa”, https://www.uber.com/legal/en/document/?name=general-community-guidelines&country=south-africa&lang=en. Accessed on 31 May 2021.
583 See para 2.3.5.3.2.3.
584 Stewart & Standford 2017:428. Per illustration, it should be noted that various Canadian provinces do permit dependent contractor to access bargaining rights and processes.
585 Stewart & Standford 2017:428.
586 Balliester & Elsheikhi 2018:19.
587 Balliester & Elsheikhi 2018:19.
588 Barrat *et al.* 2020:7.
589 Barrat *et al.* 2020:7.
590 ILO World Employment and Social Outlook 2021:212.

bargaining rights outside of the formal employment relationship.[591] This vulnerability of on-demand workers will require out-of-the-box thinking and will be dissected later in the study. Another challenge to collective bargaining for platform workers concerns the legal restrictions requiring the identification of 'bargaining units' and various categories of 'representative unions'.[592] This aspect is reminiscent of the strict provisions that apply to trade union involvement and activities in the South African context.[593]

The expansion of the gig economy into the realm of existing labour regulations must be noted, as the bargaining power of workers is undermined by the size and scope of the global market,[594] disrupting workers and unions who struggle to eradicate "labour exploitation" and replace it with civilised employment relationships.[595] It is difficult to fathom how employees in the new digital economy could form unions and strike where the platform operates automatically.[596] The vulnerability therein lies in the fact that the conventional way, in the absence of legislation, to improve terms and conditions of employment through collective bargaining has fallen away[597] and so has the right to strike. Movement in collective bargaining is noted in other jurisdictions, but not in South Afrika, Ireland or Australia, the countries that form the comparative element of the study referred to in the footnotes for the sake of completeness.[598]

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591 ILO World Employment and Social Outlook 2021:212. There are, however, some countries that allow for collective bargaining rights to the self-employed. For example, food couriers in Canada were eligible to participate in collective bargaining. It was decided in *Canadian Union of Postal Workers v Foodora Inc. d.b.a. Foodora* 2020 CanLII 16750 (ON LRB). that food couriers are regarded as dependent contractors, thus making them eligible to be unionised in terms of the *Canadian Labour Relations Act.* See Spiro 2020. "Gig economy workers in Ontario push for unionization", https://canliiconnects.org/en/commentaries/70341. Accessed on 31 July 2021 for more detail in this regard. In addition, other countries such as Argentina do not have strict regulations on the issue of collective bargaining rights for on-demand workers, meaning that self-employed persons are free to organise themselves.

592 ILO World Employment and Social Outlook 2021:213.

593 The South African collective bargaining rights are comprehensively prescribed in Chapter 3 of the *LRA*.

594 Stewart & Stanford 2017:431.

595 Stewart & Stanford 2017:431.

596 Bellace 2018:11-26.

597 It should nevertheless be noted that there are some foreign examples where legal and practical challenges to negotiating agreements for platform workers are overcome. I am of opinion that South Africa should take note thereof. ILO World Employment and Social Outlook 2021:213.

598 In 2018 the United Federation of Danish Workers signed a collective agreement with Hilfr. Hilfr is a digital platform that facilitates cleaning services in private households. See Hilfr 2021 "Cleaning made easy", https://hilfr.dk/en. Accessed on 31 July 2021 that covers innovative

On-demand workers are subjected to algorithmic control by the platform. Vallas and Shor assert that algorithms are managing workers in the case of labour platforms offering on-demand work.[599] A considerable proportion of on-demand workers from both the ridesharing and delivery sectors have experienced discrimination or harassment while providing their services.[600] Among those who witnessed these occurrences, the majority reported discrimination and harassment from clients.[601] Lane suggests that gig businesses should promote their on-demand workers' anonymity. If this is not guaranteed, discrimination may be worsened due to a lack of regulation and enforcement of their policies.[602] Lastly, algorithmic management[603] is central to the gig economy model.[604] In addition, algorithmic management of platform workers is associated with an inherent vagueness and is closely associated with a lack of disclosure about data sources and algorithmic outcomes.[605] This means that platform workers are subject to algorithmic control by the platform, resulting in algorithmic discrimination.

2.3.5.3.2.3 Dispute resolution structures

issues such as the on-demand worker's status selection, insurance coverage for all workers, dispute resolution processes, and regulations relating to digital data included in the agreement. See Ilsøe 2020:8. If collective bargaining rights are not feasible, voluntary measures could be considered. In this regard, the ILO Social Outlook Report mentions the Republic of Korea Economic, Social and Labour Council's Committee on the Digital Transformation and Future of Work. The Committee announced a code of conduct that prescribes guidelines for fair contract terms, which include aspects of payment methods, performance assessment, non-discrimination, and dispute resolution procedures ILO World Employment and Social Outlook 2021:214.

599 Vallas & Shor 2020:278.

600 ILO World Employment and Social Outlook 2021:189.

601 ILO World Employment and Social Outlook 2021:191.

602 Lane 2020. "Regulating platform work in the digital age. Going Digital Toolkit Policy Note, No. 1", https://goingdigital.oecd.org/toolkitnotes/regulating-platform-work-in-the-digital-age.pdf Accessed on 20 March 2021.

603 The ILO defines algorithmic management as "giving the responsibility of assigning tasks and making decisions to an algorithmic system of control, with limited human involvement. The algorithmic management system improves through self-learning algorithms based on data." ILO World Employment and Social Outlook 2021:33.

604 ILO World Employment and Social Outlook 2021:21.

605 Bucher *et al*. 2021:45.

The absence of an adequate and simplified dispute resolution process reinforces the imbalance that exists in the platform relationship.[606] Approaching the courts for resolving disputes is also an extensive process and undesirable for on-demand workers in the case of small claims.[607]

Dispute resolution mechanisms in the gig business relationship are prescribed and agreed to in the gig business' terms of service agreements.[608] These provisions are typically written in a legal sense and often misunderstood by on-demand workers. A recent study shows that almost 50 per cent of on-demand workers had not seen the terms and conditions they agreed to.[609] Of those who have seen the terms and conditions, one third reported not having read, not remembering or not having understood the terms and conditions of service.[610] All Uber contracts, for instance, require prospective drivers to sign away their rights to legal redress in favour of private arbitration.[611] Uber is an exception to the rule, mainly because they only operate in one domain, namely transportation.

Due to the absence of financial security, workers are often in a poor position to take on large companies for this purpose. It makes them more vulnerable to accepting settlements; hence a large number of cases are settled out of court.[612] It is a fact that with gig work, workers often use a variety of platforms[613] and this makes it even more difficult to standardise. On the other hand, companies try to counter lawsuits to prevent the passing of pro-labour regulations, and have been lobbying in the United States to

606 Lane 2020. “Regulating platform work in the digital age. Going Digital Toolkit Policy Note, No. 1”, https://goingdigital.oecd.org/toolkitnotes/regulating-platform-work-in-the-digital-age.pdf Accessed on 20 March 2021.
607 Lane 2020. “Regulating platform work in the digital age. Going Digital Toolkit Policy Note, No. 1”, https://goingdigital.oecd.org/toolkitnotes/regulating-platform-work-in-the-digital-age.pdf. Accessed on 20 March 2021.
608 ILO World Employment and Social Outlook 2021:182.
609 ILO World Employment and Social Outlook 2021:182. This statistic accounts for 58 per cent in the ridesharing sector and 49 per cent in the delivery sector.
610 ILO World Employment and Social Outlook 2021:182.
611 Stewart & Stanford 2017:424.
612 Zorob 2019. “The Future of Work: Litigating Labour Relationships in the Gig Economy. Business & Human Rights Resource Centre: Corporate Legal Accountability Annual Briefing”, https://www.business-humanrights.org/en/from-us/briefings/the-future-of-work-litigating-labour-relationships-in-the-gig-economy/. Accessed on 31 May 2021.
613 Ramaswamy 2019:289.

rewrite state employment laws and overrule local regulations.[614] The outcome is that no uniform way is established for dealing with on-demand workers' disputes. The discussion above highlights that there is a need for legal reform. However, for this to be effective all stakeholders must be involved, which include trade unions, legislators, and platform companies. It is only then when a concrete plan can be suggested to inform executive orders or a bill that bring about legal certainty.[615]

2.3.5.3.2.4 Lack of social security protection

The inclusion of social protection as a foundational right varies.[616] The very objective thereof is to afford a certain minimal level of social welfare to all,[617] thus with a broader focus, as on the traditional employee. A lack of social protection coverage also has jeopardised on-demand workers' health and safety during the Covid-19 pandemic,[618] with many on-demand workers entirely dependent on task-based work to earn an income.[619] Keeping in mind that the former UK Prime Minister, Tony Blair, once stated that the "best defence against social exclusion is having a job", [620] one may ask if on-demand work will transform the playing field to such an extent that vulnerability, exploitation and the lack of labour and social protection change the new work dispensation as decent work. In other words, I submit that the parameters of what is expected to be decent social protection in the on-demand sector could be different

614 Zorob 2019. "The Future of Work: Litigating Labour Relationships in the Gig Economy. Business & Human Rights Resource Centre: Corporate Legal Accountability Annual Briefing", https://www.business-humanrights.org/en/from-us/briefings/the-future-of-work-litigating-labour-relationships-in-the-gig-economy/. Accessed on 31 May 2021.

615 Zorob 2019. "The Future of Work: Litigating Labour Relationships in the Gig Economy. Business & Human Rights Resource Centre: Corporate Legal Accountability Annual Briefing", https://www.business-humanrights.org/en/from-us/briefings/the-future-of-work-litigating-labour-relationships-in-the-gig-economy/. Accessed on 31 May 2021.

616 Albin 2018:291.

617 Albin 2018:188.

618 ILO 2021. "Can digital labour platforms create fair competition and decent jobs?", https://ilo.org/infostories/en-GB/Campaigns/WESO/World-Employment-Social-Outlook-2021#covid-19. Accessed on 12 April 2021.

619 ILO World Employment and Social Outlook 2021:174. Of the 348 platform-based and traditional taxi and delivery drivers surveyed in Chile, Kenya, Mexico and India, 32 per cent worked throughout the pandemic due to economic necessity. More critical, the income from 9 out of 10 taxi drivers, and 7 out of 10 delivery drivers were reduced, further aggravating their vulnerabilities.

620 Albin 2018:287.

than decent work for traditional permanent employment, given the unique characteristics of this type of work. However, it does not fall within the scope of this study to comprehensively discuss social protection measures in the gig economy and on-demand work. It will warrant further research at a later stage.

On-demand workers' social security coverage is limited, which in turn exacerbates on-demand workers' vulnerability even more.[621] Platform work is a significant economic and social problem, seeing that it affects almost half a million citizens in South Africa.[622] This is important to note, seeing that combating dehumanisation lies at the very foundation of labour law, which has been built on the ideology that "labour is not a commodity"[623] and that it focuses on human rights and dignity.[624] Most on-demand workers sacrifice their rights to social security.[625] That said, this does not always translate to on-demand workers having complete autonomy and control over choosing their own working hours and break times. It becomes irrelevant in which type of platform work workers are engaged; accidents and injuries are bound to happen.[626] A recent study conducted by the ILO suggests that 37 per cent of ridesharing workers and 48 per cent in the delivery sector indicated that they could not decline or cancel tasks since doing so will negatively affect their rating.[627] It has been suggested that a complete overhaul thereof is necessary to accommodate changes for this group of

621 Mudongo & Chinembiri 2021. “South African Uber drivers set for court challenge to assert gig worker rights”, https://www.dailymaverick.co.za/article/2021-03-04-south-african-uber-drivers-set-for-court-challenge-to-assert-gig-worker-rights/. Accessed on 4 March 2021.

622 Mudongo & Chinembiri 2021. “South African Uber drivers set for court challenge to assert gig worker rights”, https://www.dailymaverick.co.za/article/2021-03-04-south-african-uber-drivers-set-for-court-challenge-to-assert-gig-worker-rights/. Accessed on 4 March 2021.

623 Albin 2018:304.

624 Albin 2018:304.

625 Ramaswamy 2019:296; Gyulavári & Menegatti 2022:16.

626 Zhou 2020. “Digital Labour Platforms and Labour Protection in China”, https://www.ilo.org/beijing/information-resources/WCMS_757923/lang--en/index.htm. Accessed on 31 May 2021.

627 ILO 2021. “World Employment and Social Outlook - The role of digital labour platforms in transforming the world of work”, https://www.ilo.org/global/research/global-reports/weso/2021/WCMS_771749/lang--en/index.htm. Accessed on 31 May 2021. Declining or cancelling tasks via the platform could also result in a reduction of work opportunities, financial penalties or in severe cases, deactivation by the platform. The control and monitoring done by the algorithm also play a significant role when on-demand workers are rated. Algorithms are mainly used to match workers and clients. The deactivation of workers if they perform, or rather rated, below a specific threshold is also algorithmically managed.

workers.[628] Successful policy responses must be adopted to mitigate these vulnerabilities.[629]

Circumvention of taking or sharing the burden of accidents could be found in the wording of the user agreements, to the extent that the agreement does not imply that an employment relationship has been established between the online preform and the gig worker if any accident should occur. This standard electronic contract creates a further vulnerability because it exempts the platform from legal liability and excludes the provisions of workers' rights.[630] Due to the lack of specific labour and social protection measures, the long-term effect of on-demand work can be seen in the on-demand workers' capacity to make investments in housing and pensions.[631] Platform workers are less likely to receive professional development training opportunities, which could negatively influence the career development of these workers.[632] While on-demand work allows workers an opportunity to supplement their employment or to generate a main source of income, on-demand workers experience precarious work conditions such as customer demand and low income.[633] Linking decent work with the

628 Ramaswamy 2019:296. See also California's AB 5 Proposition 22 for a possible alternative to prescribe minimum rights to on-demand workers. It must be noted that this should be seen as illustrative and does not form part of the main focus of the research. The California Legislature, with the passing of Assembly Bill 5 (AB 5), further codified the test above. In response to AB 5, Proposition 22 (Prop 22), which was passed in California at the end of 2020, declares that on-demand drivers are independent contractors and not employees. Gig and platform-based corporations, including Uber, Lyft, DoorDash, and Instacart, spent roughly $200 million on efforts to pass a policy to allow app-based platforms to continue to classify ride-hail and delivery drivers as independent contractors. The Prop now provides drivers with guaranteed minimum earnings for time worded while actively providing rides, compensation for some vehicle expenses, occupational accident insurance to cover injuries and illnesses on the job and "funding for new health benefits" that apply to drivers who work prescribed minimum hours per week. For more detail on AB 5, see California Legislative Information 2019. "Assembly Bill 5", https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5. Accessed on 31 July 2021; Kavin 2020. "California voters saved Uber and Lyft — and writers, artists and other independent workers", https://www.nbcnews.com/think/opinion/california-voters-saved-uber-lyft-gig-economy-backing-prop-22-ncna1246680. Accessed on 30 July 2021; & O'Brien 2020. "Prop 22 passes in California, exempting Uber and Lyft from classifying drivers as employees", https://edition.cnn.com/2020/11/04/tech/california-proposition-22/index.html. Accessed on 31 July 2021.

629 Mudongo & Chinembiri 2021. "South African Uber drivers set for court challenge to assert gig worker rights", https://www.dailymaverick.co.za/article/2021-03-04-south-african-uber-drivers-set-for-court-challenge-to-assert-gig-worker-rights/. Accessed on 4 March 2021.

630 Iossa 2019:232.

631 Balliester & Elsheikhi 2018:19.

632 Balliester & Elsheikhi 2018:20. This is especially true of youth gig workers. See Part 1 par. 3 for a discussion on the need for job creation in South Africa.

633 Balliester & Elsheikhi 2018:21.

vulnerabilities of workers in the gig economy will show that on-demand workers are largely excluded from decent work.

Excessive stress, which is often caused by traffic congestion, insufficient payment, lack of gig opportunities, and long working hours, is also a major concern affecting on-demand workers.[634] A unique factor contributing to their stress is also the timeframe in which a task is completed.[635] The on-demand worker's every move is monitored by the platform and can be tracked by the client in real-time. This increases the pressure on an on-demand worker to reach their destination as quickly as possible to eliminate the possibility of a task being cancelled. This aspect of their work can have severe consequences for the on-demand worker's health and safety, especially in the absence of any social protection coverage.[636] In addition, 83 per cent of on-demand workers in the ridesharing sector and 89 per cent of the on-demand workers in the delivery sector indicated that they had major concerns about their safety while performing tasks, mainly due to road safety, theft or physical assault.[637] The question is whether South Africa's social protection is suited to cover on-demand workers against especially health and safety concerns. I argue that the platform company has a duty to ensure that on-demand workers operate in a safe and healthy environment, for which some of their policies advocate.[638] However, full access to South African social protection is complex and multi-faceted, with the state struggling to achieve full social protection for all.[639] Furthermore, many of the social security schemes are contributory, therefore excluding on-demand workers who do not contribute to a specific scheme.[640] This only adds to the vulnerabilities of on-demand workers,

634 ILO World Employment and Social Outlook 2021:171.
635 ILO World Employment and Social Outlook 2021:171.
636 ILO World Employment and Social Outlook 2021:171.
637 ILO World Employment and Social Outlook 2021:171.
638 SweepSouth 2023. "Terms and Conditions for South African Users", https://sweepsouth.com/terms/. Accessed on 6 February 2023. SweepSouth's terms and condition prescribe that "When interacting with service providers you *should exercise caution and common sense* to protect your personal safety and property, just as you would when interacting with other persons whom you don't know". Uber, on the other hand, offers limited partner injury cover certain medical expenses, death cover, and permanent disabilities payments. However, the on-demand driver must accept to take out the insurance at an extra cost. For more detail see Uber 2023. "Partner Injury Protection", https://www.uber.com/za/en/drive/insurance/. Accessed on 6 February 2023.
639 Van Niekerk *et al* 2019:511.
640 See, for instance the limitations of the *Unemployment Insurance Act* 63/2001 and the *Compensation for Occupational Injuries and Diseases Act* 130/1993.

particularly if one considers their financial inability to contribute to private insurance schemes.

2.4 SUMMARY

The world of work is continuously changing and adapting to changes occurring in the labour landscape. Although the way in which we perform work has changed with the passing of each industrial revolution, the technology that drives the changes greatly differs.

The first part of this chapter introduced the gig economy stemming from 4IR and the increased reliance on digital technology and online platforms. If one considers the discussion on the industrial revolution, certain topics come to the fore. The use of technologies changed and shaped each revolution, and subsequently transformed societies across the globe. In addition, the discussion noted that the issue of decent work, 4IR and the world of work is not necessarily novel and has been in existence for centuries. In this regard, the chapter also noted that several similarities existed between the interactive gig business relationship and the triangular relationship of a temporary employment service.[641] For instance, both forms of work include three parties to the relationship, where the platform company in the case of an interactive gig business acts in the position of the facilitator of the agreement between the client and the on-demand worker. Consequently, it shifts most of the responsibilities on the on-demand worker and the client, unlike temporary employment services (TES) where the client and the temporary service provider are jointly and severally responsible.[642]

The term ‘gig economy’ and its categories of work were also discussed in detail. From the discussion I can conclude that the gig economy overlaps with multiple other economies, such as the digital economy, sharing economy, collaborative economy,

641 See para. 2.3.3.4.
642 Van Niekerk 2019:72.

and platform economy. In addition, it was indicated that most of the aforesaid economies involved other services that are not closely linked to labour. Thus, one of the main differences lies in the human services that are rendered and facilitated via an online platform. The term 'modern day gig economy' subsequently can be described as a flexible economic model in which short-term work, or rather gigs, are acquired through online platforms. This can further be divided into two main types of platform work, namely work conducted in the digital gig economy (crowdwork) and work performed in the physical gig economy (on-demand work).[643] The regulatory responses to extending labour and social protections to on-demand workers remain in flux. Though many cases are still pending, and classification uncertainty continues, some useful landmark developments have occurred in several foreign jurisdictions. This includes newly introduced draft legislation, novel forms of platform associations, and ground-breaking classification case law.

A discussion on the advantages and the vulnerabilities of on-demand work was presented. For purposes of this study, the vulnerabilities are of particular importance, since they assist in identifying the general decent work deficits experienced by on-demand workers. More importantly, they serve as a foundation for the discussion about the decent work indicators applicable to on-demand work that is discussed in Chapter 3. The following vulnerabilities are noted and can be tied to decent work deficits:

- On-demand workers are rendered vulnerable in respect of basic conditions of employment, having limited control over (or insight into) unilateral changes to the contractual terms that regulate their relationship.
- On-demand workers lack protection at the level of both individual and collective labour rights; therefore, they experience unfair deactivation, unfair discrimination by both clients and the platform, and poor, if any, collective bargaining power.
- Dispute resolution for on-demand workers is highly technical and occurs mostly through time-consuming and costly civil legal action, putting it beyond the average individual platform worker's reach.

643 See para. 2.3.2.6.

- With inadequate social security protection, on-demand workers are unable to invest in housing and pensions, lack skills development opportunities and have little if any career progression prospects, while their excessive stress puts them at risk of occupational health and safety issues.

Although South Africa is lagging behind insofar as technological advancements are concerned, it will need to contemplate how the obstacles relating to emerging economies, disruptive technologies and new forms of work could be overcome.[644] As a country, we must consider contingency plans to deal effectively with any possible shortcomings. Providing decent work for on-demand workers was identified as one such example.

In the chapter that follows, I will review the various international perspectives and policy approaches of the ILO and the EU to alleviate the decent work deficit experienced by on-demand workers in their member states. Chapter 3 will also examine key decent work indicators relevant to Chapters 4, 5, and 6 later in the thesis to answer the following research questions: Firstly, to what extent are on-demand workers excluded from decent work? Secondly, what are the best practices in Ireland and Australia to advocate for decent work for on-demand workers? The aforesaid includes an examination of the classification practices, and binding and non-binding measures that advocate for decent on-demand work.

644 See para. 2.3.2.4.

CHAPTER 3: INTERNATIONAL PERSPECTIVES ON DECENT ON-DEMAND WORK

3.1 INTRODUCTION

In recent years there has been considerable academic interest in the rise of the modern-day gig economy and its influence on national and international labour markets.[645] This interest has sparked a debate that has gained prominence on the topic of whether or not platform workers should be classified as being in an employment relationship. International organisations and bodies have carried out most of the studies on the protection afforded to on-demand workers, but their research is limited to the regulation of on-demand workers in selected member state countries. However, research on the gig economy in the South African labour market is in its early stages and is limited to the work of academics[646] and the findings of the Fairwork organisation.[647]

International organisations such as the International Labour Organization (ILO) and the European Union (EU), and most countries globally have yet to reach an agreement on a universal approach to regulating the broader gig economy, not to mention on-demand work. However, this does not mean that international organisations have not made significant progress in this regard.

In the context of 4IR and new technology-driven economies, providing decent work in the future of work becomes a central issue. Chapter 2 analysed the changing patterns of the future of work and singled out the precariousness of on-demand work. More importantly, it provided an overview of specific categories of vulnerability that on-demand workers face when engaging with platforms and performing tasks. This serves

645 Heeks 2017:3-4; Berg *et al.* 2018. "Digital labour platforms and the future of work: Towards decent work in the online world", https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_645337.pdf. Accessed on 6 February 2023; and De Stefano 2016:2.

646 See Chapter 6 for a discussion of the South African gig economy.

647 See para 3.6.4 for a discussion on the Fairwork principles for fair gig work.

as a good point of departure to examine various international standards and recent developments by the ILO and the EU.

This chapter sets out to identify the policy approaches of the ILO and the EU that advocate for decent on-demand work. From a broader perspective, it is appropriate to discuss the experiences of the ILO and the EU in relation to the changing world of work before narrowing down the focus to decent work, and decent on-demand work. The perspectives will inform our understanding of how the ILO and the EU perceive the impact that on-demand work has on its member states, and explore the ways in which they advocate for decent on-demand work. It must be noted from the outset that this chapter is both comprehensive and technical insofar as the discussion of international instruments is concerned.

It must be noted that due to the length constraints to be considered in the comparative chapters, the study will only focus on those indicators that could provide on-demand workers with basic minimum labour and social protections. Other instruments relating to protecting specific types of non-standard forms of employment in the formal and informal economy will only be considered where necessary and if regarded as being valuable to the discussion. It should also be noted that the discussion of the EU will be limited to Ireland's obligation as a member state. The ILO and EU structures and processes concerning establishing rules and monitoring and enforcing standards will not be described in detail, and will be referred to where applicable only. Thus, the main focus will be on identifying overarching themes that can serve as combined indicators, which in turn will serve as comparative elements in succeeding chapters.

To ease this task, the chapter is divided into four main parts as illustrated below.

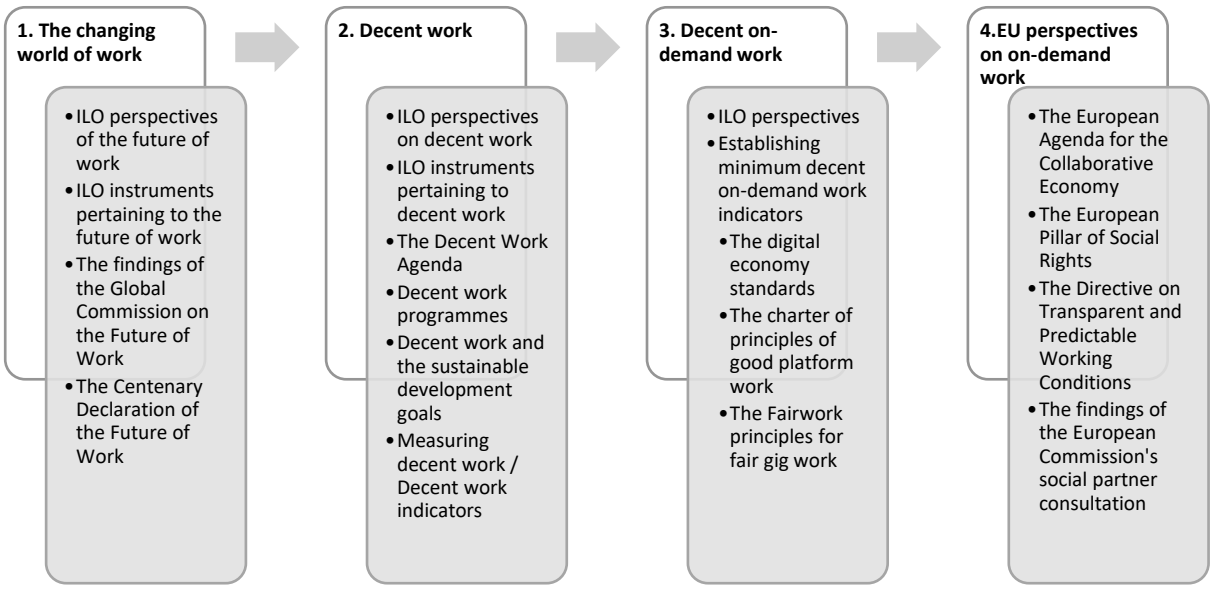

Figure 7: Outline of Chapter 4's main parts

The first part of the chapter analyses the ILO's perspectives on the future of work. A discussion of the Global Commission's research on the Future of Work and the overarching objectives of the Centenary Declaration of the Future of Work form the basis of the analysis.

The second theme of the chapter shifts the focus to achieving decent work as advocated by the ILO. In this regard, the Decent Work Agenda, decent work programmes, and the relevance of the Sustainable Development Goals are discussed. It must be stressed that all the relevant ILO instruments on decent work will be discussed, not only as a contribution to academic literature, but to identify key instruments that will be used as guiding instruments to inform the recommendations. It makes sense to also refer to the measuring instruments to ascertain how decent work could be measured. It is not relevant whether South Africa, Ireland or Australia signed these, because as member states we are all obliged to consider these guiding principles to ensure decent working conditions for all workers. It is therefore not restricted to apply to employees only.

Notably, an analysis of all the decent work indicators is also required before the study can determine the minimum decent on-demand indicators. This discussion, therefore, lays the theoretical foundation required to analyse the standards and principles rendered by Heeks, Fairwork and the World Economic Forum later in the study. With this in mind, the third part of the chapter narrows down the focus to the methods of measuring decent work in the gig economy. In this respect, the study must consider established methods and standards used by parties to determine a broad spectrum of decent work indicators applicable to the gig economy. This will be limited further to determine criteria for minimum decent work indicators, which will be used to determine best practices in Ireland and Australia.

In the final part of the chapter, an overview of the EU perspectives will be provided. It will first provide a background and introduction to the EU perspectives and key initiatives relating to regulating the collaborative economy in general. A further discussion will narrow the focus down to key initiatives relating to platform work specifically. Lastly, the preliminary findings, possible shortcomings and the way forward are discussed briefly. It is important to bear in mind that neither the ILO nor the EU has a decided universal approach to providing decent work for on-demand workers. Existing standards and decent work indicators will be considered and chosen to assist with the comparative chapters relevant to Ireland and Australia. This discussion aims to determine to what extent international policy approaches of the ILO and the EU counter the decent work deficit experienced by on-demand workers. Some regional perspectives will be analysed by providing an overview of the scope of on-demand work in various African countries.

In conclusion, I argue that it is vital for South Africa to develop its uniquely South African human-centred approach to providing on-demand workers with decent work with their unique vulnerabilities at its core. This chapter subsequently aims to determine whether the ILO's instruments and perspectives from the EU set standards for providing decent on-demand work. These standards will also serve as a benchmark to be used in the comparative chapters and, ultimately, the concluding chapter of this

thesis. This study will not be complete without reference to the interplay between international law and South African domestic law.

3.2 THE INTERPLAY BETWEEN INTERNATIONAL LAW AND SOUTH AFRICAN DOMESTIC LAW

3.2.1 Introductory remarks

South Africa was re-admitted as a member state to the ILO on 26 May 1994.[648] The provisions of the Bill of Rights bind not only the judiciary, the executive, the legislature, and all organs of state, but also juristic and natural persons to the extent that a right is applicable.[649] The rights in the Bill of Rights have therefore both a vertical and horizontal application. Section 39 confirms the previously mentioned principles by stating that when courts, tribunals, and forums interpret the Bill of Rights, it must be done in a manner that promotes the values that underlie an open democratic society. In addition, section 39(1)(b) stipulates that international law must be considered. Further to this, section 3 of the *LRA* prescribes that the *LRA* must be interpreted in compliance with the public international law obligations of South Africa.[650] Customary international law is also a law in the Republic, unless it is inconsistent with the *Constitution* or an act of Parliament.[651] Lastly, section 233 of the *Constitution* states that every court must prefer any reasonable interpretation of legislation that is consistent with international law, but it is not yet clear if on-demand workers could be classified as employees, nor if our current statutory protection can be extended to this effect. The labour standards generated by the ILO, of which South Africa is a member state, therefore constitute a valuable source of customary international law.[652]

As a member state, South Africa is obliged to adhere to the ILO's declarations that contain formal and authoritative statements reiterating symbolic and political

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648 It must be noted that South Africa re-joined the ILO as a member state in 1994 after roughly thirty years because of the ILO's international battle against apartheid.
649 *Constitution of South Africa*:sec 8(1)-(2).
650 *LRA*:sec. 3.
651 *Constitution of South Africa*:sec 232.
652 Van Niekerk *et al*. 2019:23.

undertakings by its member states.[653] Moreover, South Africa is obliged to adhere to the ILO's declarations that contain formal and authoritative statements reiterating symbolic and political undertakings by its member states.[654] In addition, South Africa is obliged to adhere to the ILO's declarations that contain formal and authoritative statements reiterating symbolic and political undertakings by its member states.[655] The ILO conventions that set out standards to determine the degree of protection afforded to vulnerable groups of workers,[656] which could also include on-demand workers based on their similar characteristics, will make an important contribution to this study. If ratified, the ILO conventions become binding on a member state.[657] An ILO recommendation is not capable of ratification, but it may serve as an important guiding document on how a particular convention may be regulated.[658]

3.2.2 ILO Standards

Two of the most significant declarations adopted by the ILO are the Declaration of Philadelphia and the Declaration on Fundamental Principles and Rights at Work. The Declaration of Philadelphia sets out the key principles for the ILO's work after the end of World War II.[659] More importantly, it enunciates that 'labour is not a commodity', referring to the fact that it is not an inanimate object that can be sold.[660] De Stefano argues that this principle is not less important than it was with the adoption of the

653 ILO 2019. "ILO Declarations", https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/departments-and-offices/jur/legal-instruments/WCMS_428589/lang--en/index.htm. Accessed on 20 June 2019.
654 ILO 2019. "ILO Declarations", https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/departments-and-offices/jur/legal-instruments/WCMS_428589/lang--en/index.htm. Accessed on 20 June 2019.
655 ILO 2019. "ILO Declarations", https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/departments-and-offices/jur/legal-instruments/WCMS_428589/lang--en/index.htm. Accessed on 20 June 2019.
656 The conventions include the Part-Time Work Convention 175/1994, Home-Work Convention 177/1996, Work, Health and Safety Convention 155/1981, Protection of Wages Convention 95/1949, Workers with Family Responsibility Convention 156/1981 and the Rural Workers' Organisation Convention 141/1975.
657 Van Niekerk *et al*. 2019:25.
658 Van Niekerk *et al*. 2019:25-26.
659 ILO 2019. "History of the ILO", https://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm. Accessed on 7 May 2019.
660 ILO 2019. "The benefits of International Labour Standards", https://www.ilo.org/global/standards/introduction-to-international-labour-standards/the-benefits-of-international-labour-standards/lang--en/index.htm. Accessed on 7 May 2019.

declaration back then, and notes that "labour is not a technology" could also be added to the modern-day context of this principle.[661]

The Declaration on Fundamental Principles and Rights at Work remains a decisive step towards universal respect of the ILO's core standards, even for countries who have not yet ratified the subsequent Conventions.[662] The Declaration places a legal obligation on all member states to promote four categories of rights.[663] These include the freedom of association and the recognition of the right to collective bargaining, the elimination of forced labour, the abolition of child labour, and the elimination of discrimination in respect of employment and occupation.[664] These principles are enshrined in the eight Fundamental Conventions of the ILO and have universal application.[665] In this respect, the "full range of fundamental principles and rights at work are applicable to platform workers in the same way as to all other workers, irrespective of their employment status." [666]

Furthermore, the ILO adopted the Employment Relationship Recommendation in 2006 that is clearly rooted in the principles set out in the Declaration on Fundamental Principles and Rights at Work.[667] The preamble of the Declaration on Fundamental Principles and Rights at Work explicitly recognises the difficulties in establishing the

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661 De Stefano 2017:14.

662 Samovia 2000. "Decent Work for all in a Global Economy: An ILO Perspective, ILO Statement to the WTO Meeting", https://www.ilo.org/public/english/bureau/dgo/speeches/somavia/1999/seattle.htm#N_1_. Accessed on 28 July 2021. It must be kept in mind that South Africa, Ireland, and Australia have ratified all the ILO's core conventions. See ILO 2023. "Ratifications of fundamental instruments by country", https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:10011:0::NO::P10011_DISPLAY_BY,P10011_CONVENTION_TYPE_CODE:1,F. Accessed on 6 February 2023.

663 Van Staden & Van Eck 2018:542.

664 ILO "ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up", https://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm. Accessed on 6 May 2019.

665 De Stefano 2016:9.

666 ILO Conference paper on Promoting employment and decent work in a changing landscape 2020:142; ILO World Employment and Social Outlook 2021:203.

667 Van Staden & Van Eck 2018:547. Art. 5 of the Declaration on Fundamental Principles and Rights at Work states that: "Members should take particular account in national policy to ensure effective protection to workers especially affected by the uncertainty as to the existence of an employment relationship, including women workers, as well as the most vulnerable workers, young workers, older workers, workers in the informal economy, migrant workers and workers with disabilities."

existence of an employment relationship and the adverse effect it may have on society.[668] This statement is especially important, considering the proliferation of non-standard employment. Stefano argues that the risks are even more severe for workers in the gig economy, an argument that I cannot differ from.[669] In 2008 the ILO adopted the Declaration on Social Justice and Fair Globalization, which builds on the earlier Declaration of Philadelphia and the Declaration on Fundamental Principles and Rights at Work. The Declaration on Social Justice reaffirmed the commitment to enhance the ILO's capacity to advance the Decent Work Agenda by institutionalising the concept decent work at the core of the organisation's policies.[670] It furthermore pronounced the universality of the Decent Work Agenda by acknowledging that the agenda's goals were 'inseparable, interrelated and mutually supportive.' [671] It stressed its key role in achieving progress and social justice in the context of globalisation, through the Decent Work Agenda.[672]

The fundamental principles of the abolition of forced labour and child labour, that labour is not a commodity, the respect for freedom of association and collective bargaining, and the elimination of discrimination in employment, remain relevant to date and are reflected in various instruments stretching over decades, as will be set out in the following part of the discussion.[673]

Most countries increasingly deal with the proliferation of non-standard forms of employment. An ever-growing number of workers find themselves in a precarious position.[674] The most vulnerable groups of workers are usually found in the informal economy and under various types of atypical working arrangements.[675] It is important

668 Van Staden & Van Eck 2018:547.
669 De Stefano 2017:13.
670 Declaration on Social Justice and Fair Globalization 2008:1.
671 Declaration on Social Justice and Fair Globalization 2008:2.
672 Eurofound 2018. 'Decent Work'. https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/decent-work. Accessed 19 November 2020.
673 These ILO fundamental principles were reaffirmed in the Declaration of Philadelphia in 1944, later in 1998 in the Declaration on Fundamental Principles and Rights at Work, in 2008 in the Declaration on Social Justice for Fair Globalisation, and recently in the ILO Centenary Declaration for the Future of Work in 2019.
674 Van Staden & Van Eck 2018:566.
675 Fourie & Smit 2009:541.

to analyse the appropriate instruments to determine the degree of protection afforded to vulnerable groups of workers. These conventions include the Protection of Wages Convention, [676] the Part-Time Work Convention, [677] the Home-Work Convention,[678] the Workers with Family Responsibility Convention,[679] the Rural Workers' Organisation Convention, [680] and the Work, Health and Safety Convention.[681]

It should be noted that to date South Africa has not ratified any of the previously mentioned conventions. They are nonetheless critical guiding documents for establishing disguised or bogus employment relationships in an effort to extend labour protections to vulnerable groups of workers. The ILO has been engaging with the idea of extending decent work considerations to labour platforms in recent years.[682] This stems from an action agenda calling for decent work standards, especially for those working on online labour platforms.[683]

3.3 ILO AND THE FUTURE OF WORK

Near the end of the 20th century, globalisation had "weakened the fabric of many societies".[684] Consequently, the ILO added a social dimension to globalisation through the adoption of the concept ‘decent work’.[685] The ILO describes decent work as the foundation of productive, fair, and inclusive societies.[686] Decent work furthermore focuses on four main strategic objectives, namely employment, social protection, social dialogue, and rights at work.

676 Protection of Wages Convention 95/1949.
677 Part-Time Work Convention 175/1994.
678 Home-Work Convention 177/1996.
679 Workers with Family Responsibility Convention 156/1981.
680 Rural Workers’ Organisation Convention 141/1975.
681 Work, Health and Safety Convention 155/1981.
682 See the discussions below under paras. 3.5.1 and 3.6
683 Heeks *et al*. 2020:4.
684 McGregor 2007:152.
685 McGregor 2007:152. For purposes of this study, see the definition of “decent work” on page 27.
686 ILO 2019. “Responding to globalization: The Decent Work Agenda” https://www.ilo.org/ankara/news/WCMS_660158/lang--en/index.htm. Accessed 7 February 2023.

3.3.1 ILO instruments pertinent to the future world of work

3.3.1.1 The Global Commission on the Future of Work

Since 2015, the ILO has been investigating the adverse effects of labour platforms on workers and employment in general.[687] In 2019, the ILO acknowledged the need for skills development by recognising that technological advancements have the potential to create new jobs. However, for those who will lose their jobs, the transition may be more difficult since they are the least equipped to seize new opportunities.[688] The vulnerability of on-demand workers was also highlighted in the Global Commission on the Future of Work's landmark report, which examined key issues on how to achieve a better future of work at a time of unprecedented changes to the world of work.[689] The Report acknowledged the challenges faced by platform workers by calling for the establishment of an international governance system for online platforms, which will require platforms to respect certain minimum rights and protections.[690] The Global Commission on the Future of Work regards social protection as a 'human right', and calls for all governments to guarantee universal social protection and to adapt their systems to the evolving world of work. This could be achieved by extending social protection measures to all forms of work, including the self-employed and vulnerable workers in the informal economy.[691]

The Commission asserts that the guarantee of fundamental rights, which include adequate living wages, maximum working hours, and health and safety protections at work, should be enjoyed by all workers regardless of their contractual or employment status.[692] It advocates for establishing a Universal Labour Guarantee that includes fundamental rights at work, adequate living wages, and limiting working hours to ensure a safe and healthy workplace.[693] In addition, the Commission calls for an

687 ILO https://www.ilo.org/global/topics/non-standard-employment/crowd-work/lang--en/index.htm Accessed on 3 January 2021.
688 Global Commission on the Future of Work 2019:10.
689 ILO 2019. https://www.ilo.org/global/topics/future-of-work/publications/WCMS_662410/lang--en/index.htm Accessed on 30 December 2020.
690 Global Commission on the Future of Work Report 2019:13. In addition, the report highlighted that technological advances also require the regulation of data use and algorithmic control in the world of work.
691 Zhou 2020:45.
692 Global Commission on the Future of Work 2019:38
693 Zhou 2020:46.

international governance system that requires of platforms and their clients to respect certain minimum rights and protections.[694] The Report again advocates for equal and adequate labour protection for all categories of workers, regardless of their contractual agreement or employment status.[695] President Ramaphosa, in his capacity as co-chair to the Commission on the Future of Work, has emphasised the Commission's vision for a human-centred agenda that is based on investing in people's capabilities, institution of work, and decent and sustainable work.[696]

3.3.1.2 The ILO Centenary Declaration for the Future of Work

The demand for adequate social protection is more critical than ever before. Many social protection systems are unprepared to meet many of the future of work challenges associated with digitalisation.[697] The ILO Centenary Declaration for the Future of Work, which was adopted in 2019, encourages all member states to build the capacities of all people to benefit from the opportunities of the changing world of work, which include strengthening the institutions of work to achieve adequate protection for all workers.[698] The aforesaid must be done whilst recognising the extent of informality and the need to ensure effective action to achieve the transition to formality.[699] The Declaration provides for a course of action for a human-centred approach to the future of work.[700] I am of the opinion that it also plays a central role in advocating for decent work in the modern-day gig economy.

694 ILO World Employment and Social Outlook 2021:255.
695 Zhou 2020:46.
696 ILO 2019. "A human-centred agenda needed for a decent future of work", https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_663006/lang--en/index.htm#:~:text=A%20universal%20labour%20guarantee%20that,needs%20over%20the%20life%20cycle. Accessed on 1 August 2021.
697 Behrendt *et al*. 2019:19.
698 Zhou 2020:46. ILO 2020. https://www.ilo.org/global/about-the-ilo/mission-and-objectives/centenary-declaration/lang--en/index.htm. Accessed on 4 August 2020.
699 ILO World Employment and Social Outlook 2021:249.
700 Article 2(A)(iv) of the ILO Centenary Declaration for the Future of Work, 2019 declares that "In discharging its constitutional mandate, taking into account the profound transformations in the world of work, and further developing its human-centred approach to the future of work, the ILO must direct its efforts to: developing effective policies aimed at generating full, productive and freely chosen employment and decent work opportunities for all …"

It remains a state's responsibility to implement ratified international standards. Thus, they can ensure that gig platforms comply with the national laws that are aligned with international standards. The regulatory framework that applies could thus offer protection to on-demand workers from different countries and regions. Although progress has been made to afford international protection, the fate of many remains uncertain.[701] This does not mean to say that unratified instruments do not serve any purpose at all, since they remain to represent the most helpful reference for national policy and legislative design.[702]

The Declaration for the Future of Work also reaffirms the importance of the Decent Work Agenda by stating that all workers should enjoy adequate protection, taking into account their fundamental rights, adequate minimum wage, the regulation of working time, and health and safety at work.[703] Likewise, the Declaration calls for policy and measures that ensure adequate privacy and personal data protection.[704] What emerges from this section of the chapter is that the reference to 'all workers' shows that the relevant conventions could apply to on-demand workers, regardless of their classification.[705] It would therefore be wise for South Africa to take cognisance of the Declaration and to consider a uniquely South African approach to the future of work.

3.4 ILO PERSPECTIVES ON DECENT WORK

This part of the discussion describes the ILO's perspectives relevant to achieving decent work. In the sections below, I will provide a brief overview of the historical development of the concept 'decent work'. What follows is an account of key declarations, conventions and covenants that played a role in the drafting of the decent work indicators. It must be kept in mind that, as stated in Chapter 1, the research in this chapter is carried out to ascertain how international policy considerations counter the decent work deficit in respect to on-demand work. First, the study must consider

701 ILO World Employment and Social Outlook 2021:249.
702 ILO World Employment and Social Outlook 2021:249.
703 Zhou 2020:46.
704 ILO World Employment and Social Outlook 2021:255.
705 Global Commission on the Future of Work 2019:38

what the term ‘decent work’ means before I can continue with an examination of the indicators that measure decent work.

3.4.1 Timeline of the concept ‘decent work’

There is an increased focus by international political leaders to provide decent job opportunities coupled with social protection measures and respecting rights at work. Employment creation is an essential part of achieving decent work, seeing that it raises a person’s standard of living, widens access to jobs, and provides workers with social protection and the security of income in the working environment.[706] In addition to and within the context of new forms of work, it is vital to remember that decent work does not merely concern job creation, but rather the creation of jobs that are of acceptable quality.[707] The notion of decent work can, of course, differ depending on the country. Similarly, each society denotes a different belief of achieving decent work, considering that the forms of work and the associated conditions of work differ.[708]

Decent work encapsulates the aspirations of people in their everyday working lives and is a means to achieving equitable, inclusive and sustainable development.[709] It consists of work opportunities that are productive, deliver a fair income, provide social protection for families, security in the workplace, improved prospects for personal development and social integration, the freedom to express one’s concerns and the right to organise and participate in decisions which affect a person's life and

706 Samovia 2000. “Decent Work for all in a Global Economy: An ILO Perspective, ILO Statement to the WTO Meeting”, https://www.ilo.org/public/english/bureau/dgo/speeches/somavia/1999/seattle.htm#N_1_. Accessed on 28 July 2021.

707 Samovia 2000. “Decent Work for all in a Global Economy: An ILO Perspective, ILO Statement to the WTO Meeting”, https://www.ilo.org/public/english/bureau/dgo/speeches/somavia/1999/seattle.htm#N_1_. Accessed on 28 July 2021.

708 Samovia 2000. “Decent Work for all in a Global Economy: An ILO Perspective, ILO Statement to the WTO Meeting”, https://www.ilo.org/public/english/bureau/dgo/speeches/somavia/1999/seattle.htm#N_1_. Accessed on 28 July 2021.

709 ILO Decent Work Indicators Manual 2013:9. Manual available at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---integration/documents/publication/wcms_229374.pdf. Accessed on 25 February 2023.

livelihood.[710] It is estimated that more than 2 billion people in developing and emerging economies are living in poverty, which in turn indicates a major lack of access to adequate employment opportunities.[711]

The notion of decent work has been with us for a long time and was already coined in 1999.[712] Of note here is that decent work sums up the aspiration of people in their working lives as it is vital to sustainable poverty reduction.[713] It concerns the work opportunities that achieve a measure of a fair income and provides for security in the workplace and social protection for families. It also delivers better prospects for personal development and social integration, freedom for people to express their concerns, organise and participate in the decisions that affect their lives, and equality of opportunity and treatment for all women and men.[714] Mackett asserts that there is a close nexus between the terms 'decent work' and 'quality of work', which are typically used in psychology literature.[715] However, Mackett sees the lack of agreement around the term 'decent work' as an advantage, seeing that it provides for a holistic conception thereof, which makes it an inherently multidisciplinary concept.[716]

It is deemed appropriate to mention that the concept of 'decent work' has been influenced by different earlier ILO conventions and human rights instruments over the past decades.[717] As a starting point, the Declaration of Philadelphia still represents valid guidelines for economic and social policy for any of the ILO's member states in the changing world of work.[718] The Declaration of Philadelphia focused on key principles applicable to various rights at work. These include the reaffirmation that:

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710 ILO Digitalization and Decent Work Report 2019:11. Report available at https://www.ilo.org/suva/publications/WCMS_712544/lang--en/index.htm. Accessed on 25 February 2023.
711 ILO What Works – Promoting Pathways to Decent Work Report 2019:15. Report available at https://www.ilo.org/global/publications/books/WCMS_724049/lang--en/index.htm. Accessed 25 February 2023.
712 Mackett 2020:204.
713 ILO Decent Work Indicators Manual 2013:9.
714 ILO 2022. "Decent Work" https://www.ilo.org/global/topics/decent-work/lang--en/index.htm. Accessed on 22 February 2022.
715 Mackett 2020:207.
716 Mackett 2020:207.
717 Ronnie, Mullagee and Basson 2017:17.
718 Purelli 2018:41.

- labour is not a commodity;[719]
- freedom of association and freedom of expression are vital to sustained progress;[720]
- poverty anywhere constitutes a danger to prosperity everywhere;[721] and
- all human beings, irrespective of race, gender, creed or sex, have the right to pursue their spiritual development and material well-being in conditions of freedom, dignity, economic security, and equal opportunity.[722]

In 1946, the Declaration of Philadelphia was annexed to the ILO Constitution and has since served to inspire other international instruments.[723]

In this context, the Universal Declaration of Human Rights that was proclaimed by the United Nations General Assembly in 1948, affords the following rights to work in article 23:

- Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.[724]
- Everyone, without any discrimination, has the right to equal pay for equal work.[725]
- Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.[726]
- Everyone has the right to form and join trade unions for the protection of interests.[727]

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719 Declaration of Philadelphia 1944: Art 1(a).
720 Declaration of Philadelphia 1944: Arts 1(b) and 3(e).
721 Declaration of Philadelphia 1944: Art 1(c).
722 Declaration of Philadelphia 1944: Art 2(a).
723 ILO 20219. “The Declaration of Philadelphia – 75 years”, https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_698989/lang--en/index.htm. Accessed on 5 August 2021.
724 On-demand work offers work opportunities and flexibility, but conditions of work are not necessarily fair; one merely has to keep in mind the hours of work, and lack of minimum pay as examples. There is also no protection against unemployment, which could be brought about by an unfair algorithm as an example. See para. 2.3.5.3.2.
725 The right to equal pay for equal work is based in discrimination and knowing that an algorithm may deactivate an on-demand worker’s profile unfairly, allocate work unfairly; this basic right is not afforded to on-demand workers in the gig economy.
726 On-demand workers often work long hours for low pay, which is not always aligned with the national minimum wage in South Africa. See para. 2.3.5.3.2
727 The very nature of on-demand work makes it difficult for on-demand workers to engage collectively. See para 2.3.5.3.2. Further examples are provided in Chapter 6, para 6.9.

Following this, in 1964, the ILO adopted the Employment Policy Convention[728] aimed at promoting programmes to achieve full employment and the right to work. In terms of this convention, a call is made to all member states to "pursue … an active policy designed to promote full, productive and freely chosen employment."[729] In addition, the aforesaid policy must aim to ensure that there is ample work opportunities for all, that such work is as productive as possible, and that there is freedom of choice of employment.[730] The Employment Policy Convention,[731] followed by the Employment Policy Recommendations,[732] both ensure a strong and overarching framework for ILO member states to promote employment and to determine specific decent work deficits encountered by vulnerable groups of workers.[733]

In furtherance to this, in 1966, the International Covenant on Economic Social and Cultural Rights (ICESCR) also referred to multiple employment rights that influenced the decent work concept.[734]

The following limitations must be duly noted: The ICESCR rights will not be discussed in detail and are merely meant to illustrate the instruments that were considered before the establishment of the 2013 decent work indicators. The latter will be discussed in full at a later stage in this chapter. The ICESCR rights that enjoyed consideration before the adoption of the decent work indicators were the right to work,[735] the right to just and favourable conditions of work,[736] union rights,[737] the right to social security,[738]

728 Employment Policy Convention 122/1964.
729 Employment Policy Convention:Art 1.
730 Employment Policy Convention:Arts 2(a)-(b).
731 It must be kept in mind that South Africa has net ratified this convention.
732 The Employment Policy Recommendation of 122 of 1964 and the Employment Policy (Supplementary Provisions) Recommendation 169 of 1984.
733 ILO Promoting employment and decent work in a changing landscape 2020:33. Conference paper available at https://www.ilo.org/ilc/ILCSessions/109/reports/reports-to-the-conference/WCMS_736873/lang--en/index.htm. Accessed 25 February 2023.
734 Ronnie, Mullagee & Basson 2017:18.
735 International Covenant on Economic, Social and Cultural Rights: Art 6.
736 International Covenant on Economic, Social and Cultural Rights: Art 7.
737 International Covenant on Economic, Social and Cultural Rights: Art 8.
738 International Covenant on Economic, Social and Cultural Rights: Art 9.

family rights,[739] rights to adequate standard of living,[740] the right to health,[741] the right to education,[742] and lastly, cultural rights.[743]

3.4.2 ILO instruments relevant to achieving decent work

As explained earlier in this chapter, the following section discusses more recent instruments advocating for decent work. An overview of the ILO Decent Work Agenda, the decent work programmes, and the decent work and sustainable development goals will be discussed below.

3.4.2.1 The Decent Work Agenda

The Decent Work Agenda was launched in 1999. It involves the creation of opportunities for men and women to obtain productive work under the conditions of freedom, human dignity, equity and security.[744] The Decent Work Agenda is defined as an 'integrated and gender-mainstreamed approach'[745] consisting of four pillars, namely productive and freely chosen work (job creation), rights and work, social protection, and strengthening social dialogue.[746] The Decent Work Agenda served a dual purpose, considering that it provided a theoretical definition of what constituted 'good work', and it created a sense of unity among workers, governments and employers.[747] The ILO Declaration on Social Justice for a Fair Globalisation recommends the establishment of appropriate indicators to monitor the progress made in terms of the Decent Work Agenda.[748] In 2015 the notion of decent work and the four

739 International Covenant on Economic, Social and Cultural Rights: Art 10.
740 International Covenant on Economic, Social and Cultural Rights: Art 11.
741 International Covenant on Economic, Social and Cultural Rights: Art 12.
742 International Covenant on Economic, Social and Cultural Rights: Art 13 – 14.
743 International Covenant on Economic, Social and Cultural Rights: Art 15.
744 ILO Report on Digitalization and Decent Work 2019:11.
745 Eurofound 2018 "Decent Work", https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/decent-work. Accessed on 19 November 2020.
746 ILO 1999. https://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm#Preface. Accessed on 19 November 2020.
747 Mackett 2020:204.
748 ILO Decent Work Indicators Manual 2013:9.

pillars of the Decent Work Agenda became an integral part of the 2030 Agenda for Sustainable Development through the inclusion of Goal 8 that calls for the promotion of sustained, inclusive and sustainable economic growth, full and productive employment, and decent work.[749] A discussion of decent work and Goal 8 is provided later in the chapter.[750]

3.4.2.2 Decent work programmes

The ILO's Decent Work Agenda aims to implement decent work at country level through policy and institutional intervention.[751] To this effect, Decent Work Country Programmes (DWCPs) have been established that serve as main vehicles for the delivery of ILO support to countries.[752] The DWCPs aim to promote decent work as a fundamental component of a country's national development strategy.[753] Likewise, the DWCPs coordinate ILO knowledge, instruments, and advocacy for the benefit of tripartite constituents.[754] The DWCPs' objectives also echo with the National Development Plan's main objective, *i.e*., to "reduce poverty and inequality through inclusive and sustainable growth and development".[755] In support of this, the South African government has pledged its commitment to achieving decent work for all workers, and has introduced various decent work imperatives into its national development strategies.[756]

The mid-term review of South Africa's first DWCP of 2010 – 2014 found that the plan was overly ambitious with too many outputs that negatively affected the successful

749 UN 2015: 21.
750 See para 3.4.2.3 for more detail in this regard.
751 Cohen & Moodley 2012:320.
752 ILO Report on Digitalization and Decent Work 2019:12.
753 ILO Report on Digitalization and Decent Work 2019:12.
754 ILO Report on Digitalization and Decent Work 2019:12. This is done in a results-orientated framework directed at advancing the Decent Work Agenda and provides a comparative advantage for the ILO.
755 Republic of South Africa Decent Work Country Programme 2018:19. Country programme available at https://www.ilo.org/wcmsp5/groups/public/---ed_mas/---program/documents/genericdocument/wcms_674579.pdf. Accessed on 25 February 2023.
756 Cohen & Moodley 2012:320.

implementation of the programme.[757] The second DWCP of 2018 – 2023 emphasised the idea that 'less is more' when determining priorities and that joint priorities or overlapping areas of interest by social partners had a bigger impact than those pursued in isolation.[758] In this context, the second DWCP prioritised the following areas: promoting more and better jobs, broadening the scope of social protection coverage, and promoting strong and representative employers' and workers' organisations.

3.4.2.3 Decent work and the sustainable development goals

The 2030 Agenda for Sustainable Development builds on decades of work and cooperation by countries and the United Nations, stretching from as early as 1992 when more than 178 countries adopted Agenda 21 at the Earth Summit in Rio de Janeiro, Brazil.[759] This was followed by the adoption of the United Nations Millennium Declaration at the Millennium Summit in 2000, which set out eight international development goals meant to be achieved by 2015.[760] The eight goals provided a global framework for world leaders to commit to eradicating extreme poverty and hunger, reducing child mortality, improving maternal health, combating HIV/AIDS, malaria and other diseases, ensuring environmental sustainability, and lastly, developing a global partnership for development.[761]

Despite the fact that global progress was successful for the most part, some goals remained unachieved and several new challenges emerged in the world.[762] It was therefore necessary to take on the unfinished aspects of the previous goals and the

757 Republic of South Africa Decent Work Country Programme 2018:18.
758 Republic of South Africa Decent Work Country Programme 2018:18.
759 UN https://sdgs.un.org/goals Accessed 21 December 2020.
760 ILO "Decent work and the Sustainable Development Goals", https://www.ilo.org/global/topics/decent-work/lang--en/index.htm Accessed on 13 October 2020.
761 WHO 2018. https://www.who.int/news-room/fact-sheets/detail/millennium-development-goals-(mdgs). Accessed on 21 December 2020.
762 ILO Decent Work and the Sustainable Development Goals: A Guidebook on SDG Labour Market Indicators. ILO:Geneva. Guidebook available at https://www.ilo.org/global/statistics-and-databases/publications/WCMS_647109/lang--en/index.htm. Accessed on 25 February 2023: See page 1.

new global challenges in a more comprehensive, integral manner by not only seeking to achieve overall development, but also ensuring the sustainability of the progress.[763] Based on this, the 2030 Sustainable Goals build on the Millennium Goals and call on countries to end poverty and ensure sustainable development, of which decent work is one of its goals, on all levels inclusive of new forms of work, which forms the subject matter of this thesis. They are universal and bring together various actors that include governments, international organisations, civil society, and the private sector.[764]

Achieving decent work for all was highlighted by the eight Sustainable Development Goals (SDG 8) calling on all countries to take measures to promote decent work, and productive and sustainable employment. Although the role of decent work was recognised in the Millennium Development Goals[765] in so far as it related to promoting economic development, Goal 8 increased its importance and relevance. [766] The achievement of decent work is a separate goal with a substantial presence in several other goals relating to gender equality and inequality.[767] The SDG 8 constitutes a global response, harmonising the achievement of decent work with the challenges of globalisation in all regions of the world.[768] This is furthermore assured by the ILO Global Commission on the Future of Work's commitment to humanising the development of working life, irrespective of a person's contractual arrangement or employment status.[769]

As mentioned in Chapter 2, the contractual arrangement and the classification of employment remain the gateway to full labour and social protection. This, in turn, affects a person’s ability to acquire decent work. More detail about how to measure

763 ILO Decent Work and the Sustainable Development Goals: A Guidebook on SDG Labour Market Indicators:1.
764 ILO Decent Work and the Sustainable Development Goals: A Guidebook on SDG Labour Market Indicators:2. The government remains responsible for designing the national framework for the realization of these goals by 2030.
765 For further detail see Goal 1 and Goal 3 of the Millennium Development Goals.
766 ILO Decent Work and the Sustainable Development Goals: A Guidebook on SDG Labour Market Indicators:2.
767 ILO Decent Work and the Sustainable Development Goals: A Guidebook on SDG Labour Market Indicators:2.
768 Rantanen *et al*. 2020:13.
769 Rantanen *et al*. 2020:13.

decent work is discussed in the following section. As a reminder, the following section links to the second theme of this chapter before we narrow down the focus to measuring decent on-demand work specifically. This section ultimately contributes to answering the primary research question, namely, if South Africa is advocating for decent on-demand work in the modern-day gig economy. However, before specific decent on-demand measures can be determined, an overview of all the decent indicators must be considered.

3.4.3 Measuring decent work

Law helps clarify the meaning of decent work by providing an authoritative answer to the question of what decent work implies in concrete terms.[770] Establishing a full legal framework for decent work requires a deep examination of the national legal regime and the context in which it operates.[771] It is also important to consider the broader legal issues to put selected legal aspects of decent work into context, and warrant a discussion on how decent work is measured.[772]

Building a strong and inclusive labour market is central to areas of human life and well-being. It is for this reason that the ILO was assigned as the custodian agency for some indicators in connection to labour rights and protection, which includes Goal 8.[773] There are 10 substantive elements for measuring decent work, namely:

- employment opportunities;
- adequate earnings and productive work;
- decent working time;
- combining work, family and personal life;
- work that should be abolished;

770 ILO Decent Work Indicators Manual 2013:23.
771 ILO Decent Work Indicators Manual 2013:23.
772 ILO Decent Work Indicators Manual 2013:23. This includes aspects relating to the relevant justice system, the way in which legislation is drafted, the dissemination of the law, the application of the law, and the respective dispute resolution mechanisms and structures.
773 ILO Decent Work and the Sustainable Development Goals: A Guidebook on SDG Labour Market Indicators:48.

- stability and security of work;
- equal opportunity and treatment in employment;
- safe work environment;
- social security; and
- social dialogue.[774]

Having access to a basic level of social protection is fundamental to ensuring a person's health and dignity.[775] More specifically, having a social protection system ensures decent living conditions throughout individuals' lives.[776] Labour rights and the implementation thereof are regarded as an integral part of decent work, considering that they are at the core of workers' well-being and human dignity.[777] The decent work indicators are intended to support the monitoring of decent work in a given economy and should be analysed in a holistic manner.[778] It is vital to consider the legal content associated with achieving decent work. It is argued that law alone cannot bring about decent work, but well-drafted, inclusive, and implemented labour laws can be regarded as preconditions to achieving decent work.[779] These decent work indicators set the scene for a discussion in Chapter 6 on the sufficiency of South African labour laws in the gig economy.

3.4.3.1 Decent work indicators

The ten decent work indicators are closely linked to the four strategic pillars of the Decent Work Agenda.[780] In addition, the indicators are the official instrument used by the ILO to determine whether a member state is achieving decent work within its

774 ILO Report on Digitalization and Decent Work 2019:12.
775 ILO Decent Work and the Sustainable Development Goals: A Guidebook on SDG Labour Market Indicators:46.
776 ILO Decent Work and the Sustainable Development Goals: A Guidebook on SDG Labour Market Indicators:46.
777 ILO Decent Work and the Sustainable Development Goals: A Guidebook on SDG Labour Market Indicators:64.
778 ILO Decent Work Indicators Manual 2013:13.
779 ILO Decent Work Indicators Manual 2013:23.
780 See para. 3.4.2.1.

national borders.[781] The following part of the discussion does not provide an in-depth discussion on each indicator, but rather provides a brief overview of what each indicator entails. In addition, it must be kept in mind that for purposes of this research consideration will be given to the legal indicators.

3.4.3.1.1 Employment opportunities

Achieving decent work presupposes the existence of ample employment opportunities for every person who is able to perform work.[782] The employment opportunities indicator covers aspects that provide insight into the quantity of labour demand and supply in the economy.[783] In addition, it includes statistical indicators that analyse the quality of employment within the scope of both informal employment and other essential elements of total employment.[784] A vital indicator of decent work is subsequently the degree to which a country can employ its population.[785] Employment opportunities, as a decent work indicator, comprises specific statistical indicators[786] and legal indicators.[787] The barriers that limit an individual's access to decent work are attributed to either structural or temporary causes that lead to both a reduction in employment opportunities, and then to deterioration of employment conditions.[788] The legal indicators concern a state's strategy to achieve full productive employment and reduce unemployment and underemployment. It furthermore aims to stimulate

781 ILO 2022. "Decent work indicators", https://www.ilo.org/integration/themes/mdw/WCMS_189392/lang--en/index.htm. Accessed on 21 February 2022.
782 Cohen & Moodley 2012:324.
783 ILO Decent Work Indicators Manual 2013:27.
784 ILO Decent Work Indicators Manual 2013:27.
785 Cohen & Moodley 2012:324.
786 ILO Decent Work Indicators Manual 2013:28-29. The eleven statistical indicators within the decent work measurement are employment-to-population, the employment rate, youth not in education and not in employment, informal employment, the labour force participation rate, the youth unemployment rate, unemployment by level of education, employment by status in employment, the proportion of own-account and contributing family workers in total employment, share of wage employment in non-agricultural employment and labour underutilization.
787 ILO Decent Work Indicators Manual 2013:28. Employment opportunities encompass two legal indicators covering both the government's commitment to full employment and aspects relating to unemployment insurance.
788 ILO What Works – Promoting Pathways to Decent Work Report 2019:15. Report available at https://www.ilo.org/global/publications/books/WCMS_724049/lang--en/index.htm. Accessed 25 February 2023.

economic growth and development and raise the standard of living.[789] The unemployment insurance legal indicator aims to provide measurements for providing a temporary income support for those who face temporary unemployment in a country.[790]

3.4.3.1.2 Adequate earnings and productive work

The Adequate Earnings and Productive Work element builds on the aims set out by the Declaration of Philadelphia that committed to the achievement of policies to ensure a just share of fruits of progress to all, and a minimum wage to all employed.[791] The ILO adds 'productive work' to this indicator to emphasise that work should not only be a source of income, but should also be productive.[792] Mackett suggests that the ILO does not adequately describe what 'productive' work is and that the majority of its indicators relate to adequate earnings only.[793]

An adequate living wage is vital in achieving decent work.[794] By the same token, promoting adequate earnings and productive work is a focal point of the Decent Work Agenda.[795] Eight statistical indicators are prescribed to measure the progress of countries in achieving adequate earnings and productive work.[796] These statistical indicators focus on the statistical data on a country's working poverty rate, the various indicators concerning the earnings received by different work groups and selected occupations, and aspects relating to minimum wage.[797] The legal indicator for this section of measuring decent work considers the statutory regulation of minimum

789 ILO Decent Work Indicators Manual 2013:63.
790 ILO Decent Work Indicators Manual 2013:64.
791 ILO Decent Work Indicators Manual 2013:65, Section III(d) of the Declaration of Philadelphia.
792 Mackett 2020:209.
793 Mackett 2020:210.
794 Cogen & Moodley 2012:327.
795 ILO Decent Work Indicators Manual 2013:65.
796 ILO Decent Work Indicators Manual 2013:65. The eight statistical indicators focus on the working poverty rate, employees with a low pay rate, mean hourly earnings in a selected occupation, mean real earnings, minimum wage as percentage of the median wage, the manufacturing wage index, and employees with recent job training.
797 ILO Decent Work Indicators Manual 2013:65.

wage.[798] In this regard, the minimum wage must be guaranteed by law and should be determined in light of the needs of the workers and their families, taking into account the national economic and social conditions.[799]

3.4.3.1.3 Decent working time

Decent working time is regarded as an essential component of decent work.[800] It furthermore has a long history in relation to the excessive hours that workers had to endure in the second and third industrial revolutions.[801] To date, it is still evident that workers in developing countries worked on average more hours than those in developed countries.[802] However, it is argued that the opposite of working excessive hours is finding oneself unemployed,[803] which is an unfortunate reality for millions of South Africans.[804] Fortunate for South Africa, the regulations of working time and payment for overtime have technical provisions prescribed by the *BCEA*.[805]

This specific decent work substantive element involves several indicators that are related to information on employment relative to working time, and specific hours worked by employed persons.[806] This is furthermore divided into information on the number of employed persons working specific hours (long or short hours) and the actual hours worked.[807] The legal indicators under decent working time concern the maximum hours worked and the regulation of paid annual leave.[808] The legal framework indicator aims to limit the maximum hours of work to safeguard a worker's

798 ILO Decent Work Indicators Manual 2013:65.
799 ILO Decent Work Indicators Manual 2013:90.
800 ILO Decent Work Indicators Manual 2013:91.
801 See paras. 2.2.2.2 and 2.2.2.3 in Chapter 2.
802 Mackett 2020:210.
803 Mackett 2020:210.
804 See the discussion in heading 2.3.5.3.2.1 of Chapter 2.
805 See the discussion in heading 6.5.2.1 in Chapter 6,
806 ILO Decent Work Indicators Manual 2013:91.
807 ILO Decent Work Indicators Manual 2013:91.
808 ILO Decent Work Indicators Manual 2013:91.

general well-being and to ensure productivity in the workplace.[809] In addition, the Decent Work Indicators Manual provides a comprehensive list of other forms of paid leave that do not constitute annual leave.[810]

3.4.3.1.4 Combining work, family, and personal life

The Combining Work, Family and Personal Life substantive element covers decent work indicators affiliated with the standards and underlying principles and rights at work and social protection.[811] The legal framework indicators specifically deal with maternity and parental leave regulation.[812] The provision for specific family leave entitlements is comprehensively prescribed by the *BCEA* for an array of family-related leave entitlements.[813]

3.4.3.1.5 Work that should be abolished

The Declaration on Fundamental Principles and Rights and Work calls for the abolishment of certain types of work. From this perspective, this substantive element prescribes several statistical measurements associated with child labour and forced labour, respectively.[814] In the same manner, the legal framework indicators centre around the enactment of statutes prohibiting child labour and forced labour.[815] The prohibition of employment of children and forced labour is comprehensively covered in chapter six of the *BCEA*. Section 43 specifically prohibits the employment of children

809 ILO Decent Work Indicators Manual 2013:104. In this regard, it is also vital to consider the regulation of rest periods and annual leave cycles within the context when determining maximum working hours.
810 ILO Decent Work Indicators Manual 2013:105.
811 ILO Decent Work Indicators Manual 2013:109.
812 ILO Decent Work Indicators Manual 2013:111.
813 The *BCEA* provides for multiple leave entitlements relating to maternity leave (secs. 25 and 26), parental leave (sec. 25A), commissioning parental leave (sec. 25C), adoption leave (sec. 25B), family responsibility leave (sec. 27), and provisions relating to daily and weekly rest periods (sec. 15).
814 ILO Decent Work Indicators Manual 2013:112. The statistical decent work indicators include a country's child labour rate, the hazardous child labour rate and the rate of other worst forms of child labour, the forced labour rate, and lastly the forced labour rate among returned migrants.
815 ILO Decent Work Indicators Manual 2013:123.

under the age of 15 years, or children who are under the minimum school leaving age, if this is 15 years or older.[816] It is currently not known to what extent this indicator is relevant to the study, since Heeks notes that there is no evidence yet of child or forced labour in the digital economy.[817] That said, the ILO suggests that there is potential for child labour or forced labour to occur in the broader platform work.[818] To my mind this further increases the vulnerability of on-demand workers and serves as a barrier to achieving decent work.

3.4.3.1.6 Stability and security of work

The Stability and Security of Work substantive element serves as a fundamental component of decent work.[819] The statistical indicators applicable to job security are determined in relation to the specific type of employment categorised as unstable or insecure.[820] The legal framework for decent work indicator considers the importance of employment protection legislation with specific reference to the statutory provisions regulating the termination of employment.[821] In addition, it aims to ensure an employer's right to dismiss workers for a fair and valid reason.[822]

As mentioned in Chapter 2, on-demand workers are often subject to unfair deactivation from the platform with little to no recourse other than what is prescribed in terms of the terms and conditions to which they agreed. The question thus remains whether this treatment is decent and fair.[823]

816 See secs. 43 to 48 of the *BCEA*.
817 Heeks 2017:12.
818 ILO World Employment and Social Outlook 2021:218-219.
819 Cohen & Moodley 2012:329.
820 ILO Decent Work Indicators Manual 2013:127. The statistical indicators for measuring stability and security at work relate to the rate of precarious work, job tenure, the subsistence worker rate, and the real earnings of casual workers.
821 ILO Decent Work Indicators Manual 2013:140.
822 ILO Decent Work Indicators Manual 2013:140.
823 See para. 2.3.5.3.2 in Chapter 2 for more detail relating to the deactivation of on-demand workers' profiles.

Over the past two decades, employment stability within the South African context has been the focal point of labour legislation and trade union movements. However, with the growing formalisation of jobs and within the milieu of platform work, flexibility has become an equally advantageous bargaining chip.[824] Nonetheless, this decent work indicator still reflects the context of traditional employment relationships.[825]

3.4.3.1.7 Equal opportunity and treatment in employment

Gender equality and non-discrimination are transverse issues in achieving decent work.[826] The Equal Opportunity and Treatment in Employment substantive element focuses not only on the gender divide in employment, but also on discriminatory practices experienced by different groups differentiated by race, ethnicity, or indigenous groups.[827] In addition, this element covers discrimination experienced by different groups of workers, which include rural workers, migrant workers and persons with disabilities.[828]

The statistical indicators introduced by this element assist countries in monitoring the developments regarding the objective related to equal opportunities and equal treatment in employment.[829] On the other hand, the legal framework indicators centre around equal opportunity and treatment, and equal work for equal pay between men and women.[830] In this regard, the legal framework indicators draw a distinction between direct and indirect discrimination by confirming that the right to equal and

824 Mackett 2020:212.
825 Mackett 2020:212.
826 ILO Decent Work Indicators Manual 2013:141.
827 ILO Decent Work Indicators Manual 2013:141.
828 ILO Decent Work Indicators Manual 2013:141.
829 ILO Decent Work Indicators Manual 2013:141. The statistical indicators to achieve the objectives of equal opportunity are as follows: the occupational segregation by sex, the female share of employment in senior and middle management, the gender wage gap, the share of women in wage employment in the non-agricultural sector. In addition, the indicators developed by the ILO include the indicator for fundamental principles and rights at work (elimination of discrimination in respect of employment and occupation), the measure of discrimination by race/ethnicity/of indigenous people, of migrant workers, and of rural workers at a national level, the measure of dispersion for sectoral/occupational distribution of (recent) migrant workers, and lastly, the measure for employment of persons with disabilities.
830 ILO Decent Work Indicators Manual 2013:141-142.

non-discrimination is a fundamental human right and as such plays a pivotal part in achieving decent work.[831] Note that this is a key issue experienced in the gig economy. Legal problems relating to equal work for equal value, algorithmic management and algorithmic discrimination in platform work will be referred to from time to time. However, an in-depth analysis of unfair algorithmic discrimination does not fall within the scope of this study but is an important consideration for further research.

3.4.3.1.8 Safe work environment

A Safe and Healthy Work Environment relates to a worker's ability to work in a space in which there is no risk of being physically harmed. It is essential for achieving decent work.[832] Four statistical indicators are prescribed to measure the extent to which workers are protected from work-related hazards and risks.[833] These indicators are mainly focused on providing information for prevention purposes. However, they can also be used for other purposes associated with health and safety measures.[834] Likewise, the legal framework indicators aim to provide a framework focused on substituting a worker's income in case of employment injury, and the critical role of labour inspectors in examining workplaces to assess occupational risks and enforce occupational health and safety regulations specifically.[835]

831 ILO Decent Work Indicators Manual 2013:152.
832 Mackett 2020:212.
833 ILO Decent Work Indicators Manual 2013:154. The statistical indicators for measuring the Safe Work Environment substantive element centres around the frequency rate of fatal and non-fatal occupational injuries, the time lost per occupational injury, and the labour inspection of occupational injuries.
834 ILO Decent Work Indicators Manual 2013:155. The other measures include, firstly, to determine which occupational and economic activities are prone to occupational injuries, inclusive of the duration and severity of the injury and measures to prevent the injury from occurring; to set priorities to prevent injuries and risks; to detect and monitor changes in the occurrence of occupational injuries; to disseminate the information relating to the occupational risks associated with the workplace to all parties; to evaluate the effectiveness of preventative measures; to estimate the consequences associated with occupational injuries; and lastly, to provide a framework for the development of policies to introduce accident prevention measures in the workplace.
835 ILO Decent Work Indicators Manual 2013:167-168.

3.4.3.1.9 Social security

Universal protection for a human-centred future necessitates that current social protection systems once more adapt to contemporary challenges, such as those created by gig work, as a means to realise a human right to social security for all engaged in this emerging sector.[836] The Social Security substantive element entails all measures that provide security against different categories of contingencies, including a lack of work-related income,[837] lack of access to health care, insufficient family support,[838] and poverty and social exclusion.[839]

In agreement with this, the ten statistical indicators used for measuring the progress made on a national level in achieving this element revolve around the extent of benefits provided to persons above the pensionable age, the expenditures of public social security schemes, the share of contributions by the active population to a pension scheme, and the statistical data on the beneficiaries of support in the case of unemployment or illness.[840] This is also reflected in the three separate legal framework indicators.[841] The first refers to old age and pension benefits,[842] the second on sickness benefits,[843] and the last on invalidity benefits.[844] South Africa has a well-structured and comprehensive social security programme.[845] As discussed in Chapter 2, on-demand workers are not regarded as employees for purposes of South African

836 Behrendt *et al*. 2019:35.
837 ILO Decent Work Indicators Manual 2013:169. This can be due to an illness, disability, an occupational injury, unemployment, old age, or the death of a family member.
838 ILO Decent Work Indicators Manual 2013:169. This refers to both adult and child dependents.
839 ILO Decent Work Indicators Manual 2013:169.
840 ILO Decent Work Indicators Manual 2013:169. The ten statistical indicators include the share of the population above the pensionable age of 65 years old who benefit from an old-age pension, the annual public social security expenditure, the share of the economically active population contributing to a pension scheme, any out-of-pocket spending by private households, the percentage of the eligible population covered by a country's basic health care provision, public expenditure on needs based cash support and, in turn, the beneficiaries of the income support, related aspects on sick leave, the percentage of unemployed persons receiving unemployment benefits, and the percentage of average old-age pension received to minimum wage.,
841 ILO Decent Work Indicators Manual 2013:170.
842 ILO Decent Work Indicators Manual 2013:186.
843 ILO Decent Work Indicators Manual 2013:187.
844 ILO Decent Work Indicators Manual 2013:188
845 Mackett 2020:213.

social security protection They are thus currently excluded from these benefits, which are necessary elements to ensure decent work in the broader digital economy.[846]

Social protection systems have, in the past, shown considerable potential to adapt to new forms of employment.[847] A large portion of the population has limited or no social protection coverage, and while the adverse effects of the future of work are inevitable, it is time to consider in which way social protection can provide decent work conditions for on-demand works. It is in this context, where several policy measures on how to strengthen coverage of workers in the informal economy and the regulations applicable to non-standard forms of employment, can serve as key indicators on how to extend social protection to contemporary forms of employment such as on-demand work.[848] The challenges with the South African social protection measures are described as 'complex and multi-faceted', with many informal workers still experiencing major decent work deficits.[849] Against the backdrop of a fragile social protection framework, it must also be noted that South African on-demand workers have limited safety nets to rely on. A detailed discussion on the social protection measures in the South African context is provided in Chapter 6.

3.4.3.1.10 Social dialogue

Social dialogue is key in achieving decent and productive work.[850] The Social Dialogue substantive element covers all forms of negotiation and information sharing between representatives of a government, employers and workers on issues of common interest.[851] The aim of social dialogue centres on building consensus between all actors in the world of work.[852] The degree to which rights to social dialogue are exercised is reflected in three statistical indicators, namely the data on trade union and

846 See para. 2.3.5.3.2.4 in Chapter 2.
847 Behrendt *et al*. 2019:35.
848 Behrendt *et al*. 2019:36.
849 Van Niekerk *et al*. 2019:31
850 Cohen & Moodley 2012:333; ILO Decent Work Indicators Manual 2013:190.
851 ILO Decent Work Indicators Manual" 2013:190. This includes tripartite processes and institutions of social dialogue.
852 ILO Decent Work Indicators Manual 2013:190.

employer organisation membership, the administrative data on collective bargaining on a national level, and lastly, the number of days lost due to strikes and lockout.[853] These indicators are complemented by legal framework indicators relating to the right to freedom of association and the right to organise,[854] collective bargaining rights,[855] and legal aspects on tripartite consultations.[856] It should be noted that these measurements relate to the coverage of trade union and employer organisation membership.[857]

Collective rights are vital for on-demand workers, due to their unequal employment position and status.[858] They are also a cornerstone and unique feature of employment protection aimed at balancing the unequal bargaining powers of workers and employers.[859] Gyulavari argues that access to collective rights is crucial for platform workers to improve their basic working conditions.[860] This is a vital consideration, seeing that work performed in the on-demand economy weakens the worker's bargaining position,[861] since many of the collective bargaining structures cater for traditional forms of employment only. An on-demand worker subsequently falls outside of the scope of bargaining rights in South Africa.[862]

3.4.3.1.11 Economic and social context of decent work

The Economic and Social Context for Decent Work is a vital element when considering the previously discussed decent work indicators in a national context.[863] The eleven statistical indicators[864] aid in interpreting the various indicators that form part of the ten

853 ILO Decent Work Indicators Manual 2013:190.
854 ILO Decent Work Indicators Manual 2013:203.
855 ILO Decent Work Indicators Manual 2013:204.
856 ILO Decent Work Indicators Manual 2013:205.
857 Mackett 2020:214.
858 Gyulavari 2020:1.
859 Gyulavari 2020:4.
860 Gyulavari 2020:4.
861 Balliester & Elsheikhi 2018:19.
862 See para. 2.3.5.3.2.2 in Chapter 2.
863 Mackett 2020:208.
864 ILO Decent Work Indicators Manual 2013:206-207. The eleven statistical indicators relate to the level of education according to age, the percentage of the working age population who are

substantive elements. In addition, this indicator must be used in combination with the other indicators, seeing that it provides a framework in which decent work is carried out in a specific country.[865] The legal indicator framework for the economic and social context of decent work focuses on labour administration, which is defined as 'public administration activities in the field of national labour policy.'[866] The aforesaid includes activities on policy shaping, formulation and implementation by means of a country's labour administrative system, which, in my opinion, influences a country's ability to achieve decent work.

For ease of reference the broad decent work indicators can be summarised as follows:

Decent work indicators	Statistical Indicators	Legal Indicators
Employment opportunities	• Labour force participation rate • Employment-to-population rate • Wage employment • Unemployment rate • Youth unemployment rate	• Full productive employment • Unemployment insurance
Adequate earnings and productive work	• Average earnings in selected occupations • Recent job training	• Statutory minimum wage
Decent working time	• Excessive hours • Under-employment	• Maximum working hours • Paid annual leave
Combining work family and personal life	• Employment rate of women with children below school age • Children in wage employment	• Maternity leave provision • Parental leave provision
Work that should be abolished	• Child labour rate • Hazardous child labour rate • Rate of worst forms of child labour • Forced labour rate • Forced labour rate among returned migrants	• Child labour • Forced labour
Stability and security of work	• Tenure less than one year • Temporary work	• Termination of employment provisions
Equal opportunity and treatment in employment	• Occupational segregation by gender • Female share of managerial posts • Share of woman in employment in the non-agricultural sector	• Equal opportunity and treatment • Equal remuneration of men and woman for equal value
Safe work environment	• Occupational injury rate • Fatal injury rate	• Employment injury benefits • Occupational Safety and Health labour inspection

HIV positive, a country's labour productivity, aspects on income inequality, the inflation rate, employment by branch of economic activity, the educational level of the adult population, the labour share in gross value added, the gross domestic product per capita, the female share of employment by industry, aspects relating to earnings inequality, and lastly a country's poverty measures.

865 Mackett 2020:208.

866 ILO Decent Work Indicators Manual 2013:242.

	• Number of inspectors per 100 000 employees • Occupational injury insurance	
Social security	• Public social security expenditure (percentage per GDP) • Share of population aged 65 and above benefiting from a pension • Health care expenditure not financed out of pocket by private households • Public expenditure on needs-based support (child grant, disability grant and pension) as percentage of GDP	• Old-age social security or pension benefits • Incapacity for work due to sickness or sick leave • Incapacity for work due to invalidity
Social dialogue	• Union density rate • Number of enterprises belonging to employer organisations • Collective wage bargaining coverage • Strikes and lockouts (per 1 000 employees)	• Freedom of association and the right to organise • Collective bargaining rights • Tripartite consultations
Economic and social context of decent work	• Growth rate of GDP per person employed (labour productivity) • Inflation • Adult literacy rate • Poverty percentage • Proportion of people living below 1 US dollar per day.	• Labour administration

Table 1: Summary of the ILO's decent work indicators (ILO 2013)

3.5 ILO PERSPECTIVES ON ON-DEMAND WORK

The ILO plays a pivotal role in supporting research and publications to enhance legally based policymaking processes. It has made significant efforts to promote African countries' ability to standardise their labour policies and enhance their workers' technical skills.[867] Rodgers emphasises that the foundations of the ILO rest on the traditional Labour Law view of vulnerability.[868] The link between vulnerability and labour law can be discerned in the foundational argument that labour is not a

867 ILO 2023. "Labour standards in Africa" https://www.ilo.org/africa/areas-of-work/labour-standards/lang--en/index.htm. Accessed on 25 January 2023. The ILO has a standard-setting role that plays a critical role in developing standards and conventions. The challenges to the traditional employment relationship posed by the increasing prevalence of on-demand work on a global scale have not escaped the attention of the ILO. The most pervasive of these challenges is the lack of social and labour protections afforded to on-demand workers. Countries with ratified conventions have a legally enforceable duty to identify and publicise possibilities to provide adequate protection to identified groups of workers. See ILO 2021 https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm Accessed on 29 January 2021.

868 Rodgers 2016:95.

commodity.[869] However, the findings in Chapter 2 suggest that on-demand workers are left vulnerable with little, if any, labour protection in South Africa.

Several recommendations also recognise the economic importance of non-standard forms of employment, and more specifically, part-time work, and the essentiality of employment policies to the vital role of part-time work.[870] The issue facing the ILO and several countries is the extent to which the gig economy is testing the limitations of the traditional employment relationship, and how basic labour and social protection could be afforded to on-demand workers.[871] Therefore, the ILO is not unaffected by the uncertainties and structural vulnerabilities experienced by on-demand work in the gig economy. That said, the principles and rights expressed in international standards remain relevant.[872] However, exactly how they should operate and apply to the on-demand work relationships remain uncertain.

The ILO has sponsored the Global Commission on the Future of Work: Work for a Brighter Future (Future of Work Report)[873] to discuss the anticipated disruption of work, as well as to find a framework wherein government can work to ready themselves and their respective labour markets for these changes.[874] Once again, it is a real disruption with which labour laws need to keep up,[875] but taking cognisance of the call to take a human-centred approach, by placing people and their "work" at the very centre of economic and social policy, as well as in practices adopted by business.[876]

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869 Rodgers 2016:4.
870 ILO 2023. "The rising tide of non-standard employment", https://www.ilo.org/infostories/Stories/Employment/Non-Standard-Employment#intro. Accessed on 25 January 2023.
871 ILO World Employment and Social Outlook 2021:249.
872 ILO World Employment and Social Outlook 2021:249.
873 This report will be fully discussed in the legal section of this research report infra.
874 Karolia – Hussain F& Moekoena K. 2020. Lessons from the ILO's Global Commission in the Future of Work Report for South Africa. In Celebrating the ILO 100 years on. Reflections on Labour Law form a South African Perspective. Juta. First edition Editors Van Eck, Bamu, Chungu on page 322.
875 Artificial intelligence: The Fourth Industrial Revolution and the need for improved employee representation March 2018, Writer unknown, Norton Rose Fulbright, available on https://www.nortonrosefulbright.com/en-za/knowledge/publications/4166fdcd/artificial-intelligence-the-fourth-industrial-revolution-and-the-need-for-improved-employee-representation , accessed 21 February 2021.
876 ILO Global Commission on the Future of work: Work for a Brighter Future (2019): 24.

It is no secret that development goal 8 of the ILO Decent Work Agenda focuses on the creation of jobs and sustainable livelihoods, and embraces equitable growth, with target 8(a) focusing on the number of good and decent jobs and livelihoods by 2030.[877] The problem is that although these goals are to be commended, the ILO is still battling with how to do so in the digital economy, which is no easy task at all. Keeping in mind that Tony Blair once stated that the "best defence against social exclusion is having a job",[878] one may ask if on-demand work will transform the playing field to such an extent that vulnerability, exploitation, and the lack of labour and social protection fit the new work dispensation as decent work. The goal of the subsequent discussion is to examine recent trends in the ILO instruments that could assist South Africa to minimise the structural vulnerability of on-demand workers.

It has been mentioned several times that the classification of the employment relationship remains the gateway to wide-ranging,[879] but decent labour and social protections at a national level. The main reason behind this is the traditional, and to some extent outdated, binary division between what is deemed "'employment' against 'independent contracting' or 'entrepreneurship.'[880] In addition, the ILO emphasises that a uniform judicial test to classify platform work could be problematic, since it would be difficult to apply the criteria for crowdworkers to on-demand workers.[881] That said, it is meaningful to highlight selected countries' approaches to classifying or regulating the true relationship between the on-demand worker and the platform.

The ILO Social Outlook Report highlights both broad and narrow approaches to determining the employment relationship. Firstly, it highlights the control that a platform exercises over the on-demand worker.[882] The second approach appreciates the availability of a middle category between an independent contractor and an

877 ILO Decent work and the Sustainable Development Goals. https://www.ilo.org/global/topics/decent-work/lang--en/index.htm , Accessed 13 October 2020.
878 Collins *et al*. 2018: 287.
879 The term 'wide-ranging' is preferred since not all forms of work, for example some non-standard forms of employment, receive the same degree of protection.
880 ILO Report "The role of digital labour platforms in transforming the world of work". 2021:230.
881 ILO Report "The role of digital labour platforms in transforming the world of work". 2021:231.
882 ILO Report "The role of digital labour platforms in transforming the world of work". 2021:231.

employee.[883] The third approach explains how the classification issue could be resolved through legislative measures.[884] The fourth and last approach suggested by the ILO emphasises the ways in which platforms do not exercise control and that some on-demand workers are true independent contractors.[885]

3.5.1 Guiding ILO standards

The ILO's Declaration on Fundamental Principles and Rights at Work, together with specific key Conventions and Recommendations, apply to all workers, regardless of their classification.[886] It is important to note that the ILO supports the notion that all platform workers[887] should enjoy the right to participate in collective bargaining, be protected against discriminatory conduct, and be safeguarded against unsafe work.[888] However, to date these problems are still being experienced in the gig economy.

The Declaration on Fundamental Principles and Rights at Work places a constitutional obligation on all member states, including those who have not ratified any conventions, to realise and promote the various principles that underlie four fundamental rights, namely freedom of association and the right to collective bargaining, the elimination of forced labour, the abolition of child labour, and the elimination of discrimination.[889]

The Employment Relationship Recommendation (ERR),[890] adopted by the ILO Conference in 2006, covers the formulation of national policy to guarantee adequate protection for workers who perform work in the context of an employment relationship, to establish criteria for determining the existence of an employment relationship contrary to the agreement between the parties, and to adopt measures to monitor the

883 ILO Report "The role of digital labour platforms in transforming the world of work". 2021:231.
884 ILO Report "The role of digital labour platforms in transforming the world of work". 2021:233.
885 ILO Report "The role of digital labour platforms in transforming the world of work". 2021:233.
886 ILO Report "The role of digital labour platforms in transforming the world of work". 2021:248.
887 In this context the use of 'platform workers' is inclusive of both crowdworkers and on-demand workers.
888 ILO Report "The role of digital labour platforms in transforming the world of work". 2021:248. This also entails that on-demand workers be provided with health and safety protection, and social security protection.
889 Article 2 of the Declaration on Fundamental Principles and Rights at Work, 1998.
890 The Employment Relationship Recommendation 198 of 2006. (Hereafter referred to as the ERR).

developments concerning the employment relationship.[891] These tools and measures are applied in both developed and developing countries to ensure that all vulnerable groups of workers, such as on-demand workers, are adequately protected. The ERR could provide vital references and guidance "to guarantee effective protection for workers who perform work in the context of an employment relationship", which in turn enables legislatures and judiciaries to ensure greater consistency in this regard. [892] Other ILO conventions relating to minimum wages and working time regulation should also be extended to platform workers.[893] Similarly, various conventions[894] relating to non-discrimination should serve as guiding principles on dealing with discrimination on platforms and from platform clients.[895]

Another ILO instrument to consider is the ILO Transition from the Informal to the Formal Economy Recommendation, 204 of 2015. The Recommendation prescribes guidelines applicable to developing an integrated policy framework to facilitate an economic transition whilst preventing further informalisation progressively.[896] The Recommendation further calls on member states to extend various rights related to health and safety, decent work conditions, and minimum wage to all workers in the informal economy.[897] I am of the opinion that the gig economy, and more specifically on-demand work, will continue to increase due to the continuously increased access to smart phones linked to the growing unemployment rate in South Africa. This then raises the question whether the labour protections can be extended to those working in the informal sector, such as on-demand workers. As a point of departure, it is noteworthy that the ILO World Employment Social Outlook Report provides an overview and summary of key fundamental principles, labour standards and convention principles that can be extended to platform workers.

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891 ILO Regulating the employment relationship in Europe: A guide to Recommendation No. 198 https://www.ilo.org/wcmsp5/groups/public/@ed_dialogue/@dialogue/documents/publication/wcms_209280.pdf Accessed on 15 March 2021.

892 ILO Report "The role of digital labour platforms in transforming the world of work". 2021:250. In addition, Govindjee opines that the ERR acknowledges the need to protect vulnerable workers by advocating for measures to counter bogus employment. See Govindjee 2020:56.

893 ILO Report "The role of digital labour platforms in transforming the world of work". 2021:251.

894 See in this regard the Discrimination (Employment and Occupation) Convention 111 of 1958, and the Equal Remuneration Convention 100 of 1951.

895 ILO Report "The role of digital labour platforms in transforming the world of work". 2021:251.

896 Zhou 2020:44-45.

897 Zhou 2020:45.

It has already been noted in this chapter that conventions, declarations, and recommendations prefer the use of 'worker' as opposed to 'employee'. This suggests that the aforesaid instruments apply to all forms of work, inclusive of on-demand work. It would thus be useful at this stage to take cognisance of South Africa's position in relation to ratifying key conventions and recommendations linked to on-demand work. I will only focus on South Africa, seeing that South Africa is the main jurisdiction. The primary research question remains if South Africa is sufficiently advocating for decent on-demand work in the gig economy. A breakdown of each of these instruments are summarised in Table 2 below:

Categories of principles, standards, and conventions	Specific instrument	Ratification status of convention
Fundamental principles and rights at work applicable to all workers		
Freedom of association and collective bargaining	The Freedom of Association and Protection of the Right to Organise Convention 87 of 1948	Ratified – in force
Non-discrimination and equal remuneration	Equal Remuneration Convention 100 of 1951	Ratified – in force
	Discrimination (Employment and Occupation) Convention 111 of 1958	Ratified – in force
Elimination of forced labour	Forced Labour Convention 29 of 1930	Ratified – in force
	Abolition of Forced Labour Convention 105 of 1957	Ratified – in force
Elimination of child labour	Minimum Age Convention 138 of 1973	Ratified – in force
	Worst Forms of Child Labour Convention 182 of 1999	Ratified – in force
Labour standards applicable to all workers		
Occupational health and safety	Occupational Safety and Health Convention 155 of 1981	Ratified – in force
	Promotional Framework for Occupational Safety and Health Convention 187 of 2006	Not ratified
	Violence and Harassment Convention 190 of 2019	Not ratified
	ILO Centenary Declaration for the Future of Work	N/a
Social security	Social Security (Minimum Standards) Convention 102 of 1952	Not ratified
	Social Protection Floors Recommendation 202 of 2012	N/a
Employment and job creation	Employment Policy Convention 122 of 1964	Not ratified

	Employment Policy (Supplementary Provisions) Recommendation 169 of 1984	N/a.
	Transition from the Informal to the Formal Economy Recommendation 204 of 2015	N/a
Labour inspection	Labour Inspection Convention 81 of 1947 (Including Protocol of 1995)	Ratified – in force
	Labour Inspection Recommendation 81 of 1947	N/a
Convention principles that could apply to platform workers		
Payment systems	Protection of Wages Convention 95 of 1949	Not ratified
	Private Employment Agencies Convention 181 of 1997	Not ratified
Fair termination	Termination of Employment Convention 158 of 1982	Not ratified
Access to data and privacy	Private Employment Agencies Convention 181 of 1997	Not ratified
	Private Employment Agencies Recommendation 188 of 1997	N/a
Clear terms of engagement	Domestic Workers Convention 189 of 2011	Ratified – in force
	Home Work Recommendation 184 of 1996	N/a
Job mobility	Employment Policy Convention 122 of 1964	Not ratified
Dispute resolution	Examination of Grievances Recommendation 130 of 1967	N/a

Table 2: My adaptation of the ILO's World Employment and Social Outlook. (ILO 2021:204-205, 207.)

Table 2 is interesting in several ways. Firstly, it provides an overview of the extent to which existing conventions and recommendations apply to on-demand work. Secondly, it shows that South Africa still needs to ratify vital conventions that advocate for decent work, arguably in the gig economy. This specifically refers to conventions applicable to social security, job creation, remuneration and payment systems, terms of engagement, and lastly, dispute resolution. It must be remembered that unratified instruments do serve an important purpose, seeing that they remain to represent the most helpful reference for national policy and legislative design.

I am of the view that the aforesaid conventions are crucial to providing decent work in the gig economy. A discussion and further delineation of specific on-demand decent work indicators is discussed next.

3.6 INVESTIGATING MINIMUM DECENT WORK INDICATORS FOR ON-DEMAND WORK

This section of my research will be more specific in nature. It investigates only those indicators that are relevant to on-demand work in the gig economy. Where the previous section took a broad approach entailing all the decent work indicators, this part of the discussion is focused on the question as to what extent on-demand workers are excluded from decent work and whether the approaches of the ILO could counter the decent work deficit.

A plethora of literature is available on the broader topic of decent work. It includes published and ongoing research applicable to individual decent work indicators, sector-specific decent work deficits, and the combination of various decent work indicators for purposes of a specific study's focus.

In analysing the extent to which South Africa is sufficiently advocating for decent work for on-demand workers in the modern-day gig economy, it is vital to consider the broad application of decent work indicators and various other principles and standards intended to achieve decent platform work. To date, there has been little agreement on a universal set of decent work standards for on-demand workers. Research on this topic has been mostly restricted to digital platform work, which encompasses both crowdwork and on-demand work.[898] Apart from the studies conducted by the Fairwork Group, there is a general lack of research in the field of decent work for on-demand workers in the South African context.

The aim of this part of the chapter, therefore, is to draw attention to the various ways in which broad decent work measures have been established, merged and developed

898 Heeks 2017:2.

in literature.[899] Moreover, this discussion aims to present comparative perspectives on how essential decent work indicators are applicable to platform work specifically.

3.6.1 ILO decent work indicators

The ILO statistical and legal indicators are extensive and at times 'fiendishly difficult'[900] to implement.[901] I am in full agreement with Heeks on this issue. It therefore becomes necessary to define decent work and to restrict the focus to specific decent work deficits in the context in which a study is undertaken.[902] For this reason, the eleven ILO decent work indicators illustrated above serve as a starting point to demarcate the focus of this study to only a selective few.[903] To accomplish this goal, it also becomes necessary to combine different indicators to fit overarching themes associated with one or more of the indicators above. It thus becomes necessary to also look outside of the ILO's legal indicators and consider alternative standards or indicators to measure decent work in the gig economy. I am of the view that an analysis of the following contributions achieves this goal. Firstly, I will use Heeks' decent digital gig economy standards,[904] secondly, the World Economic Forum's charter of principles for good platform work,[905] and lastly, the Fairwork gig work principles.[906] To my mind, these are the most prominent contributions to set alternative standards to the broader

899 See, for example, Mackett 2020:216. Mackett constructed a decent work indicator using the Labour Force Survey to assess the quality of work that comprises of four overlapping indicators derived from the eleven ILO decent work indicators, namely, decent working time and combining work, family and personal life; employment opportunity, stability and security at work; equal opportunity and treatment; adequate and productive earnings; and social security, dialogue, and workers' and employers' representation. This was done to provide a methodological starting point for measuring decent work deficits among occupational groups traditionally thought to be 'good' work. The study confirmed that certain high-skilled positions such as teaching professionals, health professionals and ICT technicians ranked amongst the best quality jobs in South Africa. More concerning, certain low-skilled occupations such as cleaners, helpers and workers in agriculture ranked amongst the worst occupational groups. Mackett signals that this is troublesome, since these groups make up some of the largest occupational groups in South Africa.

900 Mackett 2020:207.

901 Heeks 2017:5.

902 Mackett 2020:20.

903 A summary of the broad ILO decent work indicators is provided at the end of para 3.4.3.1.11.

904 Heeks 2017:33.

905 WEF 2020. "The Charter of Principles for Good Platform Work" https://www.weforum.org/reports/the-charter-of-principles-for-good-platform-work. Accessed 24 February 2022.

906 Fairwork 2022. "Principles" https://fair.work/en/fw/principles/#continue. Accessed 24 February 2022.

ILO decent work indicators to better fit the gig economy and specifically on-demand work. Even so, it is accepted that the discussion of the broader ILO decent work indicators will serve as background to the more focused discussion below.

As a point of reference, I will first consider Heeks' decent digital gig economy standards discussed below. Heeks' contribution is one of the first lists of standards applicable to the gig economy and serves as a point of departure for this part of the discussion. However, it is noted that Heeks' standards consist of an extensive list of decent work standards and requires further narrowing. I argue that the aforesaid contribution is important and provides the basis from which decent work in the gig economy can be measured.

In limiting this study, it is important to keep in mind that the discussion centres around the legal indicators of a relevant decent work indicator. In addition, although mention will be made to available information on the statistical indicators of the chosen decent work indicators, the focus remains on the extent to which the law advocates for the applicable decent work indicator. The discussion, therefore, aims to provide an analysis of the literature about the legal indicators of the chosen decent work deficits.

3.6.2 The decent digital gig economy standards

The following discussion draws upon research conducted by Heeks, with the author's comparison of the Ethical Trading Initiative Base Code and the SA8000 (SAI 2014) with the ILO decent work indicators. The table below is an adaptation of Heeks' decent digital gig economy standards and compiled by me to make the plethora of information more understandable and condensed.

The following limitations must be duly noted: Due to length constraints the chapter will not provide an in-depth analysis on the ETI Base Code and the SA8000 standards. I elected to rely on Heeks' standards, seeing that he has already researched the ETI Base Code and the SA8000 standards extensively to establish his decent digital gig economy standards. With this in mind, as illustrated in Table 4 below, Heeks clarifies

that some elements from the codes and the ILO decent work indicators are not covered. Some might be irrelevant to platform work, and some elements need to be introduced due to the unique nature of platform work.[907]

Indicator	ETI Base Code	SA8000 standard	Decent digital gig economy standards
Employment context			
Work that should be demolished	• Employment is freely chosen • Prohibition on child labour	• Prohibition on child labour • Prohibition on forced labour	• *Nothing explicitly referred to in the standards*
Social security	*Nothing explicitly referred to in the code*	*Nothing explicitly referred to in the standards*	• Provision of the following: • Annual, sick, and maternity leave • Unemployment, disability, and health insurance • Pension contribution • Portable benefits • Shared contribution from workers, platforms and clients, including taxation
Social dialogue	• Freedom of association and the right to collective bargaining	• Freedom of association and the right to collective bargaining	• Right to organise and negotiate collective agreements • Legal changes where independent contractors are excluded collective bargaining • Enable collective communication between workers
Economic and social context for decent work	*Nothing explicitly referred to in the code*	*Nothing explicitly referred to in the standards*	• Compliance with all relevant national laws in worker's jurisdiction • Client responsibility for digital supply chain • Access for policymakers to anonymous transactional platform data
• **Employment**			
Employment opportunity	*Nothing explicitly referred to in the code*	*Nothing explicitly referred to in the standards*	• Opportunity to access digital gig economy work • Provision of training opportunity. • Worker-accessible, portable work history and reputation profiles
Combining work, family, and personal life	*Nothing explicitly referred to in the code*	*Nothing explicitly referred to in the standards*	*Nothing explicitly referred to in the standards*
Stability and security of work	• Regular employment is provided	*Nothing explicitly referred to in the standards*	• Combination of stability and flexibility • Clarification of flexibility to choose employment status

907 Heeks 2017:33.

Equal opportunity and treatment in employment	• Prohibition on discriminatory practices	• Prohibition on discriminatory practices	• No discrimination • Data protection and privacy for both clients and workers
Dignity and respect at work	• No harsh or inhumane treatment allowed	• No abusive disciplinary practices	• Respectful and prompt communications between clients, platforms, and workers • Clear rules for work rejection and re-work, worker deactivation, worker ratings, and worker 'levelling-up. • Humane review of worker complaints • Neutral third-party dispute resolution mechanisms
• **Work conditions**			
Adequate earnings and productive work	• Living wages are paid	• Living wages are paid	• At least minimum wage paid taking unpaid time into account • Clear information and communication relating to tasks • Clear information about payment including schedule and conditions and non-payments • General details about client identity and task purpose • Rating system for both clients and workers
Decent working time	• Working hours that are not excessive	• Limitations on working hours and days	• Compliance with national working time directives and with ILO guidelines
Safe work environment	• Safe and hygienic working conditions	• Safe and healthy work environment	• Ensure potentially psychologically unsafe tasks are signalled, and support provided

Table 3: My adaptation of Heeks' Decent Work and the Digital Economy: A Developing Country Perspective on Employment Impacts and Standards in Online Outsourcing, Crowdwork, etc. (Heeks 2017:34-35)

The summary in Table 4 supports the view that most of the ILO decent work indicators can be adapted to apply to platform work. This is very important in that new standards in total need not be developed to ensure decent work for on-demand workers. I opine that to adapt some of the ILO decent work indicators will be less confusing than ending up with two completely separate sets of decent work indicator altogether.

One of the most noticeable differences between the ILO decent work indicators and Heeks' decent digital gig economy standards are those standards that apply to the gig economy specifically, for example, indicators in relation to novel issues experienced

in the gig economy, such as approaches to portable and shared social security benefits and contributions, and greater flexibility in respect of collective bargaining.

In contrast to the ILO decent work indicators, Heeks also proposes alternative standards applicable to data protection, privacy, and data security. The following part of the discussion aims to provide an explanation of the World Economic Forum's Charter of Principles for Good Platform Work, which is specifically directed at platform work, inclusive of on-demand work. It will show how deficits in the ILO decent work indicators and specifics for on-demand workers may be addressed.

3.6.3 The charter of principles for good platform work

The World Economic Forum (WEF)[908] published a White Paper on The Promise of Platform Work, which advocates that digital work platforms offer significant benefits to all parties concerned, including consumers, employers, and workers.[909] Much like the majority of other studies, it reveals the benefits available to workers in the emerging sector to include flexibility, inclusivity, employment opportunity, geographic diversity, formalisation, and reliable payment.[910]

For purposes of this part of the discussion, it also specifies certain areas of concern for platform workers, namely reasonable pay and fees; benefits and social securities; skills development opportunities; aspects related to dignity; and channels for voice and representation.[911] With a view to addressing these challenges, the WEF Charter

908 The World Economic Forum was established in 1971 and is an international organisation for public-private cooperation. The organisation aims to empower global leaders to shape the future for the better. Much of their research concerns the state of the South African economy and aspects about the future world of work. An important consideration for purposes of this study is the white paper on the promise of platform work and the subsequent Charter of Principles for Good Platform Work. WEF 2021. "Our Mission" https://www.weforum.org/about/world-economic-forum. Accessed 12 August 2021.
909 WEF 2020:5.
910 WEF 2020:11.
911 WEF 2020:12

of Principles for Good Platform Work proposes principles to achieve good platform work. Each principle is briefly described in Table 4 below.

WEF Principles	Description
Diversity and inclusion	• Inclusive and usable platform use and participation. • Platforms should encourage qualified participants from all backgrounds namely national, religious, gender, sexual orientation, and ethnic backgrounds, including persons with disabilities.
Safety and wellbeing	• Shared responsibility in relation to dignified working conditions by the platform, government, and the users of the platform. • Health and safety policies to protect workers from risks. • Protect and promote the physical and mental wellbeing of workers. • Strict adherence to policies and guidelines by users/clients. • Zero-tolerance for conduct that is incompatible with the platform's terms of use and service, including verbal and physical abuse, gender-based violence and sexual harassment. • Psychologically damaging tasks should be identified as such.
Flexibility and fair conditions	• Clear, transparent, and easily accessible terms and conditions. • Proper grounds and procedures for account deactivation should be clear, which includes processes to challenge such decisions. • Processes that respect confidentiality where appropriate. • Workers should be able to decline to accept offered tasks. • Workers should be able to decline to work at certain times. • Platforms should promote a culture of transparency and human accountability across use of algorithms. • Platforms should ensure that fairness and non-discrimination are a priority in the design of algorithms.
Reasonable pay and fees	• Full transparency on the basis for what workers will earn before deciding whether to accept tasks. • Workers classified as employees should earn at least the minimum wage of their jurisdiction, proportional to active working time and the reasonable expenses for their mode of work. • Workers who set their own rates should be able to do so in a way that reflects market dynamics. • Tips should always be in addition to reasonable earnings and should go entirely to workers. • Non-payment for tasks by users/clients should be subject to clear rules.
Social protection	• Collaboration between governments and platforms must take place to ensure that workers have access to a comprehensive set of reliable and affordable social protections and benefits that meet their individual needs. • Regulation should be adapted as appropriate to enable platforms to support the provision of such benefits to workers who are not classified as employees. • Contributions to public or private social protections and benefits could be made by stakeholders as appropriate, subject to employment status, jurisdictional context, and local conditions. • Social protections and benefits should be portable and pro-rated, where applicable and subject to local conditions and jurisdictional context.
Learning and development	• Encourage and enable individual professional development.

	• Collaboration by all stakeholders to ensure that workers have access to affordable educational and upskilling programmes to support their professional development. • Regulations should enable platforms to support workers who are not classified as employees to participate in upskilling programmes.
Voice and representation	• Proper channels, processes, or forums for workers to express their views on platform guidelines and practices to the platform. • Proper access to transparent and accountable dispute resolution mechanisms within a reasonable timeframe.
Data management	• Workers' access to the complete history of their platform use, which includes access to an aggregate review rating at any time. • Ongoing collaboration between platforms, policymakers, researchers, worker organisations and other parties to increase transparency and understanding of the platform economy with reference to the number, demographics and practices of workers using the platform.

Table 4: Summary of the WEF Charter of Principles for Good Platform Work. (WEF 2020:1-4)

3.6.4 The Fairwork principles for fair gig work

Fairwork is a project currently operational in 30 countries, across five continents. In terms of the project, working conditions on platform companies are scored against five established principles of fair "gig" work. These principles are fair pay, fair conditions, fair contracts, fair management, and fair representation.[912]

Taking a multi-stakeholder approach, comprising of platforms, governments, and civil society, the Fairwork Group drafted five fair work principles for the gig economy.[913] The principles outlined in Table 5 aim to provide a framework of decent work standards for gig work.[914]

Principles	Description
Fair pay	• Decent income taking account of work-related costs.
Fair conditions	• Workers' protection from foundational risks associated with the work performed. • Proactive measures to protect and promote the health and safety of workers.
Fair contracts	• Accessible, easily understandable and comprehensible terms and conditions to workers. • The party contracting with the worker must be subject to local law and must be identified in the contract. • Reasonable timeframe allowed for proposed changes to the terms and conditions.

912 Fairwork 2023. "Principles" https://fair.work/en/fw/principles/. Accessed on 8 February 2023.
913 Heeks *et al.* 2021:4.
914 Heeks *et al.* 2021:4.

	• No clauses that unreasonably restrict liability on the part of the platform. • No clauses that prevent workers from seeking redress for grievance.
Fair management	• A well-documented process through which workers can be heard, can appeal decisions affecting them, and be informed of the reasons behind those decisions. • A clear channel of communication to workers, involving the ability to appeal management decisions or deactivation. • Transparent and equitable use of algorithms. • Clear, documented policy that ensures equity in the way workers are managed on a platform.
Fair representation	• Documented processes through which workers' voice can be expressed; the right to organise in collective bodies. • Platforms should be prepared to cooperate and negotiate with workers.

Table 5: My adaptation of Fairwork's Gig Work Principles. (Fairwork 202. Available at https://fair.work/en/fw/principles/fairwork-principles-gig-work/)

Similar to Heeks' decent digital gig economy standards, the Fairwork principles further refine the ILO's decent work indicators that broadly speak to the realities of the modern-day gig economy, and which came into effect on 1 September 2022.

Of importance here is the fact that the above-listed set of principles is an excellent referencing point to identify the basic decent work indicators for on-demand work. The Fairwork team further categorised the principles into two 'basic' and 'advanced' indicators, as shown in Table 6.[915] The 'basic' indicator demonstrates the minimum level of decent work, whereas the 'advanced' indicator shows the level beyond the basic minimum levels. Platforms are then assessed against these principles.

Fairwork Principle	Basic Indicator	Advanced Indicator
Fair pay	Pays at least local minimum wage.	Pays the local minimum wage, including costs.
Fair contracts	Mitigates task-specific risks.	Actively improves working conditions.
Fair conditions	Clear terms and conditions are available	The contract genuinely reflects the nature of the employment relationship.
Fair management	There is due process for decisions affecting workers.	There is equity in the management process or informed consent for data collection.
Fair representation	There are worker voice mechanisms and freedom of association.	There is a collective body of workers that is recognised and can undertake collective representation and bargaining.

915 Heeks *et al.* 2021:4.

Table 6: Heeks' basic and advanced indicators for Fairwork principles.

Together with the five Fairwork principles, these basic and advanced indicators could serve as a point of reference to limit the scope of the study to specific categories of basic decent work indicators for on-demand workers.[916]

To examine the extent to which the ILO decent work indicators apply to on-demand workers, the discussion above provided an overview of three sets of standards and principles compiled by Heeks, the WEF, and the Fairwork group.

Table 7, which I compiled, provides an overview of each set of principles and standards and indicates to what extent specific principles or standards are linked to an ILO decent work standard in section A. Section B outlines additional indicators that could be valuable to be considered as emerging decent work indicators for on-demand workers.

3.6.5 Categorising minimum decent on-demand work indicators

The ILO standard pertaining to fair employment opportunities led to the WEF incorporating such principle in their Charter for Good platform work and called for inclusive platform use. Heeks' decent digital standards advocate for inclusive access to the use of platforms, but the Fairwork Group in their Fairwork principles is silent on this issue. The second ILO indicator for decent work, referring to adequate earnings and productive work, was incorporated by the WEF and asks for full transparency on earnings even before the tasks are accepted. It calls for minimum wage provisions and flexibility to set their own rates, and calls for non-payments to be subject to clear rules. Heeks also calls for a minimum wage and clear information relating to tasks and payment, but Fairwork refers to decent work where pay is fair and ensures a decent

916 See Chapter 6 for a discussion on the *Code of Good Practice for the Regulation of Platform Work* in South Africa.

income. Decent working time as the third ILO indicator for decent work, broadly stated, calls for decent working time, which is not called for by the WEF, whereas Heeks requires compliance with national working time and ILO guidelines to be key to ensure decent work on the platform. The Fairwork Group calls for aspects related to fair pay and fair working time. In this context, fair working time refers to the time spent actively working.[917]

Both the WEF standards and Heeks advocate for flexibility with regard to combining work, family, and personal life, although Heeks stresses the need for leave entitlements. The Fairwork principles, on the other hand, are silent on this topic. The fifth indicator relates to work that should be abolished. The WEF, Heeks, and Fairwork do not have specific standards for this indicator. However, the Global Social Outlook Report noted that the potential exists for it to occur on digital platforms.[918] All three call for stability and security at work, as the sixth indicator. The WEF and the Fairwork Group require fair procedures for the deactivation of profiles, while Heeks calls for more flexibility to choose one's employment status.

The seventh indicator, relating to discrimination, is provided for in the WEF principles and in Heeks' standards. Both advocate for anti- or non-discrimination and fairness. Fairwork's principle revolves around fair management practices. The eighth indication concerns a safe working environment, and all three sets of principles and standards advocate for healthy and safe work environments. Interestingly, Heeks calls for potentially psychologically unsafe tasks to be identified. On the matter of social protections, the WEF and Heeks advocate for various private and public social protections. The Fairwork principles are silent on this.

All three sets of principles and standards support and advocate the right to organise and the right to fair representation. The last of the ILO's indicators, namely the

917 Fairwork 2023. "Principles" https://fair.work/en/fw/principles/. Accessed on 8 February 2023.
918 ILO World Employment and Social Outlook 2021:218-219.

economic and social context, is only supported by Heeks, who calls for it to be compliant with the national laws.

An analysis of the principles and standards also indicates that there are additional indicators that do not clearly form part of the broader ILO decent work indicators. However, it is argued that they are new variations of existing indicators. A discussion on these indicators is presented below.

The WEF, Heeks, and Fairwork call for clear conditions of work that relate to the terms and conditions of service. The same goes for transparency with regard to the algorithmic management practices and proper dispute resolution processes. Heeks and the WEF call for accessible and transparent data management systems, as well as training opportunities for platform workers, whereas Fairwork does not include anything in this regard in its principles.

Considering the discussion above, I summarised the sets of principles and standards as below for ease of reference:

Indicators	WEF – Charter of Principles for Good Platform Work	Heeks – Decent Digital Standards	Fairwork – Principles
Section A: ILO indicators for decent work			
Employment opportunities	Calls for inclusive platform use.	Broad access to platform use.	*Nothing explicitly referred to in the main principles.*
Adequate earnings and productive work	Full transparency on earnings before tasks are accepted. Minimum wage provisions for employees of platforms. Flexibility to set own rates. Non-payments subject to clear rules.	Minimum wage. Clear information relating to tasks and payments.	Fair pay and decent income.
Decent working time	*Nothing explicitly referred to in the main principles.*	Compliance with national working time provisions and the ILO guidelines.	Aspects on fair pay and waiting times.

Combining, work family and personal life	Aspects on choosing when to perform tasks and at what times.	Annual, sick, and maternity leave provision.	*Nothing explicitly referred to in the main principles*.
Work that should be abolished	*Nothing explicitly referred to in the main principles.*	*Nothing explicitly referred to in the main standards.*	*Nothing explicitly referred to in the main principles.*
Stability and security of work	Proper grounds and procedures for deactivation.	Flexibility to choose employment status.	Aspects on fair management and deactivation.
Equal opportunity and treatment in employment	Inclusive and usable platform participation. Non-discrimination and fairness in the design of algorithms.	Anti-discrimination.	Aspects on fair management.
Safe work environment	Health and safety policies against risks. Protect and promote physical and mental well-being. Policy against abuse, violence, and harassment.	Identify potentially psychologically unsafe tasks.	Reference to fair conditions and risks associated with tasks.
Social security	Comprehensive set of reliable and affordable social protections and benefits. Contribution to private or public social protections and benefits.	Unemployment, disability, and health insurance. Pension contribution. Portable benefits. Shared contribution.	*Nothing explicitly referred to in the main principles.*
Social dialogue	Proper channels, processes, or forums for social dialogue.	Right to organise and negotiate collective agreements. Collective communication between workers.	Fair representation.
Economic and social context of decent work	*Nothing explicitly referred to in the main principles.*	Compliance with national laws.	*Nothing explicitly referred to in the main principles.*
Section B: Additional indicators not covered above.			
Dignity and respect	*Nothing explicitly referred to in the main principles.*	Respectful and prompt communication.	*Nothing explicitly referred to in the main principles.*
Contractual provisions of work	Dignified working conditions. Clear transparent, and easily accessible terms and conditions.	Clear rules for work rejection, worker deactivation, worker ratings, and worker's level/status.	References to risks at work
Algorithmic management	Calls for human accountability with algorithmic management systems.	Human review of worker complaints.	Transparent and equitable use.

	Multi-stakeholder collaboration on data use.		
Data management and transparency	Access to complete history of platform use. Access to ratings data.	Worker-accessible, portable work history and reputation profile. Data protection and privacy for both client and worker.	*Nothing explicitly referred to in the main principles.*
Skills development	Encourages individual professional development. Upskilling programmes.	Provision for training opportunities.	*Nothing explicitly referred to in the main principles.*
Dispute resolution	Access to dispute a transparent and accountable resolution process.	Neutral third-party dispute resolution.	Fair management. Appeal process for decisions.

Table 7: Summary of platform work standards and principles. Author's own contribution.

Due to practical constraints, this research cannot provide a comprehensive review of all the decent work indicators. The basic conditions of service and its clauses can serve as a point of departure. However, due consideration will be given to the conditions relating to decent pay and decent working hours. For purposes of this study, decent indicators relating to leave entitlements will not be considered, but are identified as a topic for future research.

Freedom of association is a vital fundamental principle, seeing that it is instrumental in allowing workers to pursue their own best interest collectively. Mackett emphasises that there is a need for 'democratisation of work' in several low-skilled occupations in South Africa.[919] This, in turn, would entail the strengthening of workers' participation practices and representative participation.[920]

In addition, as mentioned in Chapter 2, novel problems associated with platform work require new and innovated solutions which could be found outside the restrictions of labour laws. Therefore, aspects governed by the contractual provisions could also be improved to provide additional protection for the provision of working time and reasonable pay. It is acknowledged that there is a need to consider alternative

919 Mackett 2020:233.
920 Mackett 2020:233.

avenues to strengthen the decent work deficits of on-demand workers, and possible solutions could take the form of a set of guidelines or policy approaches. Against this backdrop, Chapters 4, 5 and 6, which discuss the Irish, Australian and South African perspectives will centre only on the following basic decent on-demand work indicators:[921]

- decent worker classification;
- decent working conditions with reference to pay and working hours; and
- decent structures for multi-part engagement.

In the following part of this chapter, I will discuss the EU perspectives on the gig economy. The main topics covered in the discussion below are also relevant to the Irish position applicable to Chapter 4, but not as relevant to South Africa since we are not a member state to the EU.

3.7 EUROPEAN UNION PERSPECTIVES ON THE GIG ECONOMY

3.7.1 Introductory remarks

A key aspect of the EU is to bestow certain values on its EU countries that reflect the values of human dignity, freedom, equality, democracy, the rule of law, and the advancement of human rights.[922] Keeping this in mind, the investigation of the influences of the modern-day gig economy is a continuing concern within the EU. Recent trends in the gig economy have led to a proliferation of studies focused on improving the working conditions of its citizens by establishing standards to combat precarious forms of employment.[923] In response to this, the EU has approved and adopted rules to extend minimum rights to all employees, including those working as

921 It must be repeated that due to page limitations not all the decent work indicators can be considered and discussed. However, I argue that the decent worker classification, decent working conditions with regard to decent pay and decent working time, and decent multi-stakeholder engagement structures serve as baseline indicators for advocating for decent on-demand work.

922 Europa 2019. "The EU in Brief", https://europa.eu/european-union/about-eu/eu-in-brief_en. Accessed on 1 July 2019.

923 Jovetic 2019. "New EU Law Establishes Minimum Rights for 'Gig Economy' Workers", https://www.european-views.com/2019/04/new-eu-law-establishes-minimum-rights-for-gig-economy-workers/. Accessed on 1 July 2019.

platform workers.[924] For purposes of this study, the implementation of the aforesaid directive by Ireland could serve as a comparative example. As stated in Chapter 1, Ireland has enacted several statutes that are based on the applicable EU directives. An analysis of the key directives provides the theoretical foundation for the discussion in Chapter 4 that involves the Irish framework. One must keep in mind that Ireland is a member state of the EU and as such has a legal obligation to give effect to the directives that are discussed in the next section.

Various terms, such as the 'sharing economy' and the 'collaborative economy', are used to describe the broader scope[925] of platform-based work across the European Union.[926] The size of the digital labour platform economy across the EU grew from €3 billion in 2016 to €14 billion in 2020.[927] It acknowledges the precariousness of platform work, but admits that digital labour platforms bring with them innovation, create jobs, provide an income for those who find access to employment in the labour market difficult, and enhance the EU's competitiveness.[928]

In a survey across the European Union in 2016, 17 per cent of the 14 050 respondents from all 28 of the EU member states[929] indicated that they have used services on a collaborative platform as either a service provider or a client.[930] Of the 17 per cent, respondents from Ireland, who accounted for 35 per cent of the respondents, were

924 European Parliament 2019. "Gig economy: EU law to improve workers' rights (infographic)", http://www.europarl.europa.eu/news/en/headlines/society/20190404STO35070/gig-economy-eu-law-to-improve-workers-rights-infographic. Accessed on 10 May 2019.

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

926 Eurofound https://www.eurofound.europa.eu/topic/platform-work. Accessed on 20 January 2021.

927 European Commission 2021. "Protecting people working through platforms: Commission launches second-stage consultation of social partners", https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2944. Accessed on 27 July 2021.

928 European Commission 2021. "Protecting people working through platforms: Commission launches second-stage consultation of social partners", https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2944. Accessed on 27 July 2021.

929 The United Kingdom was still included in the survey as a member state prior to it voluntarily ending as member state to the European Union on 31 January 2020.

930 Florisson 2018:5.

amongst those most likely to have used collaborative platforms. More recently in 2021, approximately 11 per cent of the EU workforce have provided services using a platform.[931] The European Commission's Joint Research Centre also confirms that men account for 66 per cent of the platform economy's workforce, with the majority of the workers aged around 34 years.[932] They are thus younger than the average of 42.6 years in the traditional economy.[933] The European Commission agrees that the Covid-19 crisis has accelerated the digital transformation of platform work, which subsequently, similar to our South African situation, also highlighted the precarious working conditions and vulnerabilities that many platform workers face.[934] An explanation of each key component of the process thus far will be outlined below.

3.7.2 An overview of key initiatives relevant to platform work

This section will dissect the key initiatives by different bodies over time. The aim thereof is to address and understand platform work in the EU member states. It does not revolve around specifics to address the deficits experienced in decent on-demand work in the gig economy. The value of this part of the chapter lies in show-casing the continuous developments in the EU in respect of addressing platform work as a new emerging form of non-standard work.

931 European Commission 2021. "Questions and Answers: First stage social partners consultation on improving the working conditions in platform work", https://ec.europa.eu/commission/presscorner/detail/es/qanda_21_656. Accessed on 25 July 2021. This accounts for roughly 21 million people in the European Union. See also European Commission (1st phase report) 2021:6.

932 European Commission Second-phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work 2021:10.

933 European Commission Second-phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work 2021:10.

934 European Commission First-phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work 2021:2.

3.7.2.1 The European Agenda for the Collaborative Economy

Since 2015, the European Commission has been engaged in a public consultation to gather information from several stakeholders, which resulted in two communications on Online Platforms[935] and on Collaborative Economy[936], which were released in 2016.[937] The rationale behind the previously mentioned communications is vested in efforts to resolve the classification of activities separating professionals from individuals occasionally working on collaborative platforms.[938]

3.7.2.2 The European Pillar of Social Rights

The 2017 European Pillar of Social Rights delivers new rights, improves existing rights, and provides that employment relationships that lead to precarious working conditions shall be prevented.[939] It addresses several policy changes associated with innovative and new forms of work, which include on-demand work.[940] Principle 12 of the Pillar provides that "Regardless of the type and duration of their employment relationship, workers, and, under comparable conditions, the self-employed, have the right to adequate social protection."[941] In light of this principle, a Council Recommendation on access to social protection – making social protection systems fit for the future – advocates for a more neutral approach to the labour status of workers, thus making the basic principles of social security coverage equal for all workers, irrespective of their classification.[942]

935 Communication from the Commission to the European Parliament, the Council, the European Committee of the Region. 2016. Online Platforms and the Digital Single Market Opportunities and Challenges for Europe. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016DC0288. Accessed on 15 February 2021.

936 Communication from the Commission to the European Parliament, the Council, the European Committee of the Region. 2016. A European agenda for the collaborative economy. https://ec.europa.eu/growth/single-market/services/collaborative-economy_ro. Accessed on 15 February 2021.

937 Bogliacino 2019:par 3.2.1.

938 Bogliacino 2019:par 3.2.1. The classification dilemma has still not been resolved and different jurisdictions deal with the status issues differently.

939 European Pillar of Social Rights 2017:Article 5(d).

940 Eurofound https://www.eurofound.europa.eu/topic/platform-work Accessed on 21 January.

941 Principle 12 of the European Pillar of Social Rights, 2017.

942 Schoukens, Barrio & Montebovi 2018:224.

3.7.2.3 Directive on Transparent and Predictable Working Conditions

Against the backdrop of the European Pillar for Social Rights' roll out-initiative, in 2019 the European Parliament and Council announced the Directive on Transparent and Predictable Working Conditions in the European Union[943] that highlighted the status of on-demand workers by confirming that on-demand work could fall within the Directive's scope.[944] The Council Recommendation followed the directive on access to social protection for workers and the self-employed.[945] The Recommendation reaffirmed that recent forms of work, such as on-demand work, increased in importance since the 2000s.[946] Likewise, it provides that on-demand workers be expressly excluded from social protection schemes, which add to their valuableness in the employment context.[947] More importantly, for purposes of this study, the directive influences the Irish labour framework in that it will considerably influence the application of the *Terms of Employment Act*.[948] In addition, it will supplement the *Employment (Miscellaneous Provisions) Act*[949] to the extent that it relates to the shortcomings of zero-hour contracts.[950] In pursuit of improved working conditions for all platform workers, the European Commission's 2020 Communication reiterated the need for improved working conditions for platform work for the sustainable growth of the platform economy.[951] In summary, the recommendation calls for social security benefits to be extended to on-demand workers.

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

944 Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019: Article 8.

945 Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed 2019/C 387/01.

946 Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed 2019/C 387/01:Sect. 11.

947 Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed 2019/C 387/01: Sect. 18.

948 *Terms of Employment Act* 5/1994. Hyde 2019. "EU Directive on Transparent and Predictable Working Conditions and its effect on existing Irish law", https://ireland.bloomsburyprofessional.com/blog/eu-directive-on-transparent-and-predictable-working-conditions-and-its-effect-on-existing-irish-law. Accessed on 28 July 2021.

949 *Employment (Miscellaneous Provisions) Act* 38/2018.

950 Hyde 2019. "EU Directive on Transparent and Predictable Working Conditions and its effect on existing Irish law", https://ireland.bloomsburyprofessional.com/blog/eu-directive-on-transparent-and-predictable-working-conditions-and-its-effect-on-existing-irish-law. Accessed on 28 July 2021. Zero-hour contracts refer to types of contracts between an employer and a worker, according to which an employer is not obliged to provide any minimum working hours and the worker is not obliged to accept any work that is offered.

951 European Commission 2020. "Commission Work Programme 2020: A Union that strives for more", https://ec.europa.eu/info/sites/default/files/cwp-2020_en.pdf Accessed on 28 July 2021. More specifically, the communication asserts the several opportunities that online platforms

3.7.2.4 European Parliament Report on a strong Europe for Just Transitions

The 2020 European Parliament Report on 'a strong Europe for Just Transitions' acknowledges that socially sustainable work and employee participation in determining working conditions are more important than ever.[952] Aimed at achieving this goal, it requested of the Commission to propose a directive on decent working conditions and rights in the digital economy.[953] Amongst other aspects, the Commission must also ensure that platform businesses comply with national and European legislation, clarify the employment statuses of platform workers,[954] and safeguard platform workers' working conditions, social protections and health and safety, and their right to organise.[955] In addition, the European Commission's 2021 Commission Work Programme echoes the vulnerabilities of platform workers by calling for legislative proposals that ensure 'dignified, transparent and predictable working conditions' for platform workers.[956] The programme is still ongoing and will continue to be led by the 2030 Agenda and its Sustainable Development Goals.[957]

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have created for labour. However, it also outlines the various vulnerabilities and risks associated with this type of work, such as the workers' employment status, poor working conditions, lack of access to social protection and the lack of representation and collective bargaining.

952 European Parliament 2020. "REPORT on a strong social Europe for Just Transitions (2020/2084(INI))" https://www.europarl.europa.eu/doceo/document/A-9-2020-0233_EN.pdf. Accessed on 27 July 2021.

953 European Parliament 2020. "REPORT on a strong social Europe for Just Transitions (2020/2084(INI))", https://www.europarl.europa.eu/doceo/document/A-9-2020-0233_EN.pdf. Accessed on 27 July 2021. The directive referred to covers all forms of work including, non-standard workers, workers in platform companies and the self-employed.

954 By way of a rebuttable presumption of an employment relationship.

955 European Parliament 2020. "REPORT on a strong social Europe for Just Transitions (2020/2084(INI))", https://www.europarl.europa.eu/doceo/document/A-9-2020-0233_EN.pdf. Accessed on 27 July 2021. See page 19-20 of the Report.

956 European Commission 2020. "2021 Commission work programme – from strategy to delivery", https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1940. Accessed 27 July 2021.

957 European Commission 2020. "Commission work programme – key documents", https://commission.europa.eu/publications/2021-commission-work-programme-key-documents_en. Accessed on 8 February 2023.

3.7.2.5 The European Commission's social partner consultation

The European Commission submits that digitisation and the need for more flexible work have led to the growth of the platform economy.[958] This initiative aims to ensure that "EU competition law does not stand in the way of initiatives to improve working conditions through collective agreements for solo self-employed where they choose to conclude such agreements, while guaranteeing that consumers and small and medium enterprises (SMEs) continue to benefit from competitive prices and innovative business models, including in the digital economy."[959] The 'European Commission inception impact assessment on collective bargaining agreements for self-employed – scope of application of EU competition rules', is essential to those working on online platforms.[960] The purpose of the initiative is to invite European social partners to submit their views on the need and direction of possible responses to improve the working conditions in platform work.[961] Other initiatives in the EU context also include regulations that promote fairness and transparency for business users on online intermediation services,[962] and provide rights to workers concerning personal data protection.[963] In line with article 154(2) of the Treaty on the Functioning of the European Union,[964] the European Commission is required to consult the social partners before submitting social policy related proposals.[965] In the succeeding

958 European Commission. 2021. "Questions and Answers: First stage social partners consultation on improving the working conditions in platform work", https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_656. Accessed on 12 Aril 2021.

959 European Commission. 2021. "Questions and Answers: First stage social partners consultation on improving the working conditions in platform work", https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_656. Accessed on 12 Aril 2021.

960 Citron & Little. 2021. "European Commission Invites Comments regarding Collective Bargaining for the Self-Employed", http://competitionlawblog.kluwercompetitionlaw.com/2021/01/13/european-commission-invites-comments-regarding-collective-bargaining-for-the-self-employed/. Accessed on 10 April 2021.

961 European Commission. 2021. https://ec.europa.eu/commission/presscorner/detail/en/IP_21_686. Accessed on 10 April 2021. The second stage of the process is foreseen for April-May 2021 and the publication of the Commission's proposal for the fourth quarter of 2021.

962 For more information, see the EU Platform to Business Regulation 2019/1150.

963 For more information, see the EU General Data Protection Regulation 2016/679.

964 Treaty on European Union and the Treaty on the Functioning of the European Union 2012/C 326/01.

965 Article 154(1) of the Treaty on the Functioning of the European Union places a duty on the European Commission to promote consultation between management and labour at Union

discussion, core perspectives from the outcomes of each stage of consultation are discussed.

3.7.2.5.1 Overview of findings

Digital transformation is a crucial component of improving not only the economic resilience, but also the social and green resilience of EU member states.[966] Furthermore, digital transformation creates novel opportunities for job creation for workers who find it difficult to access the labour market. This includes new flexible work arrangements utilised in the platform economy.[967] The 1st Stage Report reveals that platform work has the potential to collapse several space, time and organisational boundaries to working, and can be beneficial for an improved work-life balance.[968] That said, certain types of platform work are, unfortunately, also associated with precarious working conditions echoed in inadequate access to social protection.[969] In harmony with the ILO's decent work indicators, the Reports emphasised seven areas of concern insofar as platform work is concerned, namely employment status, working conditions,[970] access to social protection, access to collective bargaining rights, algorithmic management, opportunity for skills development, and the cross-border dimensions of platform work.[971] The following discussions will briefly outline each of these concerns to the degree that it concerns on-demand workers.

level through dialogue. Article 154 (2) reinforces this vital step and places a duty on the Commission to consult management and labour before they submit a proposal in the social policy field.

966 First-phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work 2021:2.

967 First-phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work 2021:2.

968 First-phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work 2021:2.

969 First-phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work 2021:2.

970 With reference to parental rights (including maternity and paternity rights) as well as social protection rights.

971 First-phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work 2021:2.

The classification of labour remains the biggest barrier to the attainment of decent working conditions and social protection rights for people working through platforms in the EU.[972] In keeping with the majority of labour platform practices, the 1st Stage Report points out that the terms and conditions remain a legal hurdle due to the *de facto* categorisation of platform workers as 'self-employed'.[973] In this respect, the lack of clarity regarding platform workers' misclassification increases the precariousness of this type of work.[974]

The labour platform's surveillance, management and performance appraisal impacts on on-demand workers' flexibility, autonomy, and ultimately their well-being.[975] In addition, earnings for on-demand work are low as compared to crowdwork.[976] Payment for actual time worked is also a major concern for on-demand workers, because they are not paid for the 'waiting time' in between tasks.[977] Health and safety risks associated with on-demand work in the EU is an ongoing issue.[978] The 1st Stage Report reiterates the findings of the ILO's report on the role of digital labour platforms in transforming the world of work, by drawing attention to the adverse consequences of the continuous rating systems used by platforms.[979] This, in turn, increases the rapid pace of work inducing the risk of motor vehicle accidents for those performing ridesharing and delivery tasks.[980] In addition, psycho-social risks such as stress, burn-out, cyber bullying, and gender-based violence and harassment are also associated

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972 First-phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work 2021:7.

973 First-phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work 2021:7.

974 Second-phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work 2021:35.

975 First-phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work 2021:10.

976 First-phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work 2021:10.

977 First-phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work 2021:10. On-demand workers are also penalised by the platform for declining work.

978 On the topic of health and safety concerns, the EU-OSHA of 2017 notes that the overlapping characteristics between agency work, temporary work and platform work could result in platform workers being exposed to similar psychological and physical risks. See Florisson 2018:68.

979 European Commission (1st phase report) 2021:13.

980 European Commission (1st phase report) 2021:13. This is also an occurrence in the South African gig economy. See De Greef 2019. "One More Way to Die: Delivering Food in Cape Town's Gig Economy" https://www.nytimes.com/2019/08/24/world/africa/south-africa-delivery-deaths.html. Accessed 27 July 2021.

with on-demand work.[981] Platforms unilaterally set contractual terms similar to basic conditions of employment,[982] with little to no negotiation processes for engagement between the platform and the on-demand worker.[983]

Eurofound and Florisson note that a further risk is that platform workers are constantly on-call, which has a negative impact on their work and life balance.[984] The same study has also found that the income received from platform work is highly variable and unpredictable.[985] Lastly, the EU 2nd phase Report shows that users on a platform can be deactivated with little to no justification from the platform,[986] which places on-demand workers in a weak bargaining position.[987]

The 2nd phase Report advises that policies surrounding the working conditions of platform workers will, in the absence of a common policy at the EU level, evolve nationally and will increase the risk of further regulatory fragmentation across all member state countries.[988] The proposed approaches for EU action are summarised as follows:[989]

- Facilitate the correct classification of platform workers by introducing a rebuttable presumption of an employment relationship.[990]

981 European Commission (1st phase report) 2021:13.
982 Gyulavari 2020:3. In the EU, the terms and conditions are set by the relevant platforms due to the lack of universal national and international regulation. See also European Commission (2nd phase Report) 2021:67. The contractual terms typically relate to pay, working time, dispute resolution clauses, customer services, deactivation clauses, and clauses relating to privacy policies.
983 Second-phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work 2021:67.
984 Florisson 2018:69.
985 Florisson 2018:77.
986 Second-phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work 2021:67.
987 Second-phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work 2021:67.
988 Second-phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work 2021:80.
989 Second-phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work 2021:81. The Report mentions that the listed measures could form part of a package of both binding and non-binding instruments. In addition, it could target all persons working on labour platforms regardless of their employment status, or be limited to 'workers' only.
990 Second-phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work 2021:81.

- Shift the burden of proof or lower the standard of proof for platform workers or their representatives.[991]
- Introduce simplified administrative procedures to examine the employment status between the platform and the platform worker.
- Adopt a process for the certification of work-related contracts at the request of either parties by labour authorities or other independent bodies.
- Establish specific criteria or indicators specific to platform work to clarify the employment status process.
- Strengthen the sharing of information for platform workers affected by algorithmic management, which also includes the enhancement of consultation rights. In addition, establish internal procedures that guarantee timely and justified human oversight.
- Introduce compliance measures in line with national traditions, which could include rules on dispute resolution options, union representation, and collective bargaining. The previously mentioned rules could also strengthen social dialogue in platform work.

The 2nd phase Report notes that the proposed options listed above serve as benchmark considerations to form a Directive,[992] a Council Recommendation,[993] or a combination of both.[994] In view of this, the European Commission introduced the draft directive on improving working conditions in platform work in December 2021 that aimed to introduce measures to determine the status of 'gig workers'[995] working on

991 Second-phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work 2021:82. In this regard, the platform worker would have to establish basic facts from which it can be presumed that an employment relationship exists. The Report also highlights some *prima facie* evidence to be considered, such as the fact that the remuneration is determined by the platform, that the platform controls or restricts the communication between the on-demand worker and the client, and lastly, that the platform requires of a worker to respect specific agreed-upon rules.

992 Second-phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work 2021:87. A Directive to this effect would consist of standards and procedures that could provide the much-needed certainty with regard to the compulsory requirements to be applied by EU member states.

993 This would generally provide for policy guidance and a common policy framework at EU level without mandatory requirements.

994 Second-phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work 2021:87.

995 It must be noted that the EU draft directive refers to gig workers and not on-demand workers specifically. Reference to gig work is, therefore, much broader than on-demand work, seeing that it includes crowdwork as well.

digital platforms.[996] The draft directive also proposed a comprehensive framework for the correct classification of gig workers across the EU.[997]

I am of the view that the EU has made significant progress in considering legal and other measures to regulate platform work. In addition, the draft directive serves as an informative policy approach that advocates for better working conditions, improved transparency, fair practices, and accountability. Keeping in mind that the aforesaid policy approach is not binding on South Africa, we stand to learn a great deal from the manner in which the stakeholders were consulted. This contributes to answering the research question of how the EU approaches can alleviate the decent deficits experienced by on-demand workers. Valuable lessons can thus be drawn from the EU's and the draft directive's approach.

3.8 COMMENTS ON REGIONAL PERSPECTIVES ON DECENT WORK AND THE GIG ECONOMY

Africa is notorious for decades of economic stagnation and has consequently been structurally dependent upon foreign aid while enduring exploitation of its resources.[998] The ILO's role in creating forums for dialogue, especially those associated with the African Union, remains critical in assuring that programmes for development within the African context are Africa-led.[999] The informal sector is prevalent in most emerging economies,[1000] and South Africa, as a leading emerging economy on the African continent, is not spared. Approximately 85.8 per cent of the employment on the continent consists of informal work[1001] with roughly 4.8 million African workers

996 European Commission 2021. "Commission proposals to improve the working conditions of people working through digital labour platforms", https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6605. Accessed on 25 January 2023.
997 Draft Directive of the European Parliament and the Council on Improving Working Conditions in Platform Work 2021:Art 1(1). In addition, Art 1(2) proposes procedures to ensure that gig workers are correctly classified.
998 Anwar & Graham 2021:238.
999 Bellucci & Otenyo 2019:216.
1000 Beghelli 2019:6.
1001 Anwar & Graham 2021:238.

indicating that they derived an income from platform work.[1002] In Africa, a convergence is gradually occurring between the informal sector and the gig economy due to a grey area within their respective regulatory frameworks. This creates a fertile ground for the multiplication of on-demand businesses, which play a crucial role in the global digital market.[1003] Bellucci and Otenye opine that the informal sector has room to reorganise itself to take advantage of opportunities in the global market, which they have previously not been able to.[1004] The participation of African gig workers therefore presents a series of new work opportunities across the continent. However, as previously stated, these employment opportunities are still regarded as a grey area and fall outside the scope of labour and social protection. This subsequently leaves tens of thousands of African on-demand workers experiencing various forms of vulnerability.

The quality of the work performed in African countries is central to growing inequalities.[1005] That said, digital platforms have immense potential to provide workers in developing countries, especially migrant workers, the youth, women and people with disabilities access to income opportunities that they normally would not have.[1006] This opportunity, in my opinion, also calls for the protection of these workers to ensure decent work, hence the question if South Africa's legal instruments advocate sufficiently for decent on-demand work in its gig economy.

As stated in Chapter 1 of the thesis, one needs to be mindful of the context in which the selected countries operate. I take cognisance of legislation that may have different underlying objectives and policy considerations that differ from the South African context. In addition, I agree that an African perspective could be beneficial for future studies. However, no previous study, to my knowledge, involves an African perspective to the achievement of decent on-demand work on the continent. Against this backdrop and in the absence of comparative measures, I strongly argue that South

1002 Anwar & Graham 2021:238.
1003 Beghelli 2019:8.
1004 Bellucci & Otenyo 2019:214.
1005 Marckett 2020:203.
1006 ILO World Employment and Social Outlook 2021:18.

Africa is experiencing and will continue to experience many of the same difficulties caused by the gig economy as is the case in Australia and Ireland.[1007]

3.9 SUMMARY

This chapter aimed to set out the theoretical foundation of international policy considerations that signatory states need to follow to achieve decent work within their national borders. Of specific importance, as outlined in the discussion above, is that South Africa has thus far accepted the ILO core conventions that form the basis for regulating certain prescribed minimum employment standards. I also argued that the ILO has adopted conventions and recommendations that deal with components of decent work in the broader gig economy. These were discussed under four main parts, namely the ILO perspectives on the changing world of work, measuring decent work, decent work for on-demand workers, and lastly, EU perspectives on on-demand work.

It was noted that South Africa had not ratified crucial conventions that could resolve several decent work deficits. A detailed summary was presented in Table 1 of this chapter. I argue that these conventions, although not ratified, play a significant role in advocating for decent work for on-demand workers. Moreover, I argue that many of the relevant conventions can be extended to on-demand work, especially if one considers the broader interpretation of reference to a 'worker' as compared to an 'employee'. This then answers the question in the affirmative if the ILO approaches can counter the deficits experienced by on-demand workers, seeing that the organisation advocates for decent work for all.

Before I consider the foreign perspectives on decent work in the gig economy in Chapters 4 and 5, this chapter reflected upon four sets of principles or standards that are specifically applicable to platform work. The broader ILO conventions and principles were narrowed down. It is necessary to keep in mind that the study would

1007 The seasons for selecting these countries have been elaborated on in Chapter 1. See para 1.5.

be too broad and comprehensive if the thesis covered all the ILO decent work indicators. This said, and within the limitation of this research, I compared Heeks' decent digital gig economy standards, the WEF's charter of principles for good platform work,[1008] and lastly, the Fairwork gig work principles as a means to identify basic decent work indicators specific to on-demand work in the gig economy. I regard the preceding works as the most prominent instruments in attempting to ensure decent work for on-demand workers.

It is acknowledged that each decent work indicator plays a vital role when advocating for decent on-demand work. However, I argue that a comparative study of the following categories of decent on-demand work will suffice for now. They form the basis of the discussions in the chapters to come:[1009]

- Decent worker classification.
- Decent working conditions with reference to pay and working hours;[1010]
- Decent multi-stakeholder engagement.

The second part of this chapter analyses the EU policy approaches applicable to decent platform work for all EU member states. This sets the scene for the comparative chapter to follow, and it is important to note that South Africa is not bound by any EU principles. The following limitations were noted: Due to the length constraints and within the limitation of the study, this chapter presented an overview of the policy considerations which are intended to serve as a basis for the discussion in Chapter 4.

1008 WEF 2020. "The Charter of Principles for Good Platform Work", https://www.weforum.org/reports/the-charter-of-principles-for-good-platform-work. Accessed on 24 February 2022.

1009 It must be remembered that leave is not included as an indicator for purposes of this study. That said, it does warrant further research.

1010 This excluded other issues such as leave provisions and overtime, as the work would become too voluminous, and could and should form part of a separate study in future.

CHAPTER 4: PERSPECTIVES ON DECENT ON-DEMAND WORK IN IRELAND

4.1. INTRODUCTION

The main research question of this thesis relates to whether a country, in this case, South Africa, sufficiently advocates for decent work for on-demand workers in the modern-day gig economy. In this chapter, I explore the degree to which Ireland advocates for decent on-demand work. As mentioned in Chapter 3, to avoid the potential problem that the scope of the thesis might be too broad, attention will be given to three minimum decent work indicators.[1011] This comprises decent working hours, decent pay, and decent multi-stakeholder engagement.

This chapter is subdivided into four sections. The first provides an overview of Ireland's legal system and the rationale for this part of the study. The second part provides an overview of the size and growth of on-demand work in Ireland. The third part analyses the classification of on-demand work under the Irish legal framework, primarily through the interpretation of statutory provisions in selected cases. Subsequent to the analysis described above, this part of the study will consider how the traditional classification of labour could apply to on-demand work in the Irish gig economy.

It must be kept in mind that the beforementioned is done to identify best practices for the classification of on-demand work. Part four of this chapter highlights alternative binding and non-binding measures which advocate for decent working hours, decent pay, and decent multi-stakeholder engagement. This analysis will evaluate how current statutes, bills, and the code of practice could advocate for decent working conditions relating to pay and working time, and decent stakeholder engagement. The final segment of this chapter considers the best practices that may provide lessons to South Africa in addressing the *lacunae* that exist in advocating for decent on-demand work.

1011 See para.3.4.3.1 in Chapter 3 for a detailed discussion of the decent work indicators.

4.2. BACKGROUND AND INTERNATIONAL PERSPECTIVES

The *Irish Constitution* includes several provisions that are relevant to the employment relationship.[1012] To give effect to these constitutional provisions relating to the labour relationship, Ireland has enacted multiple statutes, predominantly based on EU directives, which regulate almost every aspect of the employment relationship.[1013] This includes statutes for the regulation of specific forms of non-standard employment.[1014] As a signatory to international agreements such as the International Convention on Economic, Social and Cultural Rights (ICESCR),[1015] Ireland has committed to progressing access to decent work. This set of indicators provides a basis for assessing progress. It also identifies key gaps in the data needed to monitor decent work in Ireland.[1016] As a member state of the EU, Ireland has a legal obligation to adhere to its binding instruments. As mentioned in Chapter 3, Ireland has given effect to the EU directives that advocate for the regulation of platform workers. This chapter aims to provide specific statutory and regulatory examples of how Ireland intends to advocate for decent on-demand work within its borders.

1012 The right to equality is included in article 40(1) of the *Irish Constitution,* which prescribes that "… all citizens shall, as human persons, be held equal before the law." The right to freedom of association is reflected in article 40(6). This provision prescribes that every citizen has a right to express their convictions and opinions freely and to assemble peacefully and without arms. Article 45(2)(i) also states that "The state shall, in particular, direct its policy towards securing that the citizens (all of whom, men and women equally, have the right to an adequate means of livelihood) may through their occupations find the means of making reasonable provision for their domestic needs."

1013 Examples of statutes that prescribe provisions pertaining to the conditions of employment include, but are not limited to, the *Terms of Employment (Information) Act* 5/1994-2014, the *Carer's Leave Act* 19/2001, the *Maternity Protection Acts* 34/1994-2004, *Adoptive Leave Acts* 2/1995-2005, *Organisation of Young Persons (Employment) Act* 16/1996, the *National Minimum Wage Act* 5/2000-2015, etc.

1014 Atypical work refers to work that is not permanent in nature (permanent employment) or based on indefinite employment contracts. Within the Irish labour law context, it refers to part-time (*Protection of Employees (Part-Time Work) Act* 45/2001), fixed-term (*Employees (Fixed-Term) Work Act* 29/2003) and temporary work (*Protection of Employees (Temporary Agency Work) Act* 13/2012).

1015 International Covenant on Economic, Social and Cultural Rights, 1996.

1016 Economic and Social Research Institute 2021. "Ireland's Young Workers 6 times More Likely to Be on Temporary Contracts than those over 25", https://www.esri.ie/news/irelands-young-workers-6-times-more-likely-to-be-on-temporary-contracts-than-those-over-25. Accessed on 13 April 2022.

Ireland is a member state of both the ILO and the EU.[1017] As discussed in Chapter 3 of this thesis, it is therefore subject to the legal obligations the ILO imposes on it and at the same time enjoys privileges from its membership. As such, reference will be made to its obligations to give effect to specific conventions and directions discussed in the preceding chapter.[1018] This said, the discussion on the ICESCR is relevant because Ireland has ratified the ICESCR in 1989.[1019] Similar to South Africa's approach to international law, Ireland has incorporated the ICESCR's principles into its domestic law by virtue of section 29(6) of the *Irish Constitution*. Ireland is committed to having human rights "at the heart of both national and foreign policy".[1020]

Contingent forms of work became favourable during Ireland's economic decline as unemployed workers relied more on casual forms of work, zero-hour contracts, and independent contracting to guarantee an income.[1021] In 2012, when Ireland was at its peak of unemployment at 15 per cent, work seekers had to find innovative employment opportunities in the absence of full-time employment.[1022] One of these novel forms of work includes the reliance on on-demand work. However, while on-demand work through online platforms continues to grow, it has not replaced traditional forms of non-standard work such as specific types of short-term work arrangements.[1023] It is evident that this trend continues to date and that Ireland is under pressure to propose legislative measures that will advocate for enhanced labour protections, not only for on-demand work but for various presumed forms of permanent work as well.

1017 Ireland has been a member of the ILO since 1923 and a member of the EU since 1973. ILO. 2023. "Ireland – ILO Cooperation". https://www.ilo.org/pardev/donors/ireland/lang--en/index.htm#:~:text=Ireland%20has%20been%20an%20ILO,fundamental%20and%20three%20priority%20conventions.. Accessed on 26 January 2023; EU 2023. "Ireland", https://european-union.europa.eu/principles-countries-history/country-profiles/ireland_en. Accessed on 26 January 2023.

1018 See, for example, the obligations in terms of the EU directives advocating for fair platform work.

1019 The ICESR is an international human rights treaty that aims to protect economic rights, social rights as well as cultural rights. Human Rights in Ireland, Department of Foreign Affairs, https://www.dfa.ie/our-role-policies/international-priorities/human-rights/human-rights-in-ireland/. Accessed on 8 February 2023.

1020 Department of Foreign affairs. https://www.dfa.ie/our-role-policies/international-priorities/human-rights/human-rights-in-ireland/. Accessed on 1 February 2023.

1021 Quirke & Winder 2021:19.

1022 Quirke & Winder 2021:19.

1023 Keane 2020:302.

It must be kept in mind that South Africa finds itself in a similar predicament, seeing that on-demand work continues to grow in parallel to various non-standard forms of work for which limited labour and social protections are already prescribed. Much like the situation in other jurisdictions, inclusive of Ireland and Australia, on-demand work continues to grow and operate outside of the protections afforded to those classified as 'employees' in formal employment relationships, which warrants further research.

It is acknowledged that on-demand work operates in a grey area of the law. The main reason for this statement stems from the fact that on-demand work is not classified as labour, nor does it genuinely reflect independent work.[1024] Moreover, case law has yet to determine a universal classification approach to include on-demand work. Much like the rest of the countries, Ireland is not saved form this predicament and has yet to discover a proper solution to providing decent work for on-demand workers. However, this does not mean to say that it has not taken huge strides in this regard in an attempt to address vulnerabilities of work in the gig economy. Apart from enacting specific statutes applicable to platform work, it has also introduced bills specifically drafted to apply to platform work. Additionally, in 2021, Ireland included specific guidelines in its *CPDES* relevant to workers in the gig economy. I, therefore, argue that South Africa could benefit from considering some of Ireland's best practices in advocating for decent work for on-demand workers.

The allowance of the use of comparative law to address emerging South African problems is integral to section 39 of the *South African Constitution*. As was alluded to in Chapter 3, section 233 of the *Constitution* provides that our courts 'must prefer any reasonable interpretation of legislation that is consistent with international law …' At this juncture, it must be kept in mind that although comparative jurisdictions differ in terms of the South African context, there are definite similarities that are noteworthy for this research. Firstly, both countries are sovereign, democratic states. Secondly, both countries have constitutions with a process of judicial review that vests in them. Thirdly, much like the South African position, the common law is regarded as the

1024 See para 2.3.5.3.

driving force in developing the Irish employment law principles. Fourthly, similar to the South African position, the *Irish Constitution* distinguishes the executive, the judiciary and the legislator, with the judiciary as the responsible branch for the compliance of the various sources of labour law. Lastly, it is also crucial to note that both Ireland and South Africa follow a binary approach to classifying an employee or an independent contractor.[1025] This, to my mind, makes Ireland a suitable comparative jurisdiction. Given the strides that this jurisdiction has made in affording on-demand workers limited protections, South Africa could easily 'borrow' and adapt some of its forward thinking in this regard.

As a point of departure, the question may arise to what extent the traditional classification of labour could be extended to include emerging forms of work such as on-demand work in the gig economy. When attempting to answer this question, cognisance must be given to legal tests, the presumption of employment, and applicable guidelines included in codes of conduct. In doing so, the discussion relies on the judgements handed down by the WRC[1026] which is established under the *WRA.*[1027] That said, before this can be done, the size and the growth of on-demand work in Ireland will be considered next.

4.3. THE SIZE AND GROWTH OF ON-DEMAND WORK IN IRELAND

The global economic crisis was evident in the Republic of Ireland when its unemployment rate reached its highest level of 15 per cent in 2012, with youth unemployment rising to roughly 33 per cent during this time.[1028] Consequently, in the absence of formal employment opportunities at the time, many were forced to seek

1025 The binary approach referred to here relates to the classification between a contract for service and a contract of service.

1026 The WRC is an independent, statutory body responsible for promoting the improvement of workplace relations, and maintenance of good workplace relations. One of the many functions of the WRC involves the speedy resolution of labour disputes referred to it by way of binding and non-binding alternative dispute resolution methods.

1027 *Workplace Relations Act* 16/2015.

1028 Duggan *et al.* 2018. https://www.rte.ie/brainstorm/2018/0530/967082-the-rise-and-rise-of-the-gig-economy/. Accessed on 26 January 2023.

contingent forms of work to generate an income. This is reminiscent of the current situation in South Africa.[1029]

Research estimates that there are roughly 200 000 Irish workers engaged in casual work arrangements,[1030] with platform workers making up a relatively small percentage of this.[1031] It has been observed that roughly eight per cent of the Irish workforce is engaged in contingent or temporary work. However, a smaller portion of the aforesaid forms part of the gig economy, seeing that not all forms of temporary work are regarded as platform work.[1032]

It has also been conclusively shown that Ireland has the fourth-highest prevalence of platform workers across 16 EU countries.[1033] Much like South Africa, the exact size of the on-demand economy is difficult to measure due to its operating as informal work.[1034] Moreover, a significant gap exists in capturing workers' experiences when conducting on-demand work. Notwithstanding these limitations, McGinnity *et al.* opine that the most predominant challenges experienced in platform work revolve around a lack of employment standards, a lack of social protection benefits, low earnings and a general sense of job insecurity.[1035]

It is suggested that platform work, inclusive of on-demand work, provides workers from rural areas access to the labour market.[1036] This is especially prevalent for those who face discrimination in the traditional labour market. In addition, a significant part of the

1029 See para 5.3 for the statistics on the size and growth of on-demand work in South Africa.
1030 Burke-Kennedy 2020. "Gig economy: What is it? Who works in it? Why is it in the news?", https://www.irishtimes.com/business/economy/gig-economy-what-is-it-who-works-in-it-why-is-it-in-the-news-1.4346555. Accessed on 15 April 2022.
1031 Burke-Kennedy 2020. "Gig economy: What is it? Who works in it? Why is it in the news?", https://www.irishtimes.com/business/economy/gig-economy-what-is-it-who-works-in-it-why-is-it-in-the-news-1.4346555. Accessed on 15 April 2022.
1032 Burke-Kennedy 2020. "Gig economy: What is it? Who works in it? Why is it in the news?", https://www.irishtimes.com/business/economy/gig-economy-what-is-it-who-works-in-it-why-is-it-in-the-news-1.4346555. Accessed on 17 March 2022.
1033 McGinnity *et al.* 2021:123.
1034 McGinnity *et al.* 2021:123.
1035 McGinnity *et al.* 2021:123.
1036 Piasna, Zwysen & Drahokoupil 2022:20.

work performed is low-skilled, on-demand work, for example delivery work for companies such as Deliveroo.[1037] Although ridesharing gig businesses such as Uber and Bolt are limited in Ireland due to their being halted by the National Transport Authority, there has been a significant rise in other forms of platform work.[1038]

It is important to keep in mind that much of the current statistics and literature about the gig economy focus particularly on platform work, rather than specifically on on-demand work in Ireland. It is, therefore, difficult to estimate the exact size and impact of on-demand work in Ireland. The question may be raised whether all this attention is warranted for an issue that is so relatively small in comparison to casual work.

As stated in Chapter 2 of the thesis, I argue that on-demand work forms part of the broader scope of casual work. In addition, within the broader spectrum of casual work, the majority of countries, inclusive of South Arica, Ireland and Australia, need a practical legal response and uniform approach to a universal problem. To date, several studies have explored the relationship between labour law and the broader gig economy.[1039] However, it has yet to convincingly analyse minimum rights for decent on-demand work in Ireland. It therefore becomes vital to consider the statutory classification and legal test that classify employment in Ireland before alternative binding and non-binding measures can be considered. Against this setting, the following part of this chapter will provide an analysis of the aforesaid classification methods.

1037 Piasna, Zwysen & Drahokoupil 2022:20.
1038 Anon. 2017. “NTA 'unsupportive' of Uber's Irish plan to expand”, https://www.rte.ie/news/2017/0728/893553-uber-ireland/. Accessed on 13 April 2022.
1039 See, for example, the literature referred to by Keane, Ní Bhraonáin, and Quirke & Winder.

4.4. THE NOTION OF THE EMPLOYMENT RELATIONSHIP AND THE CLASSIFICATION OF LABOUR

The *Irish Constitution*, together with EU directives, case law and statutes collectively protect employees' rights in the Republic.[1040] Similar to South Africa, Ireland still follows a strict binary divide in its classification of labour by drawing a distinction between 'employees' and 'independent contractors'.[1041] This distinction becomes especially important for the different tax treatments applied to self-employed individuals and employees. Quirke and Winder explain that this is seen as a tactic to sidestep a company's PAYE[1042] and PRSI[1043] contributions, which benefit employees in terms of several statutes.[1044] Nevertheless, it must be kept in mind that the definition of an 'employee' for purposes of the Irish *National Minimum Wage Act* is much broader than other statutes.[1045] This is also reminiscent of the broader definition afforded to a 'worker' in terms of the South African *National Minimum Wage Act*[1046] *(NMWA)* which will be dealt with in Chapter 6.

One significant difference between the aforesaid definitions is the existence of a "contract of employment", which in turn is defined in accordance with the applicable statute.[1047] The contract of employment is subsequently seen as the traditional legal basis to determine the existence of an employment relationship.[1048] One exception to this rule is found in the *Protected Disclosures Act*[1049] where a definition of a "worker" is noted. This definition broadens the scope of the Act to include other categories of

1040 Quirke & Winder 2021:49.
1041 Hilary 2020:122.
1042 PAYE refers to 'Pay As You Earn' tax contributions.
1043 PRSI refers to 'Pay Related Social Insurance' contributions.
1044 Quirke & Winder 2021:49. This includes specific protections in terms of the *Employment (Miscellaneous Provisions) Act* 38/2018, the *Organisation of Working Time Act* 20/1997, the *Maternity Protection Act* 34/1994, the *Paternity Leave Benefit Act* 11/2016, the *Protection of Employees (Part-Time Work) Act* 45/2001, and the *Unfair Dismissal Act* 10/1977.
1045 *National Minimum Wage Act* 5/2000:Sec. 2 defines and 'employee' as 'a person of any age who has entered into, or works or has worked under, a contract of employment.'
1046 *National Minimum Wage Act* 23/2018:Sec. 1 of the act defines a 'worker' as 'any person who works for another and who receives, or is entitled to receive, any payment for that work whether in money or in kind.'
1047 The *Unfair Dismissals Act* 10/1977-2015, for example, defines an employee in section 1 as "…an individual who has entered into or works under (or, where the employment has ceased, worked under) a *contract of employment*…"
1048 Daly & Doherty 2010:39.
1049 *Protected Disclosures Act* 14/2014.

workers, such as individuals who are receiving work experience or training, subcontractors, and individuals who are performing work under a contract as part of someone else's business.[1050]

Traditionally, the common law distinguishes between an employment contract *of* service and a contract *for* service. As with the case in South Africa and Australia, this twofold approach was based on the traditional "master-servant" relationship and did not fit the criteria for modern-day employment relationships.[1051]

In the absence of a clear statutory definition as to whether someone is an employee or an independent contractor, the courts were tasked to provide an answer. Subsequently, this has led to the development and interpretation of various legal tests to determine the employment status of parties in cases where contemporary employment relationships do not fit the criteria of statutory definitions.[1052] In the Irish context, and as will be discussed later, the leading legal tests include the control test,[1053] the integration test,[1054] the economic reality test,[1055] and lastly, the mutual obligation test.[1056] It is important to emphasise that none of the aforementioned tests is determinative, and that they are frequently used in conjunction with other tests.[1057]

1050 *Protected Disclosures Act* 14/2014: sec 1.

1051 Ní Bhraonáin 2019:18. A primary base for such division stems from the idea that self-employed individuals require less protection against unemployment, illness entitlements and old-age entitlements.

1052 Rush 2018. "The gig economy and employment law in Ireland", https://www.lewissilkin.com/en/insights/the-gig-economy-and-employment-law-in-ireland. Accessed on 29 July 2019.

1053 Daly & Doherty 2010:46. This is seen as one of the first tests introduced by the courts to determine an employment relationship. The main authority for the interpretation of the test was determined in *Henry Denny & Sons Ltd v Minister for Social Welfare* 1998 IR 34.

1054 The integration test is similar to the South African organisational test. In terms of the integration test, the work performed by a person is deemed to be under a contract of service and forms an integral part of the business.

1055 The economic reality test is also referred to as the entrepreneurial test. This test revolves around the question of whether a person provides work and agrees to be subjected to the company's control on the one hand, and whether the person performs the work "as a person in business on his/her own account" on the other hand.

1056 Ní Bhraonáin 2019:6. The mutual obligation test requires the existence of a minimum obligation on both contractual parties to provide work and to perform work. A vital part of this test entails the rendering of personal services.

1057 Daly & Doherty 2010:44. Hardly any of the tests, especially the control test, can be used as a stand-alone test to determine the contemporary forms of employment. This is largely due to the changing nature of modern-day employment relationships.

This was once again reiterated in the latest 2022 Appeal Court decision on the status of delivery workers. It was stated by O'Doherty that the legislation that underpinned the court's decision in *Karshan (Midlands) Ltd t/a Domino Pizza v Revenue Commissioners,*[1058] was ill suited to a changing world.[1059] It should thus be noted that some parallels will be drawn between the Irish judicial tests and that of South Africa.

What follows is a discussion of each of the legal tests, followed by a discussion on the statutory classification of labour. As with the position in South Africa, the discussion aims to highlight how the criteria of each test are reflected in the contemporary classification of labour in terms of statutory definitions and presumptions. In turn, it will assist in recognising different approaches that South Africa could adopt to establish an "employment relationship" in its evolving modern workplaces. In addition, such an understanding could, for example, contribute to determining international trends with the classification of on-demand workers as well, and contribute to answering the research question of how decent classification practices could extend protections to workers in the on-demand sector..

4.4.1 The statutory classification of the employment relationship

In the Republic of Ireland, the person who is classified as an employee for purposes of statutory protection rights and protections, varies according to the piece of legislation that applies. As briefly mentioned above, Irish labour laws essentially define an employee as any person who works under a "contract of employment".

In contrast to the beforementioned, a "contract of service" is defined as:[1060]

1058 *Karshan (Midlands) Ltd t/a Domino Pizza v Revenue Commissioners* [2022] IECA 124,
1059 O'Doherty 2022. "The employment status of gig economy workers in Ireland", https://michaelodohertybl.com/the-employment-status-of-gig-economy-workers-in-ireland/. Accessed on 8 February 2023.
1060 *Terms of Employment (Information) Act* 5/1994:Sec. 1.

> a contract of service or apprenticeship, and any other contract whereby an individual agrees with another person, who is carrying on the business of an employment agency within the meaning of the Employment Agency Act, 1971, and is acting in the course of that business, to do or perform personally any work or service for a third person (whether or not the third person is a party to the contract), whether the contract is express or implied and if express, whether it is oral or in writing.

The above definition of an employee, in a narrow sense, is mirrored in several labour laws applicable to dismissal,[1061] statutory notice periods,[1062] parental,[1063] and maternity[1064] leave entitlements, the regulation of working time,[1065] and part-time work.[1066] In addition to the narrow definition of an employee, the continuity of the

1061 *Unfair Dismissals Act* 10/1977: Sec. 1. 'Employee' is defined as "an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment and, in relation to redress for a dismissal under this Act, includes, in the case of the death of the employee concerned at any time following the dismissal, his personal representative."

1062 *Minimum Notice and Terms of Employment Act* 4/1973: Sec 1. 'Employee' means an individual who has entered into or works under a contract with an employer, whether the contract be for manual labour, clerical work or otherwise, whether it be expressed or implied, oral or in writing, and whether it be a contract of service or of apprenticeship or otherwise, and cognate expressions shall be construed accordingly.

1063 *Parental Leave Act* 30/1998:Sec. 2. 'Employee' means a person of any age who has entered into or works under (or, where the employment has ceased, entered into or worked under) a contract of employment, and references, in relation to an employer, to an employee shall be construed as references to an employee employed by that employer; and for the purposes of this Act, a person holding office under, or in the service of, the State (including a member of the Garda Síochána or the Defence Forces or a civil servant within the meaning of the *Civil Service Regulation Act*, 1956) shall be deemed to be an employee employed by the head (within the meaning of the *Freedom of Information Act*, 1997) of the public body (within the meaning aforesaid) in which he or she is employed, and an officer or servant of a local authority for the purposes of the *Local Government Act*, 1941, or of a harbour authority, health board or vocational education committee shall be deemed to be an employee employed by the authority, board or committee, as the case may be.

1064 *Maternity Protection Acts* 34/1994: Sec. 2(1). An employee is defined as 'a person who has entered into or works under (or, where the employment has ceased, entered into or worked under) a contract of employment.'

1065 *Organisation of Working Time Act* 20/1997: Sec. 2. An employee is defined as a person of any age, who has entered into or works under (or, where the employment has ceased, entered into or worked under) a contract of employment and references, in relation to an employer, to an employee shall be construed as references to an employee employed by that employer; and for the purposes of this Act, a person holding office under, or in the service of, the State (including a civil servant within the meaning of the *Civil Service Regulation Act*, 1956) shall be deemed to be an employee employed by the State or Government, as the case may be, and an officer or servant of a local authority for the purposes of the *Local Government Act*, 1941, or of a harbour authority, health board or vocational education committee shall be deemed to be an employee employed by the authority, board or committee, as the case may be.'

1066 *Protection of Employees (Part-Time Work)* Act 45/2001: Sec.3. An employee is defined as 'a person of any age who has entered into or works under (or, where the employment has ceased, entered into or worked under) a contract of employment and references, in relation to an employer, to an employee shall be construed as references to an employee employed by that employer; and for the purposes of this Act, a person holding office under, or in the service of,

employment relationship is required in terms of some statutes. For example, section 2(1) of the *Unfair Dismissals Act* excludes an employee who, on the date of their dismissal, had less than one year of continuous employment.

In a wider sense, specific statutes provide a broader definition of employees who work under a contract of employment. For example, legislation applicable to the payment of wages and minimum wage defines a 'contract of employment' to include:[1067]

> any other contract whereby an individual agrees with another person to do or perform personally any work or service for a third person (whether or not the third person is a party to the contract) whose status by virtue of the contract is not that of a client or customer of any profession or business undertaking carried on by the individual, and the person who is liable to pay the wages of the individual in respect of the work or service shall be deemed for the purposes of this Act to be his employer.

Similarly, the *National Minimum Wage Act*[1068] defines a contract of employment to include "any other contract whereby an individual agrees with another person to do or perform personally any work or service for that person or a third person (whether or not the third person is a party to the contract)." When compared, I am of the opinion that the broader definition could include workers who enter into contracts with a person or a business on a casual basis. On this premise, the same argument can be made to extend limited protections to on-demand workers who perform tasks for a single platform over a specific period of time.

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the State (including a civil servant within the meaning of the *Civil Service Regulation Act*, 1956) shall be deemed to be an employee employed by the State or Government, as the case may be, and an officer or servant of a local authority for the purposes of the *Local Government Act*, 1941, or of a harbour authority, health board or vocational education committee shall be deemed to be an employee employed by the authority, board or committee, as the case may be.'

1067 *Payment of Wages Act* 25/1991:Sec. 1.

1068 *National Minimum Wage Act* 5/2000: Sec. 2.

From the discussion above, it can be concluded that the statutory classification of labour relies heavily on the existence of a contract of employment. However, the existence of a contract of service should not be seen as the primary criteria, seeing that several statutes differ in terms of the duration of the employment relationship needed to confer the status of an "employee" and the payment of wages to persons who perform work. Moreover, in the absence of an explicit inclusion of casual forms of work in the statutory definitions, these workers fall outside the scope of the statutes discussed above; therefore, this could include self-employed individuals who are dependent on the income received from a single employer. This statement is reminiscent of the legal position of casual work, and more specifically on-demand workers, in terms of the South African labour laws.[1069]

That said, in the absence of such inclusion, it is left to the courts to interpret and decide on the correct status of an employment relationship. The legal tests applied by the Irish courts will be discussed next.

4.4.2. Legal tests applied by the Irish courts

Much like the position in South Africa and Australia, various tests have been applied and adapted to determine the correct employment status of persons who are either employees or independent contractors. Therefore, an analysis of the aforesaid legal tests aims to reveal possible links to courts that have dealt with classification disputes over the past decades. It is trusted that lessons drawn from the Irish position could serve as a comparable best practice in the chapters to come.

4.4.2.1 The control test

1069 For example, the *LRA* does not make specific mention of 'casual work' or 'casual workers'.

The control test closely resembles one of the founding criteria for a contract of service, namely that the employer has the right to control what the employee does and also how it is done.[1070] From a historical perspective, this test entails that in master-servant relationships the master must have the right to tell the servant what to do and how to do it, whether or not he exercises that right.[1071]

However, keeping in mind the South African position, absence of control should not be seen as the determining factor. It should instead be seen as a factor in the overall assessment of the contractual agreement and the subsequent relationship between the parties.[1072] In addition, the *CPDES* officially describes 'control' as the extent to which a person or business paying for the work has control over the worker.[1073] This 'control' includes what, how and where the work should be done.[1074]

Given the current world of work, the control test's criteria seldom meet the realities of contemporary forms of work. In our modern workplaces, skilled workers[1075] conduct their work with a greater degree of independence, for example, professional services advertised as part of crowdwork. As mentioned in Chapter 2 of this research, crowdworkers enjoy a great degree of flexibility in terms of which gigs to accept or decline. Keeping the platform's rating system in mind, the crowdworker also determines how the work will be done. With this in mind, the same is not always true for on-demand workers, seeing that they are subject to various forms of control by the platform.[1076] We need to take one step back and determine the test for being under control before the position of on-demand workers is evaluated.

1070 Ní Bhraonáin 2019:5.
1071 See *Minister for Industry & Commerce v Elizabeth Healy* [1941] IR 545 and *Roche v Kelly and Co Ltd.* [1969] IR 100.
1072 Ní Bhraonáin 2019:5.
1073 *Code of Practice of Determining Employment Status*:Item 8.
1074 *Code of Practice of Determining Employment Status*:Item 8.
1075 See *Re Sunday Tribute Ltd* 1984 IR 505 (HC) where the High Court held in 1984 that the control test was ineffective to apply to work conducted by professional freelancers of a local newspaper. Given the current modern-day forms of work, it is unlikely that the control test alone will be sufficient to determine the status of an employment relationship.
1076 See paras. 2.3.5.2 and 2.4.

For example, the Labour Court confirmed that the following factors were regarded as exercising control over an individual:[1077]

- If the business sets the terms of engagement;
- If the business determines the individual's rate of pay;
- If the individual has to undergo training to ensure that he/she meets the company's standards;
- If the company insists that the individual wear company branded clothing;
- If the company sets strict rules relevant to specific assets, for example, the type and colour of the delivery vehicle.

Having regard to the above-listed factors, the Labour Court was convinced that the company exercised considerable control over the delivery driver and how the work was to be performed.[1078] The Appeal Court confirmed in *Karshan (Midlands) Ltd t/a Domino's Pizza v Revenue Commissioners* that the issue of control in an individual contract must be approached from the perspective that there was sufficient control based on the totality of the evidence and the relationship between the parties.[1079] The discussion below will also highlight that some of the factors listed above overlap with factors to be considered as part of the other legal tests as well.

4.4.2.2 The integration test

The integration test considers how an individual forms an integral part of an organisation. One of the earliest cases that laid the foundation for the test was the *Stevenson Jordan and Harrison Ltd*[1080] case, where a key feature of the integration test was that, for a contract of service, 'a man is employed as part of the business and his work is done as an integral part of the business, whereas under the contract for

1077 *Speedking Couriers Limited t/a Fastway Couriers Midlands v Mr John Read* 2022:page 5.
1078 *Speedking Couriers Limited t/a Fastway Couriers Midlands v Mr John Read* 2022:page 6.
1079 *Karshan (Midlands) Ltd t/a Domino's Pizza v Revenue Commissioners* [2022] IECA 124:149.
1080 *Stevenson Jordan and Harrison Ltd v MacDonald and Evans* 1952 1 TLR 101.

service, his work … is only accessory to it'.[1081] In addition, Carroll J emphasised in *Re Sunday Tribune Ltd*[1082] that a court must consider the true relationship between the parties regardless of how the parties described themselves.[1083] Cognisance needs to be taken that this accords with the South African position in that the contract of employment is 'not a *sine qua non* when determining whether a person is an employee'.[1084] Grogan goes further to opine that the parties' description of their relationship is never conclusive if the court finds otherwise.[1085]

The significance of *Re Sunday Tribune Ltd*, other than it is the leading authority on the integration test, lies in the fact that the Court took a different approach to declare three freelance columnists as an integral part of the newspaper's business although they essentially performed similar tasks. For example, the first claimant, who worked as a 'shift worker' on a part-time basis was classified as an employee based on the control the employer exercised over his working time and how the work was to be conducted.[1086] The second claimant was described as a 'regular columnist', and was classified as an employee. Her column was to be run 50 weeks per year and she partook in editorial conferences, which was enough to satisfy the court that she was an integral part of the newspaper's organisation.[1087] In contrast, the third claimant, who was described as a ''regular contributor', did not meet the criteria of the integration test. Carroll J opined that the third claimant 'was under no obligation to contribute on a regular basis. Presumably, if she did not negotiate a commissioned article, the company's editor would get articles from some other source.'[1088]

1081 *Stevenson Jordan and Harrison Ltd v MacDonald and Evans* 1952 1 TLR 101:111. The Judge went on to say 'It is often easy to recognize a contract of service when you see it, but difficult to say wherein the difference lies. A ship's master, a chauffeur, and a reporter on the staff of a newspaper are all employed under a contract of service; but a ship's pilot, a taxi-man, and a newspaper contributor are employed under a contract for services.'.
1082 *Re Sunday Tribune Ltd* [1984] IR 505.
1083 *Re Sunday Tribune Ltd* [1984] IR 505:par. 6.
1084 Grogan 2020:16.
1085 Grogan 2020:16-17.
1086 *Re Sunday Tribune Ltd* [1984] IR 505:par 13.
1087 *Re Sunday Tribune Ltd* [1984] IR 505:par 14.
1088 *Re Sunday Tribune Ltd* [1984] IR 505:par 15.

What is also noteworthy is the fact that the three complainants, as reporters for the Sunday Tribune Newspaper, had similar, yet different roles for the newspaper. This was evident from the different descriptions and the conditions that were applied to their respective services. This is, for example, different in the case of platform work where all of the on-demand workers accept the same terms and conditions of service.[1089]

Some of the more recent factors to consider for the integration test were outlined in the *Dominos Pizza*[1090] appeal case in 2019. O'Connor J concluded that factors to consider whether an individual is an integral part of the organisation could include the wearing of company uniforms, the placement of logos on driver vehicles, the reassurance which is given to clients that they are in fact dealing with the company's personnel, maintaining a coherent operation under the care of the company, and lastly taking telephone orders directly from the company and not *via* the client.[1091]

The question may be raised whether the aforesaid interpretation and application of the integration requirement can be applied to platform work where the organisation is the platform itself. This, to my mind, would fit the description provided by the *CPDES*, which states that one must consider 'whether and to what extent a worker has become an integral part of a business…'.[1092] This must be contrasted against work that is peripheral to the business itself.[1093] In other words, the focus remains on the extent to which a worker has *become an integral part* of the organisation as opposed to performing work accessory to it.[1094] In addition to the above, the Labour Court concluded in *Speedking Couriers Limited t/a Fastway Couriers Midlands v Mr John Read*[1095] that in order to determine whether a person who works for a business has become integrated into that business, you must first identify the core of the

1089 *Karshan (Midlands) Trading as Dominos Pizza v Revenue Commissioners* [2019] IEHC 894:par 45.
1090 *Karshan (Midlands) Trading as Dominos Pizza v Revenue Commissioners* [2019] IEHC 894.
1091 *Karshan (Midlands) Trading as Dominos Pizza v Revenue Commissioners* [2019] IEHC 894:par 65.
1092 *Code of Practice on Determining Employment Status:*Item 8.
1093 *Code of Practice on Determining Employment Status:*Item 8.
1094 Own emphasis.
1095 *Speedking Couriers Limited t/a Fastway Couriers Midlands v Mr John Read* 2022.

business.[1096] In this case, the Labour Court decided that the company's core business related to the delivery of small to medium parcels via courier service.[1097] In addition, the claimant was not able to take on additional work and had uncontested evidence in relation to the actual number of hours he worked daily for the company.[1098] Based on the aforesaid considerations, the Labour Court concluded that the claimant delivery driver was in fact an employee of the company.[1099]

4.4.2.3 Economic reality test

Also referred to as the enterprise test, the economic reality test entails if a worker is performing their services for themselves as opposed to performing services on behalf of someone else.[1100] *Market Investigation Ltd v Minister of Social Security*[1101] provided the basic criteria for the test by stating that:[1102]

> The fundamental test to be applied is this: "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?" If the answer to that question is 'yes' then the contract is a contract for services. If the answer is 'no' then the contract is a contract of service.

This description was applied in *Henry Denny and Sons (Ireland) Ltd v Minister of Social Welfare* which also noted that, when considering the question quoted above, a court should have regard to whether the worker provides their own equipment, whether they hire their own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management they have, and if the worker bears the risk of loss or the opportunity of profit.[1103] To conclude this part, the *CPDES* describes a key factor of the enterprise test to determine whether and to what extent a person is

1096 *Speedking Couriers Limited t/a Fastway Couriers Midlands v Mr John Read* 2022:page 5.
1097 *Speedking Couriers Limited t/a Fastway Couriers Midlands v Mr John Read* 2022:page 5.
1098 *Speedking Couriers Limited t/a Fastway Couriers Midlands v Mr John Read* 2022:page 5.
1099 *Speedking Couriers Limited t/a Fastway Couriers Midlands v Mr John Read* 2022:page 6.
1100 Ní Bhraonáin 2019:6.
1101 *Market Investigations Ltd v Minister of Social Security* [1969] 2QB173.
1102 *Market Investigations Ltd v Minister of Social Security* [1969] 2QB173:page 183.
1103 *Henry Denny and Sons (Ireland) Ltd v Minister of Social Welfare* 1969 QB:page 173.

performing work on their own account, and has the ability to profit from their own efficiency or entrepreneurial skills or, on the other hand, runs the risk of suffering a financial loss.[1104]

4.4.2.4 Mutuality of obligation

There must be a minimum obligation between two contractual parties, namely one to provide work and the other to perform work.[1105] In addition, true to a traditional master-servant employment relationship, is the requirement that the services rendered must be a personal service.[1106] This notion was confirmed in *Henry Denny and Sons (Ireland) Ltd v Minister of Social Welfare* where the Supreme Court held that a supermarket demonstrator is not permitted to assign someone else as a substitute to perform the agreed services.[1107] However, when accepting a task requiring two persons, the most likely conclusion would be a contract for services and not a contract of services.[1108] Lastly, the *CPDES* describes mutual obligations as whether and to what extent there is an obligation on one party to provide work and on the other party to accept it.[1109]

In *McKayed v Forbidden City Ltd t/a Translations.ie*[1110] the High Court noted the criteria considered in *Minister for Agriculture & Food v Barry & Ors*[1111] by stating that:[1112]

> 'The requirement of mutuality of obligation is the requirement that there must be mutual obligations on the employer to provide work for the employee and on the employee to perform work for the employer. If such

1104 *Code of Practice on Determining Employment Status:*Item 8.
1105 Ní Bhraonáin 2019:6.
1106 Ní Bhraonáin 2019:6.
1107 *Henry Denny and Sons (Ireland) Ltd v Minister of Social Welfare* 1969 QB:page 50 as referred to in Ní Bhraonáin 2019:6.
1108 Ní Bhraonáin 2019:6.
1109 *Code of Practice on Determining Employment Status*:Item 8.
1110 *McKayed v Forbidden City Ltd t/a Translations.ie* [2016] IEHC 722.
1111 *Minister for Agriculture & Food -v- Barry & Ors* [2008] IEHC 216.
1112 *McKayed v Forbidden City Ltd t/a Translations.ie* [2016] IEHC 722:par. 20.

> mutuality is not present, then either there is no contract at all or whatever contract there is must be a contract for services or something else, but not a contract of service … Accordingly, the mutuality of obligation test provides an important filter. Where one party to a work relationship contends that that relationship amounts to a contract of service, it is appropriate that the court or tribunal seized of that issue should in the first instance examine the relationship in question to determine if mutuality of obligation is a feature of it. If there is no mutuality of obligation it is not necessary to go further: whatever the relationship is, it cannot amount to a contract of service. However, if mutuality of obligation is found to exist, the mere fact of its existence is not, of itself, determinative of the nature of the relationship and it is necessary to examine the relationship further.'

In addition, Ní Raifeartaigh J has also noted that the fact that work is given regularly for a period of time is not determinative of whether one party has a legal obligation to provide the other party with work.[1113] That said, Keane argues that in the absence of a statutory right to create continuous service by combining sporadic episodes of work, Irish on-demand workers would have isolated incidents of employment.[1114] This, in turn, could possibly bring on-demand workers within the scope of employment rights.[1115]

The criteria for determining a mutual obligation were considered and applied in a recent court case concerning delivery drivers of Domino's Pizza.[1116] It must be noted that the court case did not necessarily concern a platform-based company as an employer. However, as will be seen from the discussion, the relationship between the contracting parties closely resembles that of an interactive gig business.[1117] The following parts will first analyse the notion of a mutual obligation as interpreted in the *Domino's Pizza* case.

1113 *McKayed v Forbidden City Ltd t/a Translations.ie* [2016] IEHC 722:par. 39.
1114 Keane 2020:305.
1115 Keane 2020:305.
1116 See *Karshan (Midlands) Trading as Domino's Pizza v Revenue Commissioners* [2019] IEHC 894.
1117 As discussed in Chapter 2 of this research, an interactive gig business consists of three parties to the agreement, namely the online platform (the interactive gig business), the gig worker, and a client. For a detailed discussion on this topic, see par 2.4.3.4.

The Domino's Pizza case concerned an appeal by Domino's Pizza against a determination taken by the Taz Appeals Commissioner in 2018.[1118] In the aforesaid determination, the Commissioner concluded that the Domino's drivers were employees for purposes of the *Tax Consolidation Act*.[1119] As such, Domino's Pizza was liable for PAYE returns for its drivers.[1120]

O'Connor J held that an obligation for drivers to initiate an agreement should be considered in context.[1121] Furthermore, the court noted that there was a need to adapt to modern means of engaging workers.[1122] Moreover, the court had to consider the operation of the relationship that existed between the business and the delivery drivers. In essence, a driver could contact the applicable store to inform them that the driver was available. Thereafter, the store would schedule the driver on the roster for a specific shift. Keane argues that two vital elements must be considered in this regard. First, Domino's would not request drivers to make themselves personally available. In addition, should a driver be unable to provide their service during the scheduled shift, it was the responsibility of the driver to find a suitable replacement.[1123] Second, the issue of substitution was considered.[1124]

The court also concluded that the written terms of an agreement had marginal value and that the practical execution of the contract, in reality, must be considered. Mere words are, therefore, not sufficient to determine the nature of the contractual relationship between parties.[1125] For purposes of the actual relationship between the

1118 *Karshan (Midlands) Trading as Domino's Pizza v Revenue Commissioners* [2019] IEHC 894:par. 1.
1119 *Tax Consolidation Act* 39/1997; *Karshan (Midlands) Trading as Domino's Pizza v Revenue Commissioners* [2019] IEHC 894:par. 1; *Tax Consolidation Act* 39 of 1997.
1120 *Karshan (Midlands) Trading as Domino's Pizza v Revenue Commissioners* [2019] IEHC 894:par. 1.
1121 *Karshan (Midlands) Trading as Domino's Pizza v Revenue Commissioners* [2019] IEHC 894:par. 50.
1122 *Karshan (Midlands) Trading as Domino's Pizza v Revenue Commissioners* [2019] IEHC 894:par. 50.
1123 Keane 2020:303-304.
1124 In addition to mutual obligation, item 8 of the *CPDES* describes 'substitution' as to whether and to what extent the worker is allowed to send a substitute in the event that they are unable to work themselves and, if applicable, who pays the substitute. This description must be kept in mind.
1125 *Karshan (Midlands) Trading as Domino's Pizza v Revenue Commissioners* [2019] IEHC 894:par. 66.

parties, O'Connor noted that it was vital to consider whether a substitute was regarded as a sub-contractor or a substitute.[1126] For purposes of the *Domino's* case, the court concluded that the driver was replaced by another driver from a pool of drivers to which the company had to consent. This, in essence, was seen as a substitute and not a sub-contractor as in the case of a contract for service.[1127] The court thus concluded that the drivers were indeed employees of the company for tax purposes.

On appeal to the Court of Appeal, Costello J noted that the mutuality of obligation is not *per se* the sole test for the existence of an employment relationship.[1128] The Court of Appeal held that "provider of work has no obligation to offer work and the putative recipient no obligation to accept work does not mean that mutuality of obligation is absent."[1129] Castello J, therefore, found that the Revenue Appeal Commissioner had made a mistake when finding that there was no requirements for an ongoing obligation to provide work and to perform work for the requirements of mutuality of obligation to be met.[1130] The Court of Appeal also took a clear stance on the contractual terms that the parties agree to continue to play a key role and must be respected insofar no evidence is available to proof the contrary.[1131] The Court of Appeal found that the pizza drivers engaged by Karshan did so under a contract for services as self-employed independent contractors.[1132]

4.5. BINDING LEGISLATIVE RESPONSES ADVOCATING FOR DECENT ON-DEMAND WORK

There is no reference to on-demand work within Irish labour law instruments, but this does not mean that basic labour and social protection could not be afforded to on-

1126 *Karshan (Midlands) Trading as Domino's Pizza v Revenue Commissioners* [2019] IEHC 894:par. 59.
1127 *Karshan (Midlands) Trading as Domino's Pizza v Revenue Commissioners* [2019] IEHC 894:par. 59.
1128 *Karshan (Midlands) Ltd t/a Domino's Pizza v Revenue Commissioners* [2022] IECA 124:130.
1129 *Karshan (Midlands) Ltd t/a Domino's Pizza v Revenue Commissioners* [2022] IECA 124:114.
1130 *Karshan (Midlands) Ltd t/a Domino's Pizza v Revenue Commissioners* [2022] IECA 124:114.
1131 *Karshan (Midlands) Ltd t/a Domino's Pizza v Revenue Commissioners* [2022] IECA 124:53.
1132 *Karshan (Midlands) Ltd t/a Domino's Pizza v Revenue Commissioners* [2022] IECA 124:59.

demand workers soon, reminiscent of the position in South Africa. As with South Africa, the strict binary approach to the classification of labour does not classify on-demand workers as employees of a platform. Subsequently, they are currently excluded from all labour and social protections afforded by labour legislation. As such, the question may be asked as to what extent existing legislation could apply to on-demand workers in Ireland. Although reference will be made to the amendment of specific labour legislation in Ireland, the following discussion is limited to the application and interpretation of the *Employment (Miscellaneous Provisions) Act* (*EMPA*).[1133] It does not fall within the scope of this thesis to discuss all applicable legislation in full, but the next section provides an overview of existing statutory provisions that advocate for decent working hours, decent pay and multi-stakeholder engagement for on-demand workers in Ireland.

4.5.1 The Employment (Miscellaneous Provisions) Act

The *EMPA* is a piece of legislation that seeks to update several pieces of employment legislation, which include the amendment of the *Unfair Dismissals Act*, *The National Minimum Wage Act*, and the *WRA*.[1134] More specifically, the *EMPA* aims to protect employees by receiving certain basic conditions of employment within the prescribed timeframe, minimum payments for certain low-paid workers, and the inclusion of prescribed banded hours for those whose working hours are not reflected in their employment contract.[1135] In other words, the *EMPA* aims to improve the predictability and security of those who work unpredictable working hours. This becomes relevant for dealing with the actual working hours of on-demand workers, seeing that there are

1133 *Employment (Miscellaneous Provisions) Act* 38/2018. It must be kept in mind that specific parts of the *EMPA* could apply to on-demand workers in Ireland. In this context two aspects will be discussed. Firstly, how the *EMPA* advocates for better conditions of employment, and secondly, how the *EMPA* advocates for decent working hours and decent pay.

1134 Keane 2020:310. The *EMPA* came into effect on 4 March 2019. The act affords labour protection to individuals working under flexible working hours and places a duty on employers to provide employees with specific terms of employment within a certain period after commencing employment. Section 15 of the Act specifically prohibits using "zero-hours working practices" in certain circumstances and prescribes minimum payments under specific conditions.

1135 Ní Bhraonáin 2019:16-17. Also see the preamble of the *EMPA*.

inconsistencies with regard to the pay received for periods that the drivers wait for tasks to be assigned to them.

Given the reality that on-demand workers are mainly excluded from decent working time and decent pay, the possibility of applicable binding measures, such as the *EMPA*, will be examined next. It must be noted that the *EMPA* goes beyond the provisions relating to working hours and pay. However, it must be seen as a starting point to identify applicable binding provisions.

For purposes of this study, I argue that specific parts of the *EMPA* could apply to on-demand workers in Ireland, based on the many similarities that on-demand work shares with other non-standard forms of employment, which include casual work and "zero-hours contracts". In addition, as a point of departure, the question may arise as to whether parts of the *EMPA* could serve as best practices that contribute to decent on-demand work in Ireland. It is, therefore, accepted that this analysis will provide insight into how decent pay and decent working hours as part of decent work conditions could be achieved.

4.5.1.1 The EMPA and the conditions of employment

As previously discussed, the contract of employment forms the basis of an employment relationship. It binds the parties to specific agreed terms of employment that may differ from the minimum protections prescribed by labour laws. To my mind, it is important to also consider to what extent the *EMPA* prescribes rights and protections that advance decent working hours and decent pay by virtue of the conditions of employment themselves.

Section 7 of the *EMPA* places an obligation on the employer to furnish an employee with five core terms of employment within five days after employment has

commenced.[1136] In addition, the above provision prescribes that it must be in writing and include the following information:

- The full detail of the employee and the employer;[1137]
- Where the employer's workplace is located;[1138]
- In the event of a temporary contract, the expected duration or the date on which the contract expires;[1139]
- How the employee's remuneration or the rate at which they are paid is calculated; in addition, the pay reference period concerned for purposes of the *National Minimum Wage Act* 5 of 2000;[1140]
- The number of hours that the employer expects the employee to work per day and per week.[1141]

In addition to the above, the *EMPA* places an additional obligation on the employer to provide the written particulars, even in cases where the employment ends before the fifth day.[1142] The timing provisions are foreign to South African labour law, but I am in agreement with Keane's proposition. Keane argues that on-demand workers,[1143] notwithstanding the duration of their services, have a statutory right to a written copy of their terms of service.[1144] In my view, South Africa could benefit from a similar provision, specifically for those who classify as 'workers' for purposes of the South African minimum wage legislation. This could be a first step to *contractually* enforce decent pay for on-demand workers in South Africa and Ireland.

4.5.1.2 The EMPA and perspectives on decent working hours and decent pay

1136 *EMPA* 38/2018:Sec.7(a)(1A).
1137 *EMPA* 38/2018:Sec.7(a)(1A)(a).
1138 *EMPA* 38/2018:Sec. 7(a)(1A)(b).
1139 *EMPA* 38/2018:Sec.7(a)(1A)(c).
1140 *EMPA* 38/2018:Sec.7(a)(1A)(d).
1141 *EMPA* 38/2018:Sec. 7(a)(1A)(e).
1142 *EMPA* 38/2018:Sec. 7(c).
1143 The author uses the term 'gig employee' as an umbrella term to refer to platform workers. I argue, therefore, that the same applies to on-demand workers as it is the main focus of this study.
1144 Keane 2020:310.

For purposes of this part of the discussion, the provisions relating to working hours and the calculation of pay will be combined. The main reason for this is that the amendments applicable to working hours have a direct impact on the calculation of the hourly remuneration and *vice versa*. In other words, on-demand workers will be able to receive a minimum weekly pay according to predetermined bands.

Section 15 of the *EMPA* amends section 18 of the *Organisation of Working Time Act* by prohibiting zero-hour contracts[1145] in Ireland.[1146] In addition, the section applies to employees who make themselves available to work for an employer for a certain number of hours, when the employer requires them to work, or in a combination of the aforesaid circumstances.[1147] Furthermore, amended section 18(2) states that 'In a contract for a certain number of hours … the number of hours concerned shall be greater than zero', thus eliminating any form of zero-hour contracts.[1148]

Section 15 of the *EMPA* also prescribes that an employee who does not work 25 per cent of their contract hours or 15 hours, whichever is less, is entitled to three times the national minimum hourly rate of pay, or three times the minimum rate of remuneration in terms of an employment regulation order.[1149] Of importance here is the fact that the amendment relating to the prohibition of zero-hour contracts combined with the introduction of a minimum prescribed payment, arguably guarantees on-demand workers, who mainly operate with uncertain hours, a minimum payment for each week. The specific levels to determine the rate of remuneration will be discussed next.

1145 The *EMPA* does not specifically define a zero-hour contract. However, the Law Society of Ireland describes 'zero-hour contracts' as '… an arrangement where an employee is requested to be available for a certain number of hours per week without the guarantee of work, or when required, or a combination of both. Law Society of Ireland 2022 "*Employment (Miscellaneous Provisions) Act* 2018 – what you need to know" https://www.lawsociety.ie/News/News/Stories/employment-miscellaneous-provisions-act-2018--what-you-need-to-know. Accessed 10 April 2022.

1146 *EMPA* 38/2018:Sec. 15.

1147 *EMPA* 38/2018:Sec. 15.

1148 It must, however, be noted that the exception to this provision concerns emergency services, and short-term relief work. See section (15) of the *EMPA* for more detail in this regard.

1149 *EMPA* 38/2018:Sec. 15(18)(4).

Section 16 of the *EMPA* provides that an employee whose contract of employment or statement of terms of employment does not reflect the reality of actual hours worked over a referenced period, is entitled to be placed into a specific band of weekly working hours.[1150] In addition, the employer, in terms of section 18A, must determine the appropriate band based on the average number of weekly hours worked in the previous 12 months of service.[1151] The bands of weekly working hours are prescribed as follows:[1152]

Bands	From	To
A	3 hours	6 hours
B	6 hours	11 hours
C	11 hours	16 hours
D	16 hours	21 hours
E	21 hours	26 hours
F	26 hours	31 hours
G	31 hours	36 hours
H	36 hours and over	

Table 8: Bands of weekly working hours in terms of the EMPA

In the event that the employer fails to assign an employee to an appropriate band, the employee may make a complaint in accordance with Part 4 of the *WRA*.[1153] Section 18A(7) also prescribes that an employee placed in a specific band shall be allowed to work the average permitted hours for a duration of not less than 12 months. Lastly, section 17 of the *EMPA* prohibits an employer from penalising or threatening to penalise employees for invoking any right conferred on them.[1154]

1150 *EMPA* 38/2018:Sec. 16. In addition, amended section 18A(2) states that where employees believe that they are entitled to be placed on a band of weekly working hours, they must inform the employer in writing.
1151 *EMPA* 38/2018:Sec. 16.
1152 *EMPA* 38/2018:Sec. 16 – Table: Bands of weekly working hours.
1153 *EMPA* 38/2018:Sec. 16 – (18A) (8).
1154 *EMPA* 38/2018: Sec. 17.

Keane argues that the aforesaid rights enable on-demand workers to have their average working hours set in bands based upon their average working hours over a period of 12 months.[1155] Cognisance needs to be taken of the fact that the aforesaid notion has yet to be juridically tested. However, in the absence of such, I am in agreement with Keane in that the amended section brought about by the *EMPA* applies to on-demand workers and, subsequently, advocates for improved decent working hours and decent pay.

4.5.2 Decent multi-stakeholder engagement for on-demand workers in Ireland

The *Irish Constitution* guarantees everyone the right to form associations and trade unions.[1156] However, due to the binary distinction between an employee and the self-employed which continues to be applied, on-demand workers are still excluded from participating in collective bargaining structures in Ireland, thus also excluding them from decent multi-stakeholder engagement. Moreover, the Irish government has been reluctant to establish a third category of workers, as is the case in the United Kingdom. As an alternative, they have focused their intent on identifying and preventing forms of false self-employment.[1157]

Irish trade unions acknowledge that, while the growing number of gig workers in Ireland is noteworthy, especially in terms of social media discourse, the majority of their focus and trade union involvement revolves around traditional forms of employment.[1158] This said, of note here is the Irish trade union's involvement in alternative civil society organisations publicly campaigning for sectors with a high

1155 Keane 2020:311.
1156 The *Irish Constitution*:Sec. 40.6.1(iii).
1157 Pelly 2021 "Ireland must rethink its approach to the gig economy", https://www.personneltoday.com/hr/ireland-must-rethink-its-approach-to-the-gig-economy/. Accessed on 13 April 2022. See also the discussion about the *Code of Practice* for more information in this regard.
1158 Doherty & Franca 2020: 129.

number of precarious workers.[1159] Cognisance should be taken of these alternative forms of civil society organisations, as I argue that it contributes to decent multi-stakeholder engagement. The aforesaid is particularly true in a situation where on-demand workers are excluded from collective bargaining structures altogether. In addition, of note here are new forms of coalition building that demonstrate new ways to strengthen on-demand workers' collective voice. In this regard, examples such as co-operatives, online fora, and isolated protests that are supported by trade unions are noted. Nevertheless, specific forms of coalition-building in the South African context will be considered insofar as they advocate for decent multi-stakeholder engagement.

As the following discussion will show, a possible solution for decent multi-stakeholder engagement for on-demand workers might not be found in the labour legislation, but instead by way of competition laws. The following limitations must be duly noted: This part of the chapter will not provide a comprehensive discussion on the collective bargaining structures applicable to the Irish labour law framework. The discussion relevant to competition legislation will be restricted to the classification of a specific group of workers for which the *Competition Act* already prescribes limited collective bargaining rights.

The *Industrial Relations (Amendment) Act*[1160] allows for joint labour committees that set binding terms and conditions in certain established sectors.[1161] In addition, the *Industrial Relations (Amendment) Act* of 2015 permits representative unions to apply for sectoral employment orders that are also binding terms and conditions in a specific sector.[1162] However, it is interesting to note that the *Competition (Amendment) Act* of 2017 prescribes that section 4 of the 2002 *Competition Act* does not apply to collective bargaining agreements in relation to certain categories of workers, namely freelance journalists, voice-over actors, and session musicians.[1163] In addition, the 2017

1159 Doherty & Franca 2020: 130.
1160 *Industrial Relations (Amendment) Act* 26/1946-2012.
1161 Doherty & Franca 2020: 132.
1162 Doherty & Franca 2020: 132.
1163 See the *Competition (Amendment) Act 12/*2017*:*Schedule 4.

Competition Act introduced two new categories, namely persons who are 'false self-employed workers'[1164] and the 'fully dependent self-employed worker.'[1165] In both of the aforementioned scenarios, a representative union may apply to the Minister to bargain collectively and conclude collective agreements on behalf of the group of workers.[1166] Of importance here is the fact that this legislation aims to extend the 'traditional' collective bargaining rights to vulnerable workers who would normally be excluded from such rights in terms of the binary classification system.[1167] It is thus possible for on-demand workers to be awarded collective bargaining rights based upon this premises. This option does not present itself in South African law.

For purposes of this thesis, an exposition of the fully dependent self-employed worker becomes important. In terms of section 15D of the 2017 *Competition Amendment Act*, a fully self-employed worker is a person:[1168]

- who performs services for another person (whether or not the person for whom the service is being performed is also an employer of employees) under a contract (whether express or implied, and if express, whether orally or in writing); and
- whose main income in respect of the performance of such services under the contract is derived from not more than two persons.

For a representative trade union to succeed in an application to bargain collectively on behalf of a group of on-demand workers, specific requirements must be met. Firstly, the trade union must show that the group of on-demand works indeed falls within the

1164 Section 15D of the *Competition (Amendment) Act 12/*2017 defines "false self-employed worker" as '… an individual who (a) performs for a person ('other person'), under a contract (whether express or implied and if express, whether orally or in writing), the same activity or service as an employee of the other person; (b) has a relationship of subordination in relation to the other person for the duration of the contractual relationship; (c) is required to follow the instructions of the other person regarding the time, place and content of his or her work; (d) does not share in the other person's commercial risk; (e) has no independence as regards the determination of the time schedule, place and manner of performing the tasks assigned to him or her; and (f) for the duration of the contractual relationship, forms an integral part of the other person's undertaking.

1165 *Competition (Amendment) Act 12/*2017: Sec. 15D.

1166 *Competition (Amendment) Act 12/*2017:Sec. 15F(1).

1167 Doherty and Franca 2020: 133.

1168 *Competition (Amendment) Act 12/*2017:Sec. 15D(a)-(b).

scope of 'dependent self-employed work'.[1169] Secondly, the group of dependent self-employed workers must have no or minimal economic effect on the market in which the group concerned operates.[1170] Thirdly, the union must show that the classification will not lead to or result in significant costs to the State.[1171] Lastly, the union must show that the classification "will not otherwise contravene the requirements of this Act or any other enactment or rule of law (including the law in relation to the European Union) relating to the prohibition on the prevention, restriction or distortion of competition in trade in any goods or services."[1172]

Hurley argues that on-demand workers could form part of the 'fully dependent self-employed worker' group. [1173] To my mind, this notion is true seeing that on-demand workers perform services for the platform under a set of agreed terms of services and are mainly dependent on the platform for their income, which the platform receives from the client. In addition, keeping the criteria for a representative trade union's application in mind, one can argue that collective bargaining relating to the decent pay and decent working hours could improve the overall market in which on-demand workers operate, seeing that it brings about stability.[1174] Moreover, in theory, classifying on-demand workers as fully dependent self-employed will not result in a cost to the state, seeing that most of the platform businesses form part of the private sector.[1175] In the absence of an established third category of worker, and the lack of collective bargaining rights for on-demand workers in South Africa, it would be wise to take cognisance of the alternative way to strengthen multi-stakeholder engagement between social partners by virtue of legislation outside of the labour law framework.

The previous discussion aimed to provide an overview of binding legislative responses applicable to on-demand work in Ireland. The section that follows will analyse specific non-binding instruments relevant to on-demand workers. It bears repeating that the

1169 *Competition (Amendment) Act 12/*2017:Sec. 15F(1).
1170 *Competition (Amendment) Act 12/*2017:Sec. 15F(2)(b)(i).
1171 *Competition (Amendment) Act 12/*2017:Sec. 15F(2)(b)(ii).
1172 *Competition (Amendment) Act 12/*2017:Sec. 15F(2)(b)(iii).
1173 Hurley 2020:12-13.
1174 Hurley 2020:14.
1175 Hurley 2020:14.

law should be seen as something other than the panacea for resolving all the issues relating to on-demand work. Instead, I argue that it is crucial to consider non-binding measures outside of the scope of statutes and the strict classification of labour provisions. Thus, the following section provides an examination of non-binding measures that advocate for decent on-demand work.

4.6 NON-BINDING MEASURES ADVOCATING FOR DECENT ON-DEMAND WORK

In addition to the binding statutory provisions described above, Ireland has also introduced a code of practice and a bill that advocates for decent on-demand work. Although some non-binding measures cover platform work in general, the discussion that follows will limit its focus on the extent to which the code of practice and the draft bill apply to on-demand work specifically. As with the previous part, I aim to showcase the best practices for the classification of on-demand workers. In addition, this section also analyses proposed provisions that could improve decent working hours, decent pay and decent multi-stakeholder engagement for on-demand workers.

This section of the chapter commences with an overview of the *CPDES* in Ireland. Thereafter, it analyses specific definitions applicable to the classification of labour and its mention of workers in the gig economy. This discussion will be followed by an analysis of the *Protection of Employment (Platform Workers and Bogus Self-Employment) Bill* (*Platform Workers Bill*).[1176] Considering the absence of enacted legislation dealing specifically with on-demand work, an investigation of the *Platform Workers Bill* becomes necessary.

1176 *Protection of Employment (Platform Workers and Bogus Self-Employment) Bill* 68/2021.

4.6.1 The Code of Practice on Determining Employment Status

In addition to the common law tests and the judicial interpretation of a contract of employment as discussed above, the Employment Status Group[1177] drafted the *CPDES*. This was primarily due to the inability of the legal tests to determine the status of modern employment relationships, and inconsistencies with the application of the legal tests by courts and tribunals. The *CPDES* prescribes various factors that courts and tribunals should consider when determining the true employment status of individuals.[1178] Of importance to this study will be a discussion of the definitions ascribed to 'employee' and 'self-employed'.

The *CPDES* emphasises that there is no clear definition for 'employed' or the 'self employed' in Irish law. In addition, to establish the employment relationship between parties, the written agreement must not be seen as the decisive factor which determines the true employment status.[1179] Against this backdrop, the *CPDES* lists fifteen factors as typical characteristics of an employee and being self-employed respectively. According to item 3 of the *CPDES*, a person would normally be an employee if he or she:[1180]

Characteristics of an employee	Characteristics of self-employed
is under the control of another person who directs them as to how, when and where the work is to be carried out;[1181]	has control over what is done, how it is done, when and where it is done and whether he or she does it personally;

1177 Eurofound 2009. "Ireland: Self-employed workers", https://www.eurofound.europa.eu/publications/report/2009/ireland-self-employed-workers. Accessed on 29 June 2019. The Employment Status Group was established under the 2000-2003 social partnership agreement, namely the Programme for Prosperity and Fairness due to the concerns about the misclassification of individuals as self-employed.

1178 *CPDES* 2021:Item 1.

1179 *CPDES* 2021:Item 2.

1180 For ease of reference, I have compiled a table with the listed factors in Table 9.

1181 Item 3 contradicts itself in that it explains that some individuals could have significant freedom and independence when carrying out their work and still be regarded as an employee. For example, an employee with specialist knowledge is not necessarily directed as to how the work should be performed.

supplies labour only;	owns their own business;[1182]
receives a fixed hourly/weekly/monthly wage;[1183]	costs and agrees on a price for the job;
cannot subcontract the work;[1184]	is free to hire other people, on his or her terms, to do the work which has been agreed to be undertaken;
does not supply materials for the job;	provides the materials for the job;
does not provide equipment other than the small tools of the trade;	provides equipment and machinery necessary for the job, other than the small tools of the trade or equipment which in an overall context would not be an indicator of a person in business on their own account;
is not exposed to personal financial risk in carrying out the work;	is exposed to financial risk by having to bear the cost of making good faulty or substandard work carried out under the contract;
does not assume any responsibility for investment and management in the business;	assumes responsibility for the investment and management of the enterprise;
does not have the opportunity to profit from sound management in the scheduling of engagements or in the performance of tasks arising from the engagements;	has the opportunity to profit from sound management in the scheduling and performance of engagements and tasks;
works set hours or a given number of hours per week or month;[1185]	controls the hours of work in fulfilling the job obligations;
works for one person or for one business;[1186]	can provide the same services to more than one person or business at the same time;
has their tax deducted from their wages through the PAYE system;[1187]	is registered for self-assessment tax returns or VAT;[1188]
is entitled to sick pay or extra pay for overtime;	provides his or her own insurance cover, *e.g.*, public liability cover;
is obliged to perform work on a regular basis that the employer is obliged to offer to them;	is not obliged to take on specific work offered to them;
receives expense payments to cover subsistence and/or travel expenses.	has a fixed place of business where materials, equipment, etc. can be stored;

1182 Item 4 explains that a person can be self-employed in one job and employed as an employee in another at the same time.

1183 This also includes employees that are paid through contracted hours or by reference to the amount of work actually done.

1184 It must be noted that it is possible that an employment relationship may be transferred if the work can be subcontracted and be paid on by the person subcontracting the work. See *CPDES*:Item 3.

1185 The *CPDES* also explains that the hours of work and remuneration may be uncertain.

1186 It is, however, noted that some employees could work for more than one employer and be regarded as an employee. Similarly, some employees could also be self-employed at the same time.

1187 Item 3 further notes that if a person's PAYE is not deducted through the PAYE system, it does not automatically mean that the individual is self-employed.

1188 If an individual registers for VAT under the principles of self-assessment, it does not mean that he/she is self-employed. See *CPDES*:Item 4.

Table 9: Summary of the *CPDES*' characteristics of an employee and a self-employed individual (*CPDES* 2021: Items 3 and 4)

Apart from the last elements listed above, almost all the factors are written in such a way that they are stated as the opposite of the corresponding factors. In addition, the respective factors are much more comprehensive as compared to the South African presumption as to who is an employee. Similar to the South African position, the CPDES prescribes seven factors or 'legal tests' to consider when determining employment status.[1189] As already discussed above, none of the legal tests is determinative on their own, and all of them must be considered when deciding on employment status matters.[1190]

Perhaps one of the most interesting inclusions in the *CPDES* is item 9.4 which deals specifically with workers in the gig economy. The *CPDES* acknowledges that new forms of work are emerging and that they pose a problem when determining if someone is engaged with a 'contract of service' or a 'contract for service'.[1191] Regrettably, the *CPDES* does not elaborate on alternative ways in which on-demand workers can be classified and merely states that 'the binary approach continues to apply in Ireland'.[1192] Consequently, the same approach is applied as with any other employment status dispute and each case must be considered on its own merits.

I am of the opinion that the drafters of the *CPDES* missed an opportunity to provide the Irish courts with additional guidelines on which factors to consider when deciding employment status disputes in the gig economy. This, unfortunately, concretises the current classification dilemma of on-demand workers; thus still excluding them from minimum decent work protections. Having said this, I am hopeful that the position would change if one considers the judgements of recent case law discussed earlier in

1189 *CPDES* 2021: Item 7.
1190 *CPDES* 2021: Item 7.
1191 *CPDES* 2021: Item 9.4.
1192 *CPDES* 2021: Item 9.4.

this chapter.[1193] In the next part of this chapter, I will provide a brief overview of the last non-binding measure applicable to on-demand workers in Ireland.

4.6.2 The Protection of Employment (Platform Workers and Bogus Self-employment) Bill

The *Platform Workers Bill* aims to eliminate misconceptions and provide clarity for those who work on gig platforms and who are misclassified as self-employed. Section 1 states that the purpose of the bill is to clarify and draw a distinction between employment and self-employment.[1194]

Section 2 introduces a presumption of employment by prescribing that 'it shall be presumed that an individual who executes work or a service for a person under a contract is an employee of the person until the contrary is proven.'[1195] Unfortunately, unlike the South African presumption about who an employee is, the proposed section does not list additional criteria to consider.

Similar to existing statutes' definition of a contract of service, section 3 elaborates on what is meant by an employment relationship in the context of the *Platform Work Bill*. The section prescribes that an individual is an employee and an employment relationship exists where the individual enters into or works under a contract of service or apprenticeship, or any other contract whereby the individual renders his/her service personally to a third party.[1196] In addition, this section includes work arrangements where a party to the contract provides an online platform to execute work or services

1193 For more detail, see the discussions of the *Domino's Pizza* case and the *Speedking Couriers* case discussions in para. 4.4.2.
1194 The *Protection of Employment (Platform Workers and Bogus Self-employment) Bill* 68/2021: Sec. 1(1).
1195 The *Protection of Employment (Platform Workers and Bogus Self-employment) Bill* 68/2021: Sec. 2.
1196 The *Protection of Employment (Platform Workers and Bogus Self-employment) Bill* 68/2021: Sec. 3(1)(a)-(b).

on demand.[1197] Thus, this additional section aims to bring platform work into the employment relationship framework.

In accordance with the factors listed in the *CPDES* above, section 4 provides additional criteria for determining the true employment relationship. Subsection 4(1) states clearly that the employment relationship is a status relationship, and it is governed by the law and not purely by the agreement between the parties. Furthermore, subsection 4(4) prescribes that an employment relationship may exist in cases where:[1198]

- the individual is an employee also of another person;
- the individual is also, in respect of other work or another service being executed by him or her, self-employed;
- the individual works as an outworker or teleworker;
- the individual does part-time work, temporary work, seasonal work, or occasional work;

  the remuneration of the individual is calculated by reference to the amount of work actually done; or
- the hours of work or remuneration of the individual are otherwise uncertain.

In addition to the criteria applicable to establish an employment relationship, section 5 outlines criteria to be considered in determining whether an individual is truly self-employed. Subsection 5(1) specifically refers to individuals who 'execute the work as someone in business "on their own account", that is to say, as a free agent with economic independence'. Section 2 mirrors the criteria set in the *CPDES*; however, slight differences are noted. For example, subsection 2(g) limits the execution of services of the same work to more than one person, whereas the *CPDES* refers to persons and businesses. In addition, the bill does not refer to the question of whether

1197 The *Protection of Employment (Platform Workers and Bogus Self-employment) Bill* 68/2021: Sec. 3(2)(a).

1198 The *Protection of Employment (Platform Workers and Bogus Self-employment) Bill* 68/2021: Sec. 4(4)(a)-(f).

self-employed individuals are obliged to take on specific work, or if the individual is registered for VAT.

4.7 SUMMARY

As this chapter has shown, the emergence of the gig economy and providing decent work for on-demand workers are not problems unique to South Africa, but to the Republic of Ireland as well.[1199] This chapter has also shed light on the interpretation of legal tests applicable to the classification of labour.[1200] I argue that the originality of this discussion is rooted in the analysis of the best practices relevant to two main objectives – firstly, the statutory classification practices of on-demand workers in Ireland, and secondly, the extent to which alternative binding and non-binding measures afford decent work to on-demand workers.

As far as the analysis of the legal tests is concerned, the Irish jurisprudence prescribes that no one of the tests is definitive and that the employment relationship as a whole must be considered.[1201] This notion, to some extent, is reminiscent of the South African position in the sense that the courts must consider the employment relationship that exists between the parties, and not rely solely on the classification prescribed in terms of the employment contract.[1202] This said, it is important to note that Ireland has relevant and recent judicial precedents in this regard, specifically in relation to the interpretation and application of the legal tests for the classification of the employment relationship.

Although some differences are noted, for example the strong reliance on the definition of a contract of service that applies to the majority of labour legislation, I argue that South Africa can learn from the way in which the legal tests are interpreted and

1199 See heading 4.3.
1200 See heading 4.4.2.
1201 See para. 4.4.2.
1202 See para. 4.4.2.

applied. The aforesaid is especially true if one considers the interpretation of the South African presumption of employment. However, it is noted that the binary classification of labour in both South Africa and Ireland remains a significant barrier to achieving decent on-demand work for both minimum rights and protections and full decent work.[1203]

The Irish legal framework relevant to this study provides valuable lessons in advocating for minimum decent work for on-demand workers by means of various binding and non-binding measures. For example, Irish lawmakers have enacted specific legislation that impacts on-demand workers' working hours and wages. The stipulations of the *EMPA* provide for a written copy of an employee's conditions of employment, the prohibition of zero-hours contracts, and the inclusion of bands of weekly working hours.[1204] As discussed above, the aforesaid rights establish minimum working hours according to the prescribed bands of weekly working hours, which in turn results in a fixed minimum income per week. This chapter has also shown that decent multi-stakeholder engagement could be achieved by means of legislation outside the scope of labour law. As explained earlier in this chapter, the Competition Amendment Act's definition and criteria for trade union involvement to represent 'fully dependent self-employed' individuals could be extended to cover on-demand workers as well.[1205]

Another significant aspect presented by Ireland is the non-binding measures applicable to the broader gig economy and platform work. Firstly, the *CPDES* presents comparable characteristics of employees and the self-employed. Secondly, it provides additional information on what should be considered when applying the legal tests when determining the classification of labour. The is little doubt that this will be valuable for future cases about the classification of on-demand workers in Ireland. However, I argue that the drafters of the *CPDES* missed a golden opportunity to propose specific characteristics for those engaged in on-demand work.[1206] Instead,

1203 See para.4.4 and 4.7.
1204 See heading 4.5.1 and 4.5.1.2.
1205 See para. 4.5.2.
1206 See para. 4.6.1.

the *CPDES* merely restates that the binary approach to the classification of employment remains and must be applied to each case based on its own merits.

The second non-binding measure involves the *Platform Work Bill*, which is currently in its second stage of approval. The *Platform Protection Bi*ll aims to codify the distinction between platform workers as either employees or self-employed. In addition, it aims to eliminate any misconceptions relevant to the employment status of platform workers in general.[1207] If successful, the *Platform Work Bill* could greatly improve the decent work standards of on-demand workers in Ireland by prescribing binding measures that are also reflected in the *CPDES*.

In accordance with the approach followed in this chapter, the next chapter moves on to consider the achievement of decent on-demand work in Australia.

1207 See para. 4.6.2.

CHAPTER 5: PERSPECTIVES ON DECENT ON-DEMAND WORK IN AUSTRALIA

5.1. INTRODUCTION

This chapter aims to analyse the extent to which Australian labour laws advocate for decent work for on-demand workers in its modern-day gig economy. Subsequent to the analysis of the general Australian legal framework, including its international obligations, and the size and scope of the country's gig economy, this study will consider various binding, non-binding and voluntary measures that advocate for decent on-demand work. As mentioned in Chapter 3, special attention will be given to measures advocating for decent pay, decent working hours and decent multi-stakeholder engagement.

Following the same structure as with Ireland, this chapter is divided into four main sections. The first provides an overview of the Australian legal framework and its international obligations insofar as on-demand workers are concerned. Secondly, an overview of the size and growth of Australian on-demand work is discussed. In this respect, reference will be made to available data relating to on-demand workers' pay, working hours, and lack of decent work entitlements. This sets the scene for the third section, which discusses the traditional classification of labour in the Australian context. Special attention is given to the cases that have already been dealt with by the courts regarding the classification of on-demand workers in Australia.[1208] Accordingly, this will include a review of the statutory and common law classification of an "employee" as well. It must be kept in mind that the aforesaid discussions are necessary to answer the research question as to whether the classification of labour can be developed to afford on-demand workers decent work.

Various binding, voluntary, and non-binding measures that advocate for decent on-demand work will be discussed in the fourth part of the chapter. It is hoped that this

1208 Fair Work Ombudsman. 2022. "Gig Economy", https://www.fairwork.gov.au/find-help-for/independent-contractors/gig-economy. Accessed on 20 July 2022.

part of the discussion will showcase and provide an overview of different alternative approaches to extend decent work principles, such as fair pay, decent working hours and multi-stakeholder engagement structures, to Australia's on-demand sector. It will also consider the ways in which Victoria, New South Wales, Queensland, and Western Australia are advocating for decent on-demand work in their respective federal states. In keeping with the focus of the study, the chapter will conclude by identifying best practices that may assist South Africa in addressing the *lacunae* that exist in advocating for decent on-demand work. But first, a brief overview of the Australian statutory framework and its international obligations will be explained. It is hoped to draw some comparisons with the South African legal framework to identify basic similarities between the legal systems. This discussion will also provide the reader with the required background to the Australian labour framework and what impact the emergence of the gig economy has on it.

5.2. BACKGROUND AND INTERNATIONAL PERSPECTIVES

Australia is established as a parliamentary democracy, with Australian law deeply rooted in the English common law traditions. [1209] The country's core values are vested in the freedom of election and being elected, freedom of assembly, freedom of speech, expression and religious belief, the rule of law, and basic human rights.[1210] The main sources of Australian law, in hierarchical order, consist of the Commonwealth Constitution, Commonwealth legislation, law reports of the High Courts and Federal Courts of Australia, state constitutions, and lastly state legislation and state law reports.[1211] Put differently, this resembles the three main sources of English law on which Australian law is based, namely customs, legislation and case law.[1212]

1209 Aroney 2007:323; ILO 2019. "National Labour Law Profile: Australia", https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158892/lang--en/index.htm. Accessed 10 May 2019.
1210 Australian Government: Department of Foreign Affairs and Trade "About Australia", https://www.dfat.gov.au/about-australia#democracy. Accessed on 17 July 2022.
1211 Legal Services Commission South Australia. 2022. "Legal System", https://lawhandbook.sa.gov.au/ch27.php. Accessed on 20 July 2022.
1212 Legal Services Commission South Australia. 2022. "Legal System", https://lawhandbook.sa.gov.au/ch27.php. Accessed on 20 July 2022.

The Commonwealth of Australia was established in 1901 in terms of the *Commonwealth of Australia Constitution Act* (hereafter *Commonwealth Constitution*).[1213] Like South Africa, the *Commonwealth Constitution* provides for a strict separation of powers between the executive, legislative and judicial branches of government.[1214] As far as foreign jurisdictions are concerned, the Australian High Court has become increasingly open to the citation of foreign court decisions of countries that are in some way associated with the British Commonwealth. This includes South Africa and Ireland.[1215]

The Commonwealth of Australia is a federation consisting of six states[1216] and two self-governing territories.[1217] The legal relationship between the states and the Commonwealth is regulated by the *Commonwealth Constitution,* which distributes governance and law-making powers between the states and the Commonwealth Government.[1218] Section 107 of the *Commonwealth Constitution* provides for the right of states to maintain their own constitutions.[1219] States and territories have independent legislative power in matters not assigned to the federal government, and if inconsistencies between federal laws and state laws occur, the federal laws prevail.[1220] The aforesaid discussion is important to keep in mind in the sections that follow seeing that the court cases discussed and the reports to be considered cover several states. References will therefore be made to the state and its applicable state legislation, if necessary.

1213 *Commonwealth of Australia Constitution Act*, 1900.
1214 *Commonwealth of Australia Constitution Act*: Chapters 1, 2 and 3. Chapter 1 defines the power of the legislative branch of government, Chapter 2 defines the power of the executive and Chapter 3 defines the powers of the judiciary.
1215 Aroney 2007:331
1216 New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia.
1217 The Australian Capital Territory and the Northern Territory. Australian Government 2022 "Introduction to Australia and its system of government", https://www.dfat.gov.au/about-us/publications/corporate/protocol-guidelines/1-introduction-to-australia-and-its-system-of-government. Accessed on 12 July 2022;
1218 *Commonwealth of Australia Constitution Act*:Sec.108.
1219 Sec. 7 states that "Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be."
1220 *Commonwealth of Australia Constitution Act*:Sec.109.

Australia is a founding member of the UN, and as such, formally agreed to the 2030 Agenda for Sustainable Development.[1221] In addition, UN instruments such as the *Universal Declaration of Human Rights* refer to the need for fair wages and reasonable working conditions for all.[1222] It must also be kept in mind that the UN works in close association with the ILO on labour problems and the regulation of such.[1223] Australia, similar to South Africa, is also a founding member of the ILO, and as such plays a vital role in promoting the Decent Work Agenda.[1224] To date, Australia has ratified all eight of the fundamental conventions and three of the Governance Conventions.[1225] The ILO sets standards that underpin Australia's labour laws. Although recourse to the ILO is available, Floyd *et al.* note that its enforcement capacity is lacking.[1226] Of importance for this chapter, is the close relationship that Australia has with the ILO with specific reference to achieving decent work for all. Some comparisons will thus be made to relevant conventions and recommendations that are discussed in Chapter 3. The following part will provide an overview of the sources of labour law in Australia and the dispute resolution structures for resolving labour disputes.

The main sources of labour law in Australia are the common law, industrial instruments that include awards and enterprise agreements, case law and legislation.[1227] The original main industrial legislation in Australia was the *Conciliation and Arbitration Act* (hereafter *CAA*).[1228] The establishment of the *CAA* saw the creation of the Conciliation and Arbitration Commission, which was tasked to resolve labour disputes through

1221 Australian Government: Department of Foreign Affairs and Trade "United Nations (UN)", https://www.dfat.gov.au/international-relations/international-organisations/un/united-nations-un. Accessed on 17 July 2022.
1222 Floyd *et a*l. 2018:397; Universal Declaration of Human Rights 1948:Art. 23.
1223 Floyd *et a*l. 2018:397.
1224 ILO "National Labour Law Profile: Australia", https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158892/lang--en/index.htm. Accessed 10 May 2019; ILO "Australia – ILO Cooperation", https://www.ilo.org/pardev/donors/australia/lang--en/index.htm. Accessed on 13 July 2022.
1225 ILO "Ratifications for Australia", https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102544. Accessed on 13 July 2022.
1226 Floyd *et al.* 2018:95.
1227 ICLG "Australia: Employment and Labour Law 2019" https://iclg.com/practice-areas/employment-and-labour-laws-and-regulations/australia. Accessed on 9 May 2019; ILO 2019. "National Labour Law Profile: Australia", https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158892/lang--en/index.htm. Accessed on 10 May 2019.
1228 *The Commonwealth Conciliation and Arbitration Act* 13/1904; Floyd *et a*l. 2018:77.

alternative dispute resolution.[1229] Moving on to the present day, the *CAA*'s dispute resolution functions are prescribed by the *FWA*.[1230] Adverse action is part of the *FWA's* protections. The meaning 'adverse action' is categorised by section 342 of the *FWA* and applies *vice versa* to different relationships that include the employee-employer relationship and the relationship between an independent contractor and a principal.[1231]

The *FWA* governs the employment relationship in Australia, which is furthermore regulated by the National Workplace Relations System[1232] comprising industry-specific modern awards and enterprise agreements applicable to certain specific workplaces.[1233] Established under the *FWA*, the Fair Work Ombudsman (FWO) and the Fair Work Commission (FWC) act as independent government organisations charged with the responsibility to regulate Australia's workplace regulation systems.[1234] Similar to the South African Commission for Conciliation, Mediation and Arbitration (CCMA), the FWC deals with most of the complaints referred to it by way of various binding and non-binding alternative dispute resolution methods.[1235] This distinction becomes important when case law is discussed later on in this chapter.

However, before we consider applicable case law, the size and growth of the gig economy and on-demand work are discussed next. This discussion is necessary to demonstrate the gravity of the lack of decent work in the growing on-demand sector. It sets the scene for the discussion on whether Australia needs to classify on-demand workers as employees to ensure decent work.

1229 *The Commonwealth Conciliation and Arbitration Act* 13/1904:Sec. 2.
1230 *Fair Works Act* 28 of 2009.
1231 *Fair Works Act:* Sec:342. A 'principal' refers to a person employed who enters into an agreement with an independent contractor for services.
1232 The national workplace relations system is a collection of legislation that applies to most employees and employers in Australia. It includes the *Fair Work Act* 28 of 2009, the National Employment Standards, registered agreements, and awards. Fair Work Ombudsman 2019. https://www.fairwork.gov.au/Dictionary.aspx?TermID=2033. Accessed 20 June 2019.
1233 Fair Work Commission 2019. "National workplace relations system", https://www.fwc.gov.au/about-us/national-workplace-relations-system. Accessed on 20 June 2019.
1234 Fair Work Ombudsman 2019. "The Fair Work Commission and us – what's the difference?", https://www.fairwork.gov.au/about-us/our-role/the-fair-work-commission-and-us-whats-the-difference. Accessed on 23 June 2019.
1235 Fair Work Commission 2019. "National workplace relations system", https://www.fwc.gov.au/about-us/national-workplace-relations-system. Accessed on 20 June 2019.

5.3. THE SIZE AND GROWTH OF ON-DEMAND WORK IN AUSTRALIA

Australia is no exception to the growing reliance on platform work in its economy. In 2016, roughly 80 000 workers worked on gig economy platforms.[1236] More recently, it is estimated that 250 000 Australians are part of the broader gig economy.[1237] It bears repeating that these are just estimates since there is no real way to definitively measure on-demand work's true extent.[1238] In addition, some workers are working illegally, and others are working on multiple platforms simultaneously. It is therefore difficult to include the aforesaid data in the official statistics.[1239]

A 2018 study within the New South Wales (hereafter NSW) state found that more than 45 000 people were performing platform work and that it contributed more than $504 million annually to the Australian economy.[1240] New research also shows that roughly 7 per cent of Australia's workforce has used platform work over the past 12 months to acquire work opportunities, and that 15.5 per cent of the platform workers rely on income for meeting their basic needs.[1241] Approximately 15.4 per cent of Australia's platform workers regard the income from platform work as crucial to meeting their basic needs.[1242] The Organisation for Economic Co-operation and Development (hereafter OECD) has determined that Australia ranks as one of the top three countries in the world with one of the highest "non-standard employment" per workforce percentage.[1243] In addition, the Australian Council of Trade Unions argued that "60 per cent of total employment in Australia is comprised of regular full-time or ongoing part-time work".[1244]

1236 Forsyth 2020:287.
1237 Sprajcer & Gupta. 2022. "Uncertainty, money worries and stress – gig workers need support and effective ways to cope", https://bit.ly/3RGo5uW. Accessed on 13 July 2022.
1238 Select Committee on Job Security – The Job Insecurity Report 2022:40.
1239 Select Committee on Job Security – The Job Insecurity Report 2022:40.
1240 Select Committee on the Future of Work and Workers 2018:74.
1241 Treasurer 2019. "Revealing The True Size of Australia's Gig Workforce", https://www.premier.vic.gov.au/revealing-the-true-size-of-australias-gig-workforce/. Accessed on 25 June 2019.
1242 Select Committee on Job Security – First interim report 2021:26. It must also be noted that 2.7 per cent of the Australian platform workers indicated that platform work accounted for 100 per cent of their income.
1243 Select Committee on the Future of Work and Workers 2018:67.
1244 Select Committee on the Future of Work and Workers 2018:67.

A 2019 national survey of transport sector workers found that their median income ranged from AU$20 to AU$21 per hour.[1245] This varies significantly, depending on your location. For example, on-demand workers from Melbourne made roughly AU$12.88 per hour as compared to Brisbane's on-demand workers who received AU$17.50 per hour.[1246] Furthermore, considering the unpaid work of administering their business, cleaning their vehicles, additional platform fees and driving costs, the reality is that on-demand workers take home roughly half of their earnings.[1247] Obtaining high-paying tasks exacerbates on-demand workers' income insecurity further.[1248] This is particularly true in situations where there is an oversupply of on-demand workers in a specific location. This, in turn, results in many of them competing on pricing and sacrificing part of their income per task.[1249] This form of income instability results in on-demand workers having fewer savings, which affects their ability to meet their everyday living costs, such as paying rent, providing for their families, and planning ahead financially.[1250]

The different platforms operating in Australia range from ridesharing, food delivery, care providers, cleaning services, and the delivery of goods.[1251] Keeping the scale of on-demand work and its range of services in mind, the Australian state and territory governments have begun to examine the best way to regulate on-demand work on both national and state and territory levels.[1252] A comprehensive overview of the recommendations proposed by several federal states is discussed later in this chapter.

Before I discuss the manner in which different federal states regulate their workforce, an analysis of the notion of an employment relationship and the classification of labour in Australia needs to be done. While doing so, it is hoped that the legal barriers to the

1245 Select Committee on Job Security – First interim report 2021:23.
1246 Select Committee on Job Security – First interim report 2021:23.
1247 Select Committee on Job Security – First interim report 2021:32.
1248 Select Committee on Job Security – First interim report 2021:64.
1249 Select Committee on Job Security – First interim report 2021:64.
1250 Select Committee on Job Security – First interim report 2021:88.
1251 Impact of technology and other change on the future of work and workers in New South Wales – First Report – The Gig Economy 2022:8. Hereafter, the NSW Report.
1252 NSW Report 2022:1.

classification of on-demand workers as employees of a platform business become clear.

5.4. THE NOTION OF THE EMPLOYMENT RELATIONSHIP AND THE CLASSIFICATION OF LABOUR IN AUSTRALIA

In the Australian context, multiple incentives exist for online platforms to avoid the classification of their on-demand workers as employees. In line with South Africa and Ireland, Australia's national legislation, in this case the *FWA*, imposes statutory rights and entitlements that include different leave entitlements,[1253] minimum notice periods in relation to the termination of employment,[1254] and entitlement to redundancy pay for an employee upon the termination of employment.[1255] Whether a relationship is an employment relationship is important in establishing the parties' rights and obligations, both in terms of common law and statutory law.[1256] In common law, Floyd *et al.* opine that the main reason for determining whether an employment relationship exists is to establish vicarious liability.[1257] It is for this reason that the distinction between an employee and an independent contractor remains crucial for purposes of liability in the labour context.[1258]

The legal entitlement and obligation of all workers are determined by their status as workers. Australia follows a binary approach in that a worker can either be an employee in a contract of service or an independent contractor in a contract for services.[1259] This, in turn, is regulated by both Commonwealth and state regulations.[1260]

1253 This includes annual leave in terms of sec. 87 of the *FWA*, parental leave in terms of sections 67 to 85 of the *FWA*, personal carer leave prescribed by section 96 of the *FWA*, and additional leave entitlements relating to compassionate leave as per section 104 of the *FWA*.
1254 *FWA*:Sec. 117.
1255 *FWA*:Sec. 119.
1256 Floyd *et al.* 2018:2.
1257 Floyd *et al.* 2018:2.
1258 *Franco v Deliveroo Australia Pty Ltd* [2021] FWC 2818:97; Floyd *et al*. 2018:3.
1259 NSW Report:10.
1260 NSW Report:10.

Within the bounds of Australian industrial relations legislation, the *FWA* mainly confers national rights and obligations to employers and employees.[1261] In contrast, workers who do not enjoy the status of 'employee' are not entitled to the prescribed protections in terms of the *FWA* and industry awards.[1262] Lastly, enterprise agreements approved by the FWC apply to employers and employees that agree to them.[1263] This said, some legislative obligations and rights apply irrespective of the existence of an employment relationship. Examples of these statutes apply to health and safety, discrimination, and victimisation at work.[1264]

A contractual relationship lies at the heart of the employment relationship.[1265] The employment contract does not need to be in writing, as long as the parties are in agreement on the nature of the contract.[1266] The formation of the contractual employment relationship is governed by the common law principles that apply to the formation of any legal agreement, namely consensus between the parties with the intention to create legal relations, considerations,[1267] and certainty and completeness of terms.[1268] Parties are thus free to choose the legal relationship to fit their circumstances, as long as they adhere to regulatory obligations such as the payment of tax.[1269] In addition, online platforms use flexibility as the choice that on-demand workers have to perform tasks for more than one employer,[1270] which is referred to as 'multi-apping'.[1271] Online platforms rely strongly on this argument, which allows for a finding that it is a difficult task to place the bulk of the statutory obligations on a single

1261 Floyd *et al*. 2018:3. These rights and obligations include minimum conditions of employment, inclusive of minimum pay, minimum hours of work and leave entitlements, and the right not to be unfairly dismissed.
1262 Select Committee on Job Security – First interim report 2021:102. Awards made by the industrial tribunals, such as the FWC, regulate the terms and conditions of employment.
1263 Floyd *et al.* 2018:3.
1264 Floyd *et al.* 2018:3.
1265 Floyd *et al.* 2018:4.
1266 Floyd *et al.* 2018:4.
1267 In other words, a mutuality of obligation must exist. There must be an obligation to perform work and an obligation to pay the agreed remuneration.
1268 Floyd *et al.* 2018:4.
1269 Floyd *et al.* 2018:4-5.
1270 Rawling & Munton 2022:19.
1271 Veen A 2021. "Food app court case a wake-up call for gig economy", https://indaily.com.au/opinion/2021/05/20/food-app-court-case-a-wake-up-call-for-gig-economy/. Accessed on 17 July 2022. The term 'multi-apping' refers to the act of working on multiple platforms simultaneously. This practice is also a 'phenomenon of change that new technology is bringing to the traditional arrangements for employment'.

employer.[1272] Rawling and Muton opine that the allowance of multi-apping raises considerable challenges, for example, claims relating to minimum payment entitlements.[1273]

In most cases, on-demand workers are not classified as employees of the platform and do not receive the bulk of employment rights and protections inherent to the traditional employee-employer relationship.[1274] Moreover, although it does not form part of this research, on-demand workers are offered little to no workplace training and skills development opportunities.[1275] Ultimately, on-demand drivers experience reduced power when engaging with platform businesses. For example, it is a platform business that sets the terms and conditions related to payments, work allocation, and the allowance of multi-apping.[1276] The result hereof is that on-demand workers are not able to advocate for decent terms of service, thus making their situation more precarious.[1277]

The employment relationship, as a legal definition, remains largely undefined.[1278] Most labour statutes conferring rights and obligations do not explicitly define or specify the test for determining who is an employee.[1279] Instead, the *FWA*, for example, refers to 'employer' and an 'employee' within their 'ordinary' meaning.[1280] A discussion of the statutory classification of the labour relationship is provided in the next section.

In line with the Irish position, Australian courts also consider the 'reality' of the parties' relationship. In doing so, they examine the true relationship beyond the terms of the contract itself.[1281] Floyd *et al.* describe this process as one that is both practical and

1272 Rawling & Munton 2022:19.
1273 Rawling & Munton 2022:20.
1274 NSW – First Report – The Gig Economy 2022:25; Select Committee on Job Security – First interim report 2021:69. This include, *inter alia*, minimum pay, workers' compensation and insurances, superannuation, leave entitlements, and health and safety protections. In addition, on-demand workers do not have access to labour dispute resolution protections against unfair dismissals and anti-discrimination protections.
1275 Select Committee on Job Security – First interim report 2021:70.
1276 Select Committee on Job Security – First interim report 2021:78.
1277 Select Committee on Job Security – First interim report 2021:79.
1278 Floyd *et al.* 2018:8.
1279 Floyd *et al.* 2018:9.
1280 See, for example, section 11 of Part 1-2 and subsections 15(1) and 30E(1) of the *FWA*.
1281 Floyd *et al.* 2018:8.

realistic, especially given the different modern-day work arrangements.[1282] That said, the contract of employment remains the starting point to determine whether a contract is a contract *of* service[1283] or a contract *for* service.[1284] A discussion on the *indicia* to be considered is included later in this chapter.[1285]

5.4.1 The statutory classification of the labour relationship in Australia

As mentioned earlier, Australia's labour regulatory framework draws a division between "employees" and "independent contractors".[1286] The definition of an employee and employer must also be interpreted within their ordinary meaning. This, in essence, presumes the import of the common law meaning of an employee into an applicable statute.[1287] In keeping with the common law definition of a contract of service, the relationship can best be described as one of control and dependency.[1288] The control test was therefore the main test that was applied. However, as with the case in both South Africa and Ireland, the binary divide between the degree of control of a contract of service and a contract for service is not always clear. The 'ultimate question' for purposes of common law classification was explained in *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation*[1289] wherein Bromberg J explained the test as follows:[1290]

> Simply expressed, the question of whether a person is an independent contractor in relation to the performance of particular work, may be posed and answered as follows: Viewed as a "practical matter":
> (i) is the person performing the work of an entrepreneur who owns and operates a business; and,
> (ii) in performing the work, is that person working in and for that person's business as a representative of that business and not of the business receiving the work?
> If the answer to that question is yes, in the performance of that particular work, the person is likely to be an independent contractor. If no, then the person is likely to be an employee.

1282 Floyd *et al.* 2018:8.
1283 An employment relationship.
1284 An independent contractor relationship.
1285 See heading 5.4.2.
1286 Select Committee on Job Security – First interim report 2021:101.
1287 Floyd *et al.* 2018:9.
1288 Floyd *et al.* 2018:9.
1289 *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation* (2011) 279 ALR 341.
1290 *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation* (2011) 279 ALR 341:308.

Bromberg J went on to explain that the central question has two elements, namely that the person providing the services has a business and that "the work or the economic activity being performed is being performed in and for the business of that person".[1291] However, the aforesaid criteria are not the sole criteria to determine the totality of the relationship between contracting parties. Instead, the Australian courts rely on the multi-factor test to determine the classification of the employment relationship.[1292] These *indicia* or criteria are characteristics of a contract of service of which the right to control is often the dominant criteria.[1293]

A further distinction between casual employees and permanent employees is also prescribed by the *FWA*. The *FWA* prescribes limited benefits to casual employees if they qualify as "*long term casual employees*". The *FWA* defines long term casual employees as:[1294]

> Long term casual employee: a national system employee of a national system employer is a long-term casual employee at a particular time if, at that time:
> (a) the employee is a casual employee; and
> (b) the employee has been employed by the employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months.

Anti-discrimination legislation provides some protection to various forms of employees;[1295] however, atypical workers are generally excluded from the application.[1296] *The Fair Works Amendment (Protecting Vulnerable Workers) Act*[1297] has been enacted to afford additional protection for vulnerable employees against employers contravening workplace laws, and to prohibit employers from making

1291 *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation* (2011) 279 ALR 341:309.
1292 Bomball 2019:378. See also *Stevens v Brodribb Sawmilling Co Pty Ltd* (2001) 207 CLR 21:29; *Hollis v Vabu Pty Ltd* [2001] HCA 44:33.
1293 Select Committee on Job Security – First interim report 2021:102; Floyd *et al* 2018:12.
1294 *FWA*:sec. 12.
1295 This includes full-time and part-time employees, apprentices or trainees, probation workers, casual workers, labour hire workers, fixed-term contract workers and workers on a work visa. ICLG "Australia: Employment and Labour Law 2019", https://iclg.com/practice-areas/employment-and-labour-laws-and-regulations/australia. Accessed on 9 May 2019.
1296 ICLG "Australia: Employment and Labour Law 2019", https://iclg.com/practice-areas/employment-and-labour-laws-and-regulations/australia. Accessed on 9 May 2019.
1297 *Fair Work Amendment (Protecting Vulnerable Workers) Act* 2017.

unreasonable payments. This act would thus only find application if on-demand workers are categorised as employees, which is currently not the case.

In addition to the labour laws applicable to those fortunate to be in an employment relationship, Australia enacted legislation dealing specifically with the independent contractor and principal relationship. The *Independent Contractors Act*[1298] (hereafter the *ICA*) applies to all contracts for services. It aims to protect the freedom of independent contractors and to recognise independent contracting as a legitimate work arrangement.[1299] The *ICA* was thus enacted to ensure that the independent contractor relationship is governed by commercial law rather than industrial law.[1300] Subsection 5(1) prescribes that the contract for service must relate to the performance of work by the independent contractor. In addition, subsection 5(2) requires a contract for service to have a 'constitutional connection'.[1301] The *ICA* does not define what an 'independent contractor' entails. However, subsection 4 prescribes that an independent contractor is not limited to natural persons.

In the absence of a detailed definition, the meaning of an 'independent contractor' is left to the common law and the application of the multi-factor test, which is discussed in the part that follows.[1302]

5.4.2 Multi-factor test

The statutory definition of an employee has changed over decades and is now applied in terms of various factors which assess the terms of the contract and the totality of

1298 *Independent Contractors Act* 162/2006.
1299 *ICA*:Secs. 31(a) and 31(b). Although the *ICA* prescribes some remedies pertaining to unfair contracts, the extension of the remedies is not suited, nor designed, for platform work. The Victoria inquiry found that the *ICA* could potentially apply to platform work, however, workers are obliged to pay their own legal costs which, in turn, could take years with limited prospects of success. See the Select Committee on Job Security – First interim report 2021:111, 113; Rawling & Munton 2022:9.
1300 Select Committee on Job Security – First interim report 2021:113. See heading 5.5.1 for a comprehensive discussion on the *ICA*.
1301 A contract has a constitutional connection if at least one party to the contract is a constitutional corporation, the Commonwealth or a Commonwealth authority; or a body corporate incorporated in a Territory in Australia.
1302 Floyd *et al.* 2018:35.

the work relationship.[1303] The multi-factor test, or the multi-*indicia* test, requires a court or tribunal to consider a range of factors when examining the totality of the relationship.[1304] Depending on the type of work relationship, some factors might be more useful than others.[1305] Although not an exhaustive list, the test weighs up all the features of the relationship, including the following factors:

- the right to perform work of others or to reject work that is offered;[1306]
- the right to legal authority to exercise control over the worker and the ability to delegate work to others;[1307]
- the ability to engage other staff;[1308]
- the economic dependency on the business of the putative employer;[1309]
- whether the worker is integrated into the organisation hiring their service;[1310]
- who provides and maintains tools and equipment;[1311]
- the responsibility of business expenses or the provision of a place of work;[1312]
- whether the remuneration is dependent on the hours of work rather than based on a result;[1313]
- if there is a provision for paid leave;[1314] and

1303 Rawling & Munton 2022:14.
1304 Floyd *et a*l. 2018:12; Bomball 2019:378.
1305 *Kaseris v Rasier Pacific VOF* 2017 FWC 6610:46; *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation* (2011) 279 ALR 341:204.
1306 Floyd *et al.* 2018:14.
1307 *Kaseris v Rasier Pacific VOF* 2017 FWC 6610:53; Rawling and Munton 2022:12; Select Committee on Job Security – First interim report 2021:102; Floyd *et al.* 2018:15. This factor considers the flexibility that a person has to delegate their personal services. If, for example, they have more flexibility in this regard, the relationship is indicative of that of a contract for services.
1308 Floyd *et a*l. 2018:14.
1309 Floyd *et al.* 2018:14. Being self-reliant is indicative of a contract for services.
1310 Select Committee on Job Security – First interim report 2021:102; *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation* (2011) 279 ALR 341:288. Integrating a person into an organisation is indicative of a contract of service. Examples of such include regular communication and contact between the worker and the organisation, investing in the training and skills development of a worker by the organisation, and attending an organisation's social functions.
1311 *Kaseris v Rasier Pacific VOF* 2017 FWC 6610:53; Select Committee on Job Security – First interim report 2021:102
1312 Floyd *et al.* 2018:14
1313 Select Committee on Job Security – First interim report 2021:102; Floyd *et al.* 2018:17; *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation* (2011) 279 ALR 341:204. Broberg J explained that care must be taken when considering this factor. Employees can either be paid by wage or by reaching a specific result. In the same way, independent contractors are paid for a result, yet there are examples where independent contractors, such as solicitors, are charged on a time basis.
1314 Floyd *et al.* 2018:14, 17. It must be kept in mind that the absence of leave entitlements is not a feature of casual employment in Australia.

- the way in which tax and superannuation obligations are accounted for.[1315]

When considering the factors, courts must to some extent be 'impressionistic' and 'intuitive'.[1316] The following section will discuss how the multi-factor test is applied in the gig economy by discussing a series of cases. Since 2017 there have been several conflicting judgements handed down by the Australian courts on the matter of classifying on-demand workers as either employees or independent contractors. Although many cases relating to the classification of labour can be considered, preference will be given to case law relating to on-demand work specifically. In doing so, I aim to provide a judicial timeline that explains the way in which the multi-factor test has been applied to on-demand work.

One of the earliest cases dealing with the classification of on-demand workers is *Kaseris v Rasier Pacific.*[1317] In this case, the applicant, Mr Kaseris, worked as an Uber driver in Victoria and alleged that he was dismissed by Uber on 11 August 2017.[1318] The FWC stated that in order for Mr Kaseris to be protected against unfair dismissal, he needed to be classified as an 'employee' for purposes of section 382 of the *FWA*.[1319] While applying the multi-factor test, the FWC held that the applicant had complete control over the hours he worked,[1320] he was required to supply his own equipment,[1321] he did not have to wear an official uniform while performing tasks,[1322] and had to maintain his own private taxation affairs.[1323] The Tribunal also alluded that:

1315 *Kaseris v Rasier Pacific VOF* 2017 FWC 6610:53. Floyd *et al*. 2018:12
1316 *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation* (2011) 279 ALR 341:204. Bromberg J explains that this approach 'involves what may be described as a "smell test", or a "level of intuition"'.
1317 *Kaseris v Rasier Pacific VOF* 2017 FWC 6610.
1318 *Kaseris v Rasier Pacific VOF* 2017 FWC 6610:1-2. Uber argued that the applicant was not an employee of Uber and that the *indicia* of the relationship illustrated that of an independent contractor relationship.
1319 *Kaseris v Rasier Pacific VOF* 2017 FWC 6610:43.
1320 *Kaseris v Rasier Pacific VOF* 2017 FWC 6610:54-55. The FWC noted that the factors indicated some control; however, not 'overwhelmingly' enough to meet this factor of the test.
1321 *Kaseris v Rasier Pacific VOF* 2017 FWC 6610:56. This includes his own vehicle, smartphone and wireless data plan.
1322 *Kaseris v Rasier Pacific VOF* 2017 FWC 6610:57.
1323 *Kaseris v Rasier Pacific VOF* 2017 FWC 6610:58.

> The notion that the work-wages bargain is the minimum mutual obligation necessary for an employment relationship to exist, as well as the multi-factorial approach to distinguishing an employee from an independent contractor, developed, and evolved at a time before the new "gig" or "sharing" economy. It may be that these notions are outmoded in some senses and are no longer reflective of our current economic circumstances.

Keeping this in mind, the FWC failed to elaborate on this matter and left it up to the legislator to 'develop laws and refine traditional notions of employment'.[1324] Considering the facts of the case and the true characteristics of the relationship between the parties, the FWC held that the *indicia* pointed to an independent contractor relationship.[1325]

This position was followed in *Janaka Namal Pallage v Rasier Pacific Pty Ltd,*[1326] a case that also dealt with an unfair dismissal from the respondent, Uber, and the application of the multi-factor test. The Commissioner held that the applicant had full control over when he wanted to work, the hours he wanted to work, and that he was able to accept or reject trip requests.[1327] When considering the factor relating to the delegation of work, the tribunal noted that the 'absence of capacity to delegate or subcontract work' received via the Uber App illustrated that the relationship was more consistent with an employment relationship.[1328] In addition, the Commissioner also explored Uber's capacity to suspend services or deactivate a partner driver. In doing so, the Commissioner explained that the terms of service expressly stated that Uber could terminate the applicant's services immediately and without notice for any material breach of Uber's community guidelines.[1329]

The FWC could, unfortunately, not decisively conclude on this requirement due to a lack of evidence from the respondent.[1330] The Commissioner had regard to the multi-

1324 *Kaseris v Rasier Pacific VOF* 2017 FWC 6610:66.
1325 *Kaseris v Rasier Pacific VOF* 2017 FWC 6610:67.
1326 *Janaka Namal Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579.
1327 *Janaka Namal Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579:36.
1328 *Janaka Namal Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579:41.
1329 *Janaka Namal Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579:42.
1330 *Janaka Namal Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579:43. The Commission noted that 'the absence of cogent evidence on the subject from the Respondent, whether or not those

factor test by affirming that the overall assessment of the *indicia* was not a 'mechanical exercise' and that not all the details were of equal weight.[1331] Considering all but two of the multi-factor test criteria,[1332], the FWC found that the applicant was not an employee within the meaning of the *FWA*.[1333]

In the months to follow, the FWC dealt with two cases concerning the legal reclassification of on-demand workers as employees. Although previous cases were unsuccessful[1334] in extending labour protections to Uber drivers, the FWC concluded differently in *Joshua Klooger v Foodora Australia Pty Ltd.*[1335] The FWC again considered and applied the criteria set out by the multi-factor test. The FWC's interpretation of the multi-factor test, as far as it applies to on-demand work, will be discussed next.

As a point of departure, the FWC noted that Foodora's offer and selection process for engagement was comparable with web-based systems typically used to inform part-time or casual employees of available shifts.[1336] In addition, the applicant was obliged to wear Foodora's uniform and to ride the branded bicycle.[1337] The control exercised by Foodora was evident in the company's ranking system.[1338] This included reference to the place of work and when each shift started and finished.[1339] Essentially, the applicant could not decide to pick a task or choose when and where to work. Although the service contract repeatedly branded the relationship as that of an independent contractor, the FWC noted that most of its content reflected that of an employment contract.[1340] The contract indicated that it was highly problematic for the driver to work

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complaints (or any others it may have considered) may reasonably be said to have amounted to a "material breach" of the Services Agreement by Mr Pallage is unknown.'

1331 *Janaka Namal Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579:53.
1332 Namely the delegation of work and the right to suspend or dismiss.
1333 *Janaka Namal Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579:53-54.
1334 *Kaseris v Rasier Pacific VOF* 2017 FWC 6610 and *Janaka Namal Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579.
1335 *Joshua Klooger v Foodora Australia Pty Ltd* U2018/2625.
1336 *Joshua Klooger v Foodora Australia Pty Ltd* U2018/2625:69.
1337 *Joshua Klooger v Foodora Australia Pty Ltd* U2018/2625:68.
1338 *Joshua Klooger v Foodora Australia Pty Ltd* U2018/2625:69 and 74.
1339 *Joshua Klooger v Foodora Australia Pty Ltd* U2018/2625:73.
1340 *Joshua Klooger v Foodora Australia Pty Ltd* U2018/2625:72 This includes clauses prescribing the rostering and acceptance of tasks and the attire to be worn while performing tasks.

for more than one delivery company. However, the FWC compared the applicant's situation with that of a casual restaurant staff working two or more jobs simultaneously.[1341] In addition, the applicant was paid by Foodora on a weekly basis after he approved official invoices from the company.[1342]

On a more contentious note, the issue of sub-contracting and delegation of tasks was the strongest consideration in favour of Foodora's contention that the applicant was classified as an independent contractor.[1343] The FWC specifically noted that 'an employee could sub-contract her or his work to another would, ordinarily, be antithetical to the existence of any employment relationship'.[1344] In addition, the FWC noted that Foodora endorsed the substitution scheme followed by the applicant.[1345] Consequently, Foodora was not allowed to rely on the substitution scheme as an acceptable basis to classify the relationship as that of an independent contractor relationship.[1346] Accordingly, the FWC concluded that the applicant was deemed an employee of the company.[1347]

1341 *Joshua Klooger v Foodora Australia Pty Ltd* U2018/2625:76.
1342 *Joshua Klooger v Foodora Australia Pty Ltd* U2018/2625:92.
1343 *Joshua Klooger v Foodora Australia Pty Ltd* U2018/2625:79.
1344 *Joshua Klooger v Foodora Australia Pty Ltd* U2018/2625:79.
1345 *Joshua Klooger v Foodora Australia Pty Ltd* U2018/2625:85. It must be noted that Foodora had knowledge of at least one sub-contractor performing tasks and that it was in breach of its own contract and Australian laws due to immigration-related matters.
1346 *Joshua Klooger v Foodora Australia Pty Ltd* U2018/2625:87. The FWC noted that "Foodora should not have permitted the operation of the substitution scheme. In these circumstances, the substitution scheme, as an example of sub-contracting, should not represent a proper or acceptable basis for validation of the characterisation that should be determined for the relationship between the applicant and Foodora."
1347 *Joshua Klooger v Foodora Australia Pty Ltd* U2018/2625:102. The applicant was subsequently awarded $15 000 for unfair dismissal. The FWC went on to say that there was no valid reason for the dismissal of the applicant and that the true substantive reason for the dismissal was not defensible and followed an 'entirely unjust and unreasonable' process. See *Joshua Klooger v Foodora Australia Pty Ltd* U2018/2625:122, 124. In contrast with the decision reached in *Joshua Klooger v Foodora Australia Pty Ltd*, the Fair Work Ombudsman finalised a yearlong investigation into Uber Australia and found that its drivers were not deemed to be employees of Uber Australia. Fair Work Ombudsman Sandra Parker recommended that no employment relationship existed between the Uber drivers and Uber Australia, since they were not subjected to any formal obligation to perform work. She concluded by mentioning that the FWO "will continue to assess allegations of non-compliance on a case-by-case basis". For more detail see Fair Work Ombudsman 2019. "Uber Australia investigation finalized", https://www.fairwork.gov .au/about-us/news-and-media-releases/2019-media-releases/june-2019/20190607-uber-media-release. Accessed on 14 July 2022.

Following this decision, yet another case was brought before the FWC to determine whether a rider was an employee of Deliveroo or an independent contractor. In *Franco v Deliveroo Australia Pty Ltd,*[1348] the FWC accentuated that digital platform companies, such as Deliveroo, 'camouflaged' the significant degree of control that they possess.[1349] Furthermore, the capacity of this control was vested in the gathering of a significant volume of data that provided the system of measurement upon which control could be exercised.[1350]

As far as work performed for competitors was concerned, the Commissioner held that the traditional arrangements for the performance of work had changed considerably, most of which was brought about by the use of new technologies.[1351] Referring to the new technologies adopted in many workplaces due to Covid-19, the Commissioner noted that the traditional approach to exclusivity within the employment relationship context required reconsideration.[1352] In addition, the FWC described the service agreements as 'contracts of adhesion' that left the applicant little to no negotiation power in respect of the terms and agreements.[1353]

In line with the application followed in *Joshua Klooger v Foodora Australia Pty Ltd*, the FWC maintained that arrangements involving the delegation or sub-contracting of work did not automatically exclude the existence of an employment relationship.[1354] As with the previous cases, the FWC considered other *indicia* including the method of remuneration,[1355] the parties' taxation obligations,[1356] and the provision of paid leave.[1357] In reaching a decision, the Commissioner considered the applicable *indicia* 'like the colours from an artist's palette, emerged from a complete picture' and

1348 *Franco v Deliveroo Australia Pty Ltd* [2021] FWC 2818.
1349 *Franco v Deliveroo Australia Pty Ltd* [2021] FWC 2818:112; See also Select Committee on Job Security – First interim report 2021: 80.
1350 *Franco v Deliveroo Australia Pty Ltd* [2021] FWC 2818:112.
1351 *Franco v Deliveroo Australia Pty Ltd* [2021] FWC 2818:117.
1352 *Franco v Deliveroo Australia Pty Ltd* [2021] FWC 2818:118. The Commissioner went on to state that "in the context of the modern, rapidly changing workplace, it could not represent a factor that should be construed as preventing the existence of an employment relationship."
1353 *Franco v Deliveroo Australia Pty Ltd* [2021] FWC 2818:122.
1354 *Franco v Deliveroo Australia Pty Ltd* [2021] FWC 2818:128. The Commissioner followed a similar approach as in *Joshua Klooger v Foodora Australia Pty Ltd* U2018/2625 by comparing on-demand workers' right to delegate or sub-contract with that of casual workers.
1355 *Franco v Deliveroo Australia Pty Ltd* [2021] FWC 2818:130.
1356 *Franco v Deliveroo Australia Pty Ltd* [2021] FWC 2818:131.
1357 *Franco v Deliveroo Australia Pty Ltd* [2021] FWC 2818:132.

concluded that the applicant was an employee of the company and that his dismissal was harsh, unjust and unreasonable.[1358]

It bears mentioning that Deliveroo launched an appeal against the decision arguing that Mr Franco was an independent contractor. The full bench of the FWC deferred the appeal by Deliveroo subject to the outcomes of the judgements in *ZG Operations Australia Pty Ltd & Anor v Jamsek & Ors,*[1359] and *Construction, Forestry, Maritime, Mining and Energy Union & Anor v Personnel Contracting Pty Ltd.*[1360] Both of the aforesaid appeal cases involved the test to distinguish between an employee and an independent contractor and is of importance, seeing that their judgements have far reaching implications for the broader on-demand sector in Australia.[1361] The following section provides a discussion of the extent to which the judgements impact the status of on-demand workers in Australia.

In *Construction, Forestry, Maritime, Mining and Energy Union & Anor v Personnel Contracting Pty Ltd,* a 22-year-old British backpacker, Mr McCourt, signed an Administrative Services Agreement (hereafter ASA) with Construct, a labour-hire company.[1362] The terms of the ASA specifically described Mr McCourt as a 'self-employed contractor'.[1363] Construct assigned Mr McCourt to perform work on two separate construction sites operated by one of its clients, Hanssen Pty Ltd, which was regulated by their Labour Hire Agreement.[1364] It bears mentioning that there was no contractual relationship between Hanssen Pty Ltd and Mr McCourt.[1365] The legal question in issue was whether Mr McCourt was an employee of Construct for purposes

1358 *Franco v Deliveroo Australia Pty Ltd* [2021] FWC 2818:139;160. The Commissioner went on to state that the 'fact that Mr Franco could and did work for competitors of Deliveroo, must be assessed in the context of a modern, changing workplace impacted by our new digital world.'
1359 *ZG Operations Australia Pty Ltd & Anor v Jamsek & Ors* [2022] HCA 2.
1360 *Construction, Forestry, Maritime, Mining and Energy Union & Anor v Personnel Contracting Pty Ltd* [2022] HCA 1.
1361 *Deliveroo Australia Pty Ltd v Diego Franco* (C2021/3221):4.
1362 *Construction, Forestry, Maritime, Mining and Energy Union & Anor v Personnel Contracting Pty Ltd* [2022] HCA 1:4-5.
1363 *Construction, Forestry, Maritime, Mining and Energy Union & Anor v Personnel Contracting Pty Ltd* [2022] HCA 1:2.
1364 *Construction, Forestry, Maritime, Mining and Energy Union & Anor v Personnel Contracting Pty Ltd* [2022] HCA 1:10.
1365 *Construction, Forestry, Maritime, Mining and Energy Union & Anor v Personnel Contracting Pty Ltd* [2022] HCA 1:10.

of seeking compensation and penalties in terms of the *FWA*.[1366] Both the primary judge of the Federal Court of Australia[1367] and an appeal to the Full Court applied the multi-factor test and concluded that Mt McCourt was an independent contractor as stipulated in the ASA.[1368]

This resulted in McCourt launching an appeal to the High Court of Australia. The High Court acknowledged that the application of the multi-factor test was 'apt to generate considerable uncertainty, both for the parties and the courts' if applied to the parties' conduct over the course of their work relationship.[1369] Ultimately, the High Court considered two main factors that assisted in assessing to answer the question of whether someone was an employee, namely the degree of control and if, in terms of the contract agreed to by both parties, it could be shown that the person acted in the business of, or under the control and discretion of the other.[1370] The court went on to make several statements relating to the contractual terms between Mr McCourt and Construct.[1371]

First, the High Court noted that the factors of the multi-factor test held equal weight and should be considered as such. However, in this case, the factor relating to Mr McCourt conducting his own business or serving the business of the employer was a key consideration.[1372] In this context, the court explained that Construct was

1366 *FWA*:Secs. 545-547; *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1:6.

1367 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2019] FCA 1806; 176-178. The High Court noted that the primary judge of the Federal Court considered the ASA's description of 'the Contractor' as decisive and that the other factors of the multiple-factor test were reasonably balanced. The appeal was upheld by the Full Court of the Federal Court of Australia. *Construction, Forestry, Maritime, Mining and Energy Union & Anor v Personnel Contracting Pty Ltd* [2022] HCA 1:7-8.

1368 *Construction, Forestry, Maritime, Mining and Energy Union & Anor v Personnel Contracting Pty Ltd* [2022] HCA 1:7-8.

1369 *Construction, Forestry, Maritime, Mining and Energy Union & Anor v Personnel Contracting Pty Ltd* [2022] HCA 1:33.

1370 *Construction, Forestry, Maritime, Mining and Energy Union & Anor v Personnel Contracting Pty Ltd* [2022] HCA 1:62.

1371 This is an important aspect, seeing that most on-demand platform companies rely heavily on the terms of agreements to justify the independent contractor relationship. The following points are of importance to the classification of labour.

1372 *Construction, Forestry, Maritime, Mining and Energy Union & Anor v Personnel Contracting Pty Ltd* [2022] HCA 1:71-72.

authorised to reward Mr McCourt for his work, to act as his paymaster and terminate his contract should he fail to obey the instructions of Construct or the client.[1373]

Secondly, the High Court analysed the terms of the ASA, stating that 'where the terms of the parties' relationship are comprehensively committed to a written contract … there is no reason why the legal rights and obligations so established should not be decisive of the character of the relationship'.[1374] This said, the court cautioned that contractual parties were free to agree to rights and obligations that fitted their relationship.[1375] However, the court went on to state that it did not mean that parties could 'label' their relationship as something different from their agreed terms and conditions.[1376] The High Court, therefore, applied the multi-factor test through the lens of the terms and obligations agreed to in the ASA. To this end, the court indicated that the right to control of Mr McCourt's labour was an essential asset of Construct's business. Subsequently, the contractual terms reflected that of a contract of service.[1377]

ZG Operations Australia Pty Ltd & Anor v Jamsek & Ors concerned two respondents, Mr Jamsek and Mr Whitby, who provided their services as truck drivers to a company, the appellant in this case, from 1977 to 2017. [1378] Following the termination of the aforesaid agreement in 2017, the respondents commenced proceedings in the Federal

1373 *Construction, Forestry, Maritime, Mining and Energy Union & Anor v Personnel Contracting Pty Ltd* [2022] HCA 1:71.

1374 *Construction, Forestry, Maritime, Mining and Energy Union & Anor v Personnel Contracting Pty Ltd* [2022] HCA 1:43.

1375 *Construction, Forestry, Maritime, Mining and Energy Union & Anor v Personnel Contracting Pty Ltd* [2022] HCA 1:64.

1376 *Construction, Forestry, Maritime, Mining and Energy Union & Anor v Personnel Contracting Pty Ltd* [2022] HCA 1:79. The High Court explained that 'it was erroneous in point of principle to use the parties' description of their relationship to resolve uncertainty produced by application of the multifactorial test. There was no occasion to have recourse to the label chosen by the parties, whether as a "tie-breaker" or otherwise.'

1377 *Construction, Forestry, Maritime, Mining and Energy Union & Anor v Personnel Contracting Pty Ltd* [2022] HCA 1:90.

1378 *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2:1. For convenience, the court referred to 'the company' seeing that different business owners that engaged the respondents and their partnership from 1977 to 2017. The respondents were initially employed by the company until 1986 when the company could no longer employ them. As of early 1986, the respondent agreed to a new arrangement with the company. This entailed that the respondents purchased the company's trucks and entered into a new agreement to carry goods for the company. From then on, the respondents set up a partnership and continued to make deliveries as requested by the company. Each partnership invoiced the company for the service provided and was paid by the company for those services. *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2:1.

Court of Australia on the basis that their relationship was that of a contract of services and not as independent contractors.[1379]

Applying the multi-factor test, Thawley J of the Federal Court of Australia concluded that the respondents were not employees but rather independent contractors.[1380] The deciding factor was that, based on the totality of the relationship, the respondents were independent contractors running their own business.[1381] In addition, the Federal Court noted that the company had little say in the way the respondents conducted their deliveries or the decision to purchase the vehicles, noted the absence of any decision to wear the company's uniform,[1382] and their flexibility in deciding how and where the deliveries should occur.[1383] This was found to not resemble the typical contract of service.[1384]

On appeal, the Full Court of the Federal Court overturned this decision and found that the respondents were employees due to the fact that the company exercised a high level of control over the respondents.[1385] The Full Court of the Federal Court applied the multi-factor test and concluded that there was a disproportion bargaining position between the respondents and the company,[1386] that the respondents had little option

1379 *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2:3. The respondents approached the Federal Court seeking a declaration entitling them to statutory entitlements in terms of the *FWA*, the *Superannuation Guarantee (Administration) Act* 111/1992, and the *Long Service Leave Act* 38 of 1955.

1380 *Whitby v ZG Operations Australia Pty Ltd* [2018] FCA 1934:227.

1381 *Whitby v ZG Operations Australia Pty Ltd* [2018] FCA 1934:122, 156. Amongst other factors, the Federal Court considered that the purchasing of the trucks was a significant factor that favoured a characteristic of an independent contractor relationship. More importantly, the purchasing of the vehicles through the partnership also weighed in favour of this consideration. See also *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2:39.

1382 *Whitby v ZG Operations Australia Pty Ltd* [2018] FCA 1934:188. The Federal Court noted that the Mr Jamstek and Mr Whitby would wear a mix of personal and branded clothing, although they were not instructed by the company to do so.

1383 *Whitby v ZG Operations Australia Pty Ltd* [2018] FCA 1934:188. Thawley J noted that 'They were not, however, directed how to carry out their deliveries. This kind of communication is equally consistent with what one might expect if the deliveries were being provided by any courier. A notification of what to deliver or collect is quite different to a direction as to how to conduct the delivery activities.' See also *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2:41.

1384 *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2:41.

1385 *Jamsek v ZG Operations Australia Pty Ltd* [2020] FCAFC 119:215.

1386 *Jamsek v ZG Operations Australia Pty Ltd* [2020] FCAFC 119:199;201. Anderson J stated that the reality was that there was 'little, or no, room for negotiation in respect of the formation of the terms of the contract … This evidence demonstrates that the applicants were faced with the likely, if not certain, prospect of redundancy should they not enter into the 1986 Contract. There was no opportunity for negotiation and the applicants, unless they wished to seek alternative work, were compelled to accept the terms of the 1986 Contract.'

but to purchase the vehicles and enter into the new agreement with the company to continue working for the company,[1387] that the respondents' ability to work for third parties was theoretical and not possible in practice,[1388] and lastly, that the respondents never worked for other companies and that the sale of their vehicles would not have guaranteed goodwill.[1389]

On appeal, the High Court set aside the Full Court of the Federal Court's decision and unanimously held that the respondents were employees of the company.[1390] In addition, the High Court considered two errors in the approach of the Full Court's decision. Firstly, substantial emphasis was placed on the characteristics of the totality of the relationship with reference to the way in which they conducted themselves during the contractual relationship period.[1391] Secondly, the Full Court erred when considering the disparity in the bargaining power between the respondents and the company. It was held that these 'expansive approaches' involved 'an unjustified departure from orthodox contractual analyses'.[1392]

It is interesting to note that the High Court highlighted that the character of the relationship between the parties had to be established with respect to the written contractual agreements that 'comprehensively regulated the relationship'.[1393] Based on this reasoning, the Court found that the reality of the situation was that the agreement was between the partnership and the company and not between the respondents and the company.[1394] Other persuasive factors included, *inter alia*, that

1387 *Jamsek v ZG Operations Australia Pty Ltd* [2020] FCAFC 119:206.
1388 *Jamsek v ZG Operations Australia Pty Ltd* [2020] FCAFC 119:232. The court took into account that Mr Jamstek and Mr Whitby were expected to work nine hours a day during set hours from Monday to Friday. Anderson J considered this and concluded that this fact, in practice, left them with no time to serve other companies. The company was thus seen as the sole source of income for over 40 years. At this point, it is important to note the High Court's critique in this regard considering that the Full Court applied an 'expansive approach' to determine the 'substance and reality' of the relationship between the parties. The High Court noted that it was relying on the reasons stated in *WorkPac Pty Ltd v Rossato* (2021) 95 ALJR 681 and *CFMMEU v Personnel Contracting* [2022] HCA 1. See *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2:51.
1389 *Jamsek v ZG Operations Australia Pty Ltd* [2020] FCAFC 119:237.
1390 *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2:70.
1391 *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2:51.
1392 *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2:51.
1393 *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2:8.
1394 *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2:63.

the services included the skills provided by the partnership,[1395] that the partnership incurred expenses related to the ownership and operation of the vehicles, and that they took advantage of the tax benefit of the structure.[1396] The High Court also alluded to the fact that the respondents 'enjoyed the advantages of splitting the income generated by the business conducted by the partnership with their fellow partners'.[1397] In reaching its decision, the High Court's judgement indicates a departure from the traditional characterisation of the employment relationship premised on the substance of the totality of the relationship. Consequently, this gives primacy to the written agreement to determine the relationship between the parties. Valuable lessons can be drawn from this approach since it applies to relationships and agreements that form part of the economy, as will be illustrated next.

Following the decisions of both *Construction, Forestry, Maritime, Mining and Energy Union & Anor v Personnel Contracting Pty Ltd* and *ZG Operations Australia Pty Ltd & Anor v Jamsek & Ors,* the FWC had to determine if an Uber driver was an employee or an independent contractor for purposes of the protections prescribed by the *FWA*. In *Nawaz v Rasier Pacific Pty Ltd t/a Uber BV,*[1398] the applicant, Mr Asim Nawaz, and Uber entered into an agreement on 27 July 2019 to work as a driver for the Uber platform.[1399] The applicant's access to the platform was removed by Uber based on a complaint received by a person who was transported by him.[1400]

The applicant contended that the parties' relationship was not comprehensively set out in the written contract between himself and Uber.[1401] Unlike previous cases, the applicant also relied on the *Consumer Protection Act*[1402] (hereafter CPA) to support several contentions that the contract was a sham and should be invalidated.[1403]

1395 *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2:70. The Court held that the provision of such services was consistent with the characteristics of independent contractors, not employees.
1396 *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2:63.
1397 *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2:63.
1398 *Nawaz v Rasier Pacific Pty Ltd t/a Uber BV* [2022] FWC 1189.
1399 *Nawaz v Rasier Pacific Pty Ltd t/a Uber BV* [2022] FWC 1189:2.
1400 *Nawaz v Rasier Pacific Pty Ltd t/a Uber BV* [2022] FWC 1189:3.
1401 *Nawaz v Rasier Pacific Pty Ltd t/a Uber BV* [2022] FWC 1189:20.
1402 *Consumer Protection Act* 134/2010.
1403 *Nawaz v Rasier Pacific Pty Ltd t/a Uber BV* [2022] FWC 1189:22-23. The applicant argued, *inter alia*, that there was a material mistake with reference to the 'relationship clause' of the contract, that the dispute resolution clause was illegal because it referred to the wrong dispute resolution body, that the unilateral amendments to the contract caused economic duress, that

Uber, on the other hand, argued that the recent decisions of the High Court in *Construction, Forestry, Maritime, Mining and Energy Union & Anor v Personnel Contracting Pty Ltd* and *ZG Operations Australia Pty Ltd & Anor v Jamsek & Ors* clarified that the characteristic of a contract of service proceeded by reference to the rights and duties in terms of the written agreements between the parties.[1404] In addition, while the 'totality of the relationship' was considered, it had to be applied with reference to the *indicia* related to the express terms and the comprehensive agreement between the parties.[1405]

With reference to the required approach to the characterisation of the relationship between the parties, the FWC followed the approach of *Construction, Forestry, Maritime, Mining and Energy Union & Anor v Personnel Contracting Pty Ltd* and *ZG Operations Australia Pty Ltd & Anor v Jamsek & Ors*, saying that 'Relevantly, elements of the past approach of the Commission (itself based on the extant court authority) … are, to a large degree, no longer to be applied'.[1406] Having said that, the FWC listed the relevant principles as follows:[1407]

- The characterisation of the relationship must be determined by the parties' rights and duties.
- Unless the contract is sham or legally ineffective, the comprehensive contract remains the primary source of the parties' rights and duties.
- The conduct of the parties post entering the agreements is not generally relevant.
- The way the relationship is conducted in practice may be relevant. However, this is limited to situations where the contractual terms are unclear.
- It is permissible to consider events and circumstances external to the contract that could assist in determining the objective of the agreement.
- The relative bargaining power of the parties is not relevant.

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the absence of insurance was unfair, that the instruction to park on no-parking zones was unfair, and lastly, that Uber exercised undue influence on drivers.

1404 *Nawaz v Rasier Pacific Pty Ltd t/a Uber BV* [2022] FWC 1189:30.

1405 *Nawaz v Rasier Pacific Pty Ltd t/a Uber BV* [2022] FWC 1189:30.

1406 *Nawaz v Rasier Pacific Pty Ltd t/a Uber BV* [2022] FWC 1189:50.

1407 *Nawaz v Rasier Pacific Pty Ltd t/a Uber BV* [2022] FWC 1189:51-52. In addition to the above-listed factors, Commissioner Hampton held that the reference to foreign case law was of limited value given their significant attention to the 'practical post-contract conduct of the parties'. In other words, the emphasis on the 'contract-based legal rights and obligations of the parties' as part of the Australian law. There was thus no need to consider foreign judgements.

- The multi-factor test remains relevant but must be applied within the context of the parties' written agreement. The terms of the contract must be seen as determinative and not 'merely factors' to be considered.
- All the relevant *indicia* of the multi-factor test require consideration. However, the degree of control exercisable by the principal or employer and the question of whether a person engaged in work for another is an employee or an independent contractor, as per their written contract, are particularly important.
- The notion of goodwill is not necessarily decisive.
- The FWC should consider whether the worker is contracted to work for the employer's business as opposed to forming part of an independent enterprise.
- The 'label' applied to the contract is not decisive and must not act as a 'tie-breaker' if the multi-factor test is unclear.
- It should not be seen as a contraindication of employment if a worker is free under the contract to work for others. The same applies to the terminability at short notice and the absence of a guarantee of work.

In reaching its conclusion, the FWC found that the applicant was not an employee for purposes of the *FWA*, and that given the reality of the terms of the contract and the absence of any variation thereof, the post-contract conduct was not relevant to the case.[1408] The Commissioner also observed that in several situations in Australian workplaces, the imbalance of bargaining power between the parties led to the establishment of regulations advocating for minimum standards and dispute resolution rights.[1409] That said, the FWC stressed that this remained a matter for the Parliament of Australia.[1410] I agree with this sentiment. However, as will be discussed in Chapter 8 of this study, a national approach to advocating for decent on-demand work should be seen as a long-term objective.

1408 *Nawaz v Rasier Pacific Pty Ltd t/a Uber BV* [2022] FWC 1189:239.
1409 *Nawaz v Rasier Pacific Pty Ltd t/a Uber BV* [2022] FWC 1189:243.
1410 *Nawaz v Rasier Pacific Pty Ltd t/a Uber BV* [2022] FWC 1189:243.

5.5 BINDING LEGISLATIVE RESPONSES ADVOCATING FOR DECENT ON-DEMAND WORK IN AUSTRALIA

As the debate on the classification of on-demand workers rages on, platform workers are left outside of the scope of labour and social protections in Australia for the most part. Moreover, the common law concept of 'employment' distinguishes it from commercial transactions.[1411]

Rawling and Munton emphasise that there are certain fundamental needs that all workers share, irrespective of their classification.[1412] This includes decent remuneration, decent job security, and safe work conditions.[1413] In addition, they note that Australian workers, within its broader meaning, require prompt and accessible dispute resolution mechanisms to resolve their disputes.[1414] In addition, it bears mentioning that there are few options available to on-demand workers to engage collectively to challenge the terms and conditions they agree to.[1415] However, this does not mean that they do not have any recourse at all. In terms of the Australian laws, on-demand workers who are self-employed may seek a remedy for unfair contractual terms in the broader commercial laws as opposed to the *FWA*. This is done in one of two ways, namely in terms of either the *ICA* or the *CCA*.[1416]

This, in essence, means that the rights and obligations applicable to competition law could apply to platform workers if they remain classified as independent contractors.[1417] However, if this remains the case, it would be illegal for on-demand workers to engage in collective bargaining, or jointly negotiate the terms and conditions of their services.[1418] The applicability of each will be discussed in the next section. It must be noted that the discussion is limited to the provisions that could be extended to on-demand workers that advocate for decent conditions of work or decent representation. The discussion will thus exclude a comprehensive discussion on the

1411 Select Committee on Job Security – First interim report 2021:110.
1412 Rawling & Munton 2022:21.
1413 Rawling & Munton 2022:21.
1414 Rawling & Munton 2022:21.
1415 Victoria State Government: Consultation Paper on Fair Conduct and Accountability Standards for the Victorian On-demand Workforce 2021:22.
1416 Hardy & McCrystal 2022:3.
1417 Select Committee on Job Security – First interim report 2021:113.
1418 Select Committee on Job Security – First interim report 2021:113.

aims of the statutes and the correct classification of the labour relationships within the context of the *CCA* and the *ICA*.

5.5.1 The Independent Contractors Act

Genuine independent contractor agreements will always form part of work relationships. However, allowing businesses to utilise technology and 'legal gymnastics' to avoid statutory responsibilities cannot be allowed.[1419] From this perspective, the *ICA* aims, *inter alia*, to protect the freedom of independent contractors who enter into services, to recognise independent contracting as a form of work arrangement that is mainly commercial, and lastly, to prevent interference with the terms of genuine independent contracting agreements.[1420] The *ICA* also applies to a contract for services to which an independent contractor is a party, and which relates to the performance of a specific work or task.[1421] Although the *ICA* does not specifically define an 'independent contractor', section 4 states that it need not be a natural person. Its meaning is thus left to the common law and the applicable tests to determine the classification of the parties' arrangement.[1422]

Given the reality that on-demand workers have limited to no labour recourse, the *ICA* includes provisions that allow for limited protections where unfair contractual terms are evident.[1423] The *ICA* acknowledges that unfair grounds relating to a service contract include any of the following grounds, namely if:

- the contract itself is unfair;[1424]
- the contract is harsh or unconscionable;[1425]
- the contract is unjust;[1426]
- the contract goes against the public interest;[1427]

1419 Select Committee on Job Security – Job Insecurity Report:151.
1420 *ICA* 2006:Ssec. 1(a)-(c).
1421 *ICA* 2006:Sec. 5.
1422 Floyd *et al.* 2018:35.
1423 Rawling & Munton 2022:21. See also *ICA* 2006:Sec. 7.
1424 *ICA* 2006:Sec.1(a).
1425 *ICA* 2006:Sec.1(b).
1426 *ICA* 2006:Sec.1(c).
1427 *ICA* 2006:Sec.1(d).

- the contract is designed to avoid the provisions of the *FWA*, the Workplace Relations Act, a State or Territory industrial law, or any award or agreement;[1428]
- the contract provides for remuneration that is less than the rate afforded to an employee performing similar work.[1429]

Of note here is that section 12 prescribes that a competent Court may review an independent contractor agreement if it is found to be unfair or harsh.[1430] However, a Court is limited to only considering the terms of the contract when it was established.[1431] Rawling and Munton note that, in theory, the *ICA* could be applied to on-demand work performed in the transport sector.[1432]

For purposes of this research, it is worth noting that the *ICA* offers limited protections to on-demand workers against unfair contracts in that a Court can set aside the whole or parts of a contract.[1433] In making this decision, the Court may consider the bargaining position of the parties.[1434] However, it is acknowledged that the *ICA* does not allow for penalties for unfair terms. Another barrier for on-demand workers is that each party must pay their own costs.[1435] To date, the Select Committee on Job Security has noted that this recourse has not been utilised or well supported by platform workers.[1436] The applicability of the *CCA* will thus be discussed next.

5.5.2 The Competition and Consumer Act

The fact that on-demand workers are classified as independent contractors also places them within the framework of the Australian Competition laws.[1437] The *CCA* covers several areas in the commercial field and is aimed at improving the welfare of

1428 *ICA* 2006:Secs.1(e)(i)-(iii).
1429 *ICA* 2006:Sec.1(f).
1430 Hardy & McCrystal 2022:3.
1431 *ICA* 2006:Sec.12(3)(a).
1432 Rawling & Munton 2022:23.
1433 Select Committee on Job Security – The job insecurity report 2022:136.
1434 Hardy & McCrystal 2022:3.
1435 Select Committee on Job Security – First interim report 2021:113. The Transport Workers' Union also attested that claims brought in terms of the *ICA* are ineffective seeing that it requires an on-demand worker to fund their own legal action, which could be a lengthy process with no assurance of success. See also Hardy & McCrystal 2022:4.
1436 Select Committee on Job Security – First interim report 2021:113.
1437 NSW – First Report – The Gig Economy 2022:11; Select Committee on Job Security – First interim report 2021:113.

Australians by promoting fair trade and competition, and the provision of consumer protections.[1438] In addition, the *CCA* creates a remedy for eligible parties, including the self-employed, to challenge unfair contractual terms. Self-employed workers, such as on-demand workers, can therefore seek to review the terms of their agreement on the grounds that some of the terms of the agreement are unfair.[1439] Section 23 of the *CCA* prescribes that its protections extend to 'consumer contracts' that include a contract for the supply of goods and services.[1440] Thus, this includes a contract for services as it applies within the labour law context.

A contract or its provisions may be 'unfair' if it causes a significant imbalance in the parties' rights and obligations in terms of the contract, if it is not reasonably necessary in order to protect the 'legitimate interests' of the party who would be advantaged by the term, and lastly, if it causes detriment to a party if the contractual provision is to be applied.[1441] In addition, in making this assessment a court may consider the contract in its entirety and the extent to which the terms are transparent.[1442]

Statutory examples of unfair terms are, amongst others, the following:[1443]

- A term that allows one party, but not the other, to avoid or limit performance.[1444]
- A term that allows one party, but not the other, to terminate the contract.[1445]
- A term that penalises one party, but not the other, for a breach or the termination of the contract.[1446]
- A term that allows one party, but not the other, to change the terms of the agreement.[1447]

1438 The Australian Competition and Consumer Commission 2022. "Legislation – The Competition and Consumer Act 2010", https://www.accc.gov.au/about-us/australian-competition-consumer-commission/legislation#:~:text=The%20Competition%20and%20Consumer%20Act%202010%20(CCA)%20covers%20most%20areas,the%20provision%20of%20consumer%20protections. Accessed on 19 July 2022.
1439 *CCA* 2010:Parts 2-3, secs.23-28.
1440 *CCA* 2010:Sec.23(3)(a).
1441 *CCA* 2010:Secs.24(1)(a)-(c). See also Hardy & McCrystal 2022:4.
1442 *CCA* 2010:Secs.24(2)(a)-(b). Sub-sections 24(3)(a)-(c) prescribe that a term is 'transparent' if it is expressed in reasonably plain language, it is legible, presented clearly and readily available to any party affected by it.
1443 See *CCA* 2010:Sec.25 for the full list of examples of unfair terms in the commercial context.
1444 *CCA* 2010:Sec.25(1)(a).
1445 *CCA* 2010:Sec.25(1)(b).
1446 *CCA* 2010:Sec.25(1)(c).
1447 *CCA* 2010:Sec.25(1)(d).

- A term that allows one party to unilaterally vary the characteristics of the services.[1448]
- A term that allows one party to unilaterally determine if the contract has been breached.[1449]
- A term that limits one party's vicarious liability for its agents.[1450]
- A term that limits one party's right to start legal action against the other party.[1451]

If the court is of the opinion that a term is 'unfair' for purposes of the *CCA*, it is deemed to be automat*ica*lly void.[1452] It bears mentioning that significant changes occurred in 2021, seeing that the Australian Competition and Consumer Commission (hereafter ACCC) introduced a 'class exemption' for all small businesses and the self-employed, thus inclusive of on-demand workers, to engage in 'collective bargaining' like arrangements without prior authorisation or notification.[1453] However, much like the *ICA*, the ACCC has little power to seek penalties against those who contravene the *CCA* and include unfair provisions in their contract for services.[1454] It is also noted that seeking a review of unfair contractual terms by the tribunal is 'practically impossible' for many small businesses, let alone self-employed individuals.[1455]

This said, the remedy provided by the *CCA* is, to some extent, more advantageous for contracting parties who seek relief seeing that the ACCC is present as an active regulator.[1456] More important for this study, the ACCC has a specialist Digital Platform Branch (hereafter the DPB) that aims to conduct further work related to digital platform markets in Australia.[1457] To date, the DPB has been focusing on the impact of online

1448 *CCA* 2010:Sec.25(1)(g).
1449 *CCA* 2010:Sec.25(1)(h).
1450 *CCA* 2010:Sec.25(1)(i).
1451 *CCA* 2010:Sec.25(1)(k).
1452 Hardy & McCrystal 2022:4.
1453 Hardy & McCrystal 2022:2.
1454 Hardy & McCrystal 2022:5.
1455 Hardy & McCrystal 2022:5. It must be noted that the Australian Treasury released an Exposure Draft Bill that aims to enhance the remedies and enforcement of the *CCA*. The proposals include precautionary penalties, flexible remedies, and a rebuttable presumption. In addition, the Bill expands the class of contracts and clarifies the uses related to the repeated use of a contract when determining a 'standard form contract'.
1456 Hardy & McCrystal 2022:4.
1457 ACCC 2022. "Digital Platforms", https://www.accc.gov.au/focus-areas/digital-platforms. Accessed on 22 July 2022.

search engines and social media.[1458] In addition, the DPB has made signif*ica*nt progress in the field of competition in media and advertising services.[1459] For example, in April 2020 the Australian Government directed the ACCC to establish a mandatory code of conduct that addresses the bargaining imbalance between the Australian news businesses and the online platforms, Google and Facebook.[1460] However, much like the *ICA*, it remains to be seen if the ACCC will play an active role in advocating for decent on-demand work in Australia. The next discussion explains how the ACC and the ACCC could improve multi-stakeholder engagement in the on-demand sector.

5.5.3 Decent multi-stakeholder engagement for on-demand workers in Australia

Collective organising is regarded as a powerful method of expressing workers' needs and must be seen as the first step in advocating for better rights and protections in the on-demand sector.[1461] Hardy and McCrystal opine that little attention is given to vulnerable self-employed workers who are subject to probable unfair terms in the platform economy.[1462] The authors go on to note that nothing prohibits trade unions or other organisations who advocate for decent work for on-demand workers to bring action under the applicable *CCA* provisions.

It is my submission that the *CCA* provisions related to unfair contractual terms, together with the extended operations of the ACCC, could provide a suitable platform for on-demand workers to engage with other stakeholders to tackle the basic issues related to this research. In other words, the recent developments within the ACCC could become the driving force to advocate for decent work for on-demand workers in the modern-day gig economy. This could take the form of a multi-stakeholder

1458 ACCC 2022. "Digital Platforms", https://www.accc.gov.au/focus-areas/digital-platforms. Accessed on 22 July 2022. Hardy & McCrystal 2022:4.
1459 ACCC 2022. "Digital Platforms", https://www.accc.gov.au/focus-areas/digital-platforms. Accessed on 22 July 2022.
1460 ACCC. 2022. "News media bargaining code", https://www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code. Accessed on 23 July 2022.
1461 Select Committee on Job Security – Job insecurity report 2022:150.
1462 *CCA* 2010:Sec.44ZZRA. The collective bargaining type of conduct is, in terms of section 44ZZRA, described as cartel behaviour and could lead to civil and criminal penalties. See also Hardy & McCrystal 2022:4.

engagement that is similar to ‘collective bargaining’ type mechanisms, which are discussed next.

In addition to the remedies explained above, the right to engage in collective bargaining as an ‘employee’ of the business is exclusively governed by the *FWA*. Subsequently, everyone else who is not classified as an employee must rely on other remedies within the broader commercial law, such as the *CCA* provisions.[1463] More specifically, part four of the *CCA* prohibits various collective bargaining types of conduct, such as conduct by independent businesses relating to price fixing, boycotts, and anti-competitive information sharing.[1464] This, in essence, implies that in situations where trade unions seek to reach agreements with labour engagers (such as platform companies) outside of the scope of labour laws, the ACCC could declare their conduct as cartel behaviour.[1465]

To avoid this situation, contracting parties were required to seek authorisation for exemption for their conduct.[1466] This was the case until recently. In 2021, a new ‘class exemption’ came into force in terms of the *Competition and Consumer (Class Exemption—Collective Bargaining) Determination*[1467] (hereafter the *CCCECBD*). In terms of this exemption, eligible businesses are permitted to engage in certain kinds of conduct that are exempted by the *CCA*.[1468] Clause 6 of the *CCCECBD* defines an ‘initial contract’ as a contract that involves the supply of a service or the acquisition of a service from one or more other persons by a corporation. Collective bargaining, in the context of the *CCA*, occurs when two or more competitors negotiate with a supplier or customer[1469] and negotiate their agreement’s terms and conditions.[1470]

1463 Hardy & McCrystal 2022:7.
1464 Hardy & McCrystal 2022:7.
1465 *CCA* 2010:Sec.44ZZRA. Cartel provisions prescribed by the *CCA* include price fixing, restricting outputs in the production and supply chain, allocating customers, suppliers and territories, or bid-rigging.
1466 *CCA* 2010:Part IV, Division D. Hardy & McCrystal 2022:8.
1467 Competition and Consumer (Class Exemption—Collective Bargaining) Determination of 2020.
1468 ACCC Collective bargaining class exemption guidelines 2021:3.
1469 ACCC Collective bargaining class exemption guidelines 2021:2. A supplier or a customer is also referred to as the target business in terms of clause 6 of the *CCCECBD*.
1470 ACCC Collective bargaining class exemption guidelines 2021:2.

To qualify for the class exemption, an eligible business or independent contractor must have an aggregated turnover of less than AU$10 million in the most recent fiscal year prior to joining the collective bargaining group.[1471] Once the requirement is met, the business or independent contractor may bargain collectively with suppliers or customers about the supply or acquisition of goods and services.[1472] It must be kept in mind that the collective bargaining class exemption notice must be lodged by members of the group, or representatives of the group.[1473] However, it cannot be lodged by a trade union, an officer of a trade union, or a person acting under the direction of a trade union.[1474] Keeping this restriction in mind, Hardy and McCrystal note that it does not prevent a trade union from acting as a representative of a small business during the bargaining process.[1475] As will be seen below, I deduce that this is not an impossible hurdle to cross. However, I assert that is crucial that one should have the trade unions' cooperation, since this is a process that is different from the traditional collective bargaining processes.

For purposes of advocating for decent work conditions for on-demand workers, this avenue is beneficial in several ways. Firstly, the class exemption exempts participants in collective bargaining from liability for cartel restrictions as determined by Part Five of the *CCA*. This, arguably, could include on-demand workers and platform businesses in the broader gig economy as well. Secondly, the overall benefit of negotiation enables an independent contractor to reduce the time and cost of putting an agreement in place, create opportunities to negotiate the agreement's terms, and improve access to information and information sharing.[1476] However, the exemption for collective bargaining must be voluntary and not involve any form of coercion. Simply put, prospective parties cannot be compelled to join the bargaining, and targets cannot be compelled to bargain.[1477]

1471 Hardy & McCrystal 2022:8.
1472 *CCCECBD* 2021:Clause 7.
1473 *CCCECBD* 2021:Clause 9(2)(a)-(b).
1474 *CCCECBD* 2021:Clause 9(2)(c)(i)-(iii); Hardy & McCrystal 2022:9.
1475 Hardy & McCrystal 2022:9.
1476 ACCC Collective bargaining class exemption guidelines 2021:9; Hardy and McCrystal 2022:10. Clause 13 places a restriction on the type of information to be shared during the collective bargaining by stating that information can be shared if 'the corporation believes that it is reasonably necessary to share or use that information in order to facilitate it engaging in that conduct'. It is also important not to share sensitive information that might breach the provisions of the *CCA*.
1477 Hardy & McCrystal 2022:9

It is also noteworthy that collective boycotts are also not covered by the class exemption. In other words, a collective boycott cannot be used as a 'strike action' method to force the target to bargain or to reach an agreement.[1478] It is, of course, obvious that this sentiment is in stark contrast with the traditional industrial strike action provided for in the labour law context. Nevertheless, the ACCC argues that 'this kind of voluntary collective bargaining is most effective when it provides mutual benefits for the businesses wishing to collectively bargain, and for the target business."[1479]

Ultimately, the class exemption is not designed to replace the traditional collective bargaining structures provided for by the *FWA*. Instead, it aims to facilitate collective bargaining in the commercial sense and removes potential barriers imposed by the *CCA*. That said, it is a novel form of collective bargaining that could be utilised to advocate for decent work conditions for on-demand workers. It also provides a platform for multi-parties to participate in multi-stakeholder engagement and to establish collective agreements with other independent contractors and businesses at enterprise, multi-enterprise, sector or industry levels.[1480] For on-demand workers operating in the gig economy with limited to no recourse, the class exemption could create favourable outcomes which, in turn, provide them with decent work.

Before discussing the different non-binding measures that advocate for decent on-demand work, the voluntary actions and agreements between multi-stakeholders in the on-demand sector will be elaborated on.

5.6 VOLUNTARY ACTION, AGREEMENTS, STANDARDS AND PRINCIPLES ADVOCATING FOR DECENT ON-DEMAND WORK

Given the slow pace at which on-demand work is regulated on a national and federal level, it becomes necessary to consider alternative mechanisms to advocate for decent work in the on-demand sector. The question may be asked as to how to

1478 ACCC Collective bargaining class exemption guidelines 2021:2; Hardy & McCrystal 2022:9. The guidelines furthermore note that although a collective boycott could be helpful in achieving some benefits of collective bargaining, it can become a costly exercise that damages a wide range of market participants.
1479 ACCC Collective bargaining class exemption guidelines 2021:5.
1480 Hardy & McCrystal 2022:11.

mitigate on-demand workers' risks in the absence of Commonwealth or state legislation. In this respect, valuable lessons can be drawn from voluntary agreements concluded between stakeholders in the gig economy, which include on-demand workers, trade unions and platform businesses.

Two agreements concluded between the Transport Workers' Union (hereafter TWU) and two major platform businesses, Uber and Doordash, will be discussed next to illustrate how voluntary actions between multi-stakeholders could advocate for better rights in the on-demand economy. Lastly, this section will conclude with an example of voluntary action taken by Menulog that advocates for a sector-specific new modern industry award for the on-demand sector.

5.6.1 The Transport Workers' Union (TWU) and Doordash agreement

Doordash and the TWU worked constructively to establish a set of principles that advocate for safe and fair practices for on-demand workers in Australia.[1481] In their statements declaring their commitment to the chapter of principles, Doordash emphasised the need for industry-based standards set by independent bodies. In this respect, Doordash and TWU agreed to six broad principles.[1482] First, workers must have access to appropriate rights and entitlements. Second, is the need for transparency. Third, is the establishment of a forum to contribute to a collective voice. The fourth principle entails on-demand workers' access to dispute resolution processes. Fifth, resources are allocated to ensure that the industry standards are established and for the skills development of on-demand workers. Lastly, affirming a three-stage approach to regulating the on-demand sector.[1483]

1481 Doordash. 2022. "DoorDash and Transport Workers Union sign charter of principles to ensure safety and fairness for gig workers in Australia", https://doordash.news/australia/doordash-and-transport-workers-union-sign-charter-of-principles-to-ensure-safety-and-fairness-for-gig-workers-in-australia/. Accessed on 27 July 2022.

1482 Trade Workers' Union. 2022. "TWU signs Australia-first MoU with DoorDash" https://www.twu.com.au/general/twu-signs-australia-first-mou-with-doordash/. Accessed on 26 July 2022.

1483 Doordash. 2022. "DoorDash and Transport Workers Union sign charter of principles to ensure safety and fairness for gig workers in Australia", https://doordash.news/australia/doordash-and-transport-workers-union-sign-charter-of-principles-to-ensure-safety-and-fairness-for-gig-workers-in-australia/. Accessed on 27 July 2022. The three-stage approach entails confirming the charter of principles, the signing of a memorandum of understanding, and lastly, joint advocacy by both parties to policymakers in Australia.

5.6.2 The TWU and Uber agreement

Following in Doordash's footsteps, Uber was next to sign a statement of principles with the TWU.[1484] The TWU emphasises that the historic agreement paves the way for decent minimum standards and benefits for the on-demand sector whilst still protecting its flexibility.[1485] Central to the agreement, and similar to the memorandum of understanding between the TWU and Doordash, both parties support federal government legislation for the establishment of an independent body.[1486] However, what makes this agreement unique and different from the one concluded between Doordash and the TWU, is that it extends cover to both food delivery and ridesharing on-demand workers in Australia.[1487] The agreement mainly advocates for an independent body to:[1488]

- set minimum and transparent enforceable earnings and conditions for on-demand workers, keeping in mind the nature of their work;
- facilitate cost-effective and competent dispute resolution mechanisms for disputes such as the deactivation of on-demand workers' accounts;
- ensure that on-demand workers have a collective voice by guaranteeing the right to collective bargaining and to join, or not to join, a registered organisation; and
- ensure proper enforcement of the standards.

1484 Taylor. 2022. "Uber and TWU strike deal that lays the foundations for the future of gig workers", https://www.uber.com/en-AU/newsroom/twuaus/. Accessed on 27 July 2022.

1485 TWU. 2022. "TWU Signs Breakthrough Charter with Uber in Support of Enforceable Rights", https://www.twu.com.au/general/twu-signs-breakthrough-charter-with-uber-in-support-of-enforceable-rights/. Accessed on 28 July 2022.

1486 Thorpe. 2022. "New legislation in the works to protect gig economy workers after historic Uber deal", https://thenewdaily.com.au/finance/work/2022/07/01/uber-deal-gig-economy-workers/. Accessed on 27 July 2022.

1487 TWU. 2022. "TWU Signs Breakthrough Charter with Uber in Support of Enforceable Rights", https://www.twu.com.au/general/twu-signs-breakthrough-charter-with-uber-in-support-of-enforceable-rights/. Accessed on 28 July 2022.

1488 Canetti. 2022. "Breakthrough moment': Uber and Transport Workers' Union strike agreement over gig workers' rights", https://www.sbs.com.au/news/article/breakthrough-moment-uber-and-transport-workers-union-strike-agreement-over-gig-workers-rights/735dp982l. Accessed on 27 July 2022; Thorpe. 2022. "New legislation in the works to protect gig economy workers after historic Uber deal", https://thenewdaily.com.au/finance/work/2022/07/01/uber-deal-gig-economy-workers/. Accessed on 27 July 2022.

In addition to the four standards listed above, the parties committed to continuing their discussions and implementing the agreed regulatory principles.[1489] Incidentally, they also agreed to participate in further good faith discussions to achieve industry standards in the food delivery sector and other areas of Uber's work.[1490] Given the reality that the Australian Government aims to extend the powers of the FWC, possibly in the near future, the voluntary agreements serve as an alternative approach which could lead to better outcomes as opposed to ongoing litigation regarding the reclassification of on-demand workers as employees.[1491] More crucially, given the recent court decisions discussed earlier in the chapter, I am of the opinion that voluntary agreements could serve as a basis for more coordinated sector-specific protections.

5.6.3 Menulog's approach

In addition to voluntary agreements, I am in agreement that platform companies themselves can advocate for decent work conditions for their on-demand workers by reviewing their own employment models.[1492] In fact, this should be seen as a first step to advocate for decent on-demand work. An example hereof is the steps taken by Menulog to employ on-demand workers in 2021.[1493] According to Mr Bellin, the company's managing director, the reasoning behind this decision was based on a

1489 Thorpe. 2022. "New legislation in the works to protect gig economy workers after historic Uber deal", https://thenewdaily.com.au/finance/work/2022/07/01/uber-deal-gig-economy-workers/. Accessed on 27 July 2022.

1490 Goods, Veen and Barratt. 2022 "What's driving Uber's historic agreement with the TWU on gig work", https://theconversation.com/whats-driving-ubers-historic-agreement-with-the-twu-on-gig-work-186044#:~:text=Uber%20Australia%20has%20struck%20a,relations%20in%20the%20gig%20economy. Accessed on 27 July 2022; Thorpe. 2022. "New legislation in the works to protect gig economy workers after historic Uber deal", https://thenewdaily.com.au/finance/work/2022/07/01/uber-deal-gig-economy-workers/. Accessed on 27 July 2022.

1491 Goods, Veen and Barratt. 2022 "What's driving Uber's historic agreement with the TWU on gig work", https://theconversation.com/whats-driving-ubers-historic-agreement-with-the-twu-on-gig-work-186044#:~:text=Uber%20Australia%20has%20struck%20a,relations%20in%20the%20gig%20economy. Accessed on 27 July 2022.

1492 NSW – First Report – The Gig Economy 2022:37.

1493 Barat, Veen and Goods. 2021. "Did somebody say workers' rights? Three big questions about Menulog's employment plan", https://theconversation.com/did-somebody-say-workers-rights-three-big-questions-about-menulogs-employment-plan-158942. Accessed on 28 July 2022; See also NSW – First Report – The Gig Economy 2022:37.

'moral imperative'.[1494] The TWU noted that paying Menulog's on-demand workers a minimum wage and superannuation entitlements was a 'watershed moment for the gig economy'.[1495] However, Menulog confirmed that its decision to revisit its employment model was a pilot project that may result in costing the company more.[1496] Having said that, the platform business maintains that it is the right decision in the long run.[1497]

To date, Menulog continues to advocate for decent work for the on-demand sector.[1498] In June 2021, the platform company commenced an application to the FWC for a new industry modern award.[1499] As part of its application, Menulog argued that the on-demand sector did not exclusively form part of the existing awards relating to food delivery, road transport, or in terms of the Miscellaneous Award.[1500] The full bench of the FWC, however, decided that the Road Transport Award[1501] applied to Menulog's on-demand couriers and not the Fast Food Award,[1502] or the Miscellaneous Award.[1503] Finally, the FWC noted that parties were free to engage in consultation and conciliation to further deliberate on the correct classification of their on-demand workers.[1504]

1494 See also NSW – First Report – The Gig Economy 2022:37.
1495 Barat, Veen and Goods. 2021. "Did somebody say workers' rights? Three big questions about Menulog's employment plan", https://theconversation.com/did-somebody-say-workers-rights-three-big-questions-about-menulogs-employment-plan-158942. Accessed on 28 July 2022
1496 NSW – First Report – The Gig Economy 2022:38.
1497 NSW – First Report – The Gig Economy 2022:38.
1498 Select Committee on Job Security – The Job Insecurity Report 2022:139.
1499 An "industry modern award" is a document that prescribes the minimum conditions of employment in addition to the Australian National Employment Standards. This is comparable to South Africa's sectoral determinations and can include provisions relating to leave entitlements, working hours, pay and overtime. See Fairwork Ombudsman 2023. "Modern Awards", https://www.fairwork.gov.au/tools-and-resources/fact-sheets/minimum-workplace-entitlements/modern-awards#:~:text=Related%20information-,What%20is%20a%20modern%20award%3F,National%20Employment%20Standards%20(NES). Accessed on 10 February 2023.
1500 Menulog Pty Ltd (AM2021/72) [2022] FWCFB 5:3. The *Miscellaneous Award* applies to lower-paid employees who do not fall under the cover of any other existing award.
1501 *Road Transport and Distribution Award,* 2020.
1502 *Fast Food Industry Award*, 2010.
1503 Menulog Pty Ltd (AM2021/72) [2022] FWCFB 5:55. Select Committee on Job Security – The Job Insecurity Report 2022:140.
1504 Menulog Pty Ltd (AM2021/72) [2022] FWCFB 5:56.

5.7 NON-BINDING MEASURES ADVOCATING FOR DECENT ON-DEMAND WORK IN AUSTRALIA

In 2017, the Select Committee on the Future of Work and Workers (SCFWW) was tasked to investigate "the impact of technological and other changes on work and workers in Australia".[1505] An integral part of the investigation involves the inadequacies of employment laws to regulate on-demand work.[1506] The outcomes in terms of the report are, among others, multiple recommendations about the future of work and the gig economy in general and the proposed amendment of labour legislation to not only strengthen the protection of specific non-standard workers,[1507] but also ensure that gig workers have full labour protection.[1508] Recommendation 10 of the SCFWW states that:

> The committee recommends that the Australian Government make legislative amendments that broaden the definition of employee to capture gig workers and ensure that they have full access to protection under Australia's industrial relations system.

The report concluded that casual work, bogus employment and outsourcing had become a common practice nationwide.[1509]

Following this SCFWW's inquiry, the Select Committee of Job Security (hereafter SCJS) was established in 2020 to investigate the impact of precarious employment on the Australian economy and workplace rights and conditions.[1510] Important for the

1505 Parliament of Australia 2017. "Select Committee on the Future of Work and Workers", https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Future_of_Work_and_Workers. Accessed on 28 June 2019.
1506 Select Committee on the Future of Work and Workers 2018:xi.
1507 Select Committee on the Future of Work and Workers 2018:91-92. Recommendation 8 states, "The committee recommends that the Australian Government review the definition of "casual" work in light of the large numbers of Australians who are currently in non-standard employment." In addition, recommendation 8 provides that "The committee recommends that the Australian Government ensure legislated workplace health and safety and improved superannuation rights for workers who are not classified as employees and/or perform non-standard work."
1508 Select Committee on the Future of Work and Workers 2018:92. Recommendation 10 states, "The committee recommends that the Australian Government make legislative amendments that broaden the definition of employee to capture gig workers and ensure that they have full access to protection under Australia's industrial relations system."
1509 Select Committee on the Future of Work and Workers 2018:xi.
1510 Parliament of Australia. 2022. "Terms of Reference", https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Job_Security/JobSecurity/Terms_of_Reference. Accessed on 26 July 2022. The SCJSR was appointed by a resolution of the Senate on 10 December 2020.

purposes of this research, the SCJS was tasked to investigate the workplace trends and the impact of the gig economy and the on-demand economy on employment arrangements in Australia.[1511] Although aspects of the SCJS's reports[1512] will be referred to below, the following section aims to highlight some of the submissions made by several Federal states that the SCJS considered in their findings in relation to on-demand work and job insecurity in Australia. Recommendations from the SCJS's First Interim Report recognised the following recommendations that advocate for better protections in the on-demand sector:

- A Commonwealth-led reform of state-based workers' compensation schemes.[1513]
- Expand the definition of 'employment' and 'employees' in the *FWA* to broaden the scope to include the on-demand work sector.[1514]
- A Federal regulator with the authority to request information about working hours, pay and working conditions.[1515]
- Expand the powers of the FWC to resolve disputes in the on-demand work sector.[1516]
- Empower the FWC to afford 'pathways to permanency via arbitrations for casual conversion'.[1517]
- Provide great protection for independent contractors who are sole traders by establishing an accessible and low-cost specialist tribunal.[1518]

In this context, it must be kept in mind that this part of the chapter discusses non-binding measures advocating for decent work in the gig economy.

The submissions of four federal state inquiries will be discussed below. The discussion is limited to these states for the following reasons: Firstly, the Victorian state has the

1511 Parliament of Australia. 2022. "Terms of Reference", https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Job_Security/JobSecurity/Terms_of_Reference. Accessed on 26 July 2022.
1512 The reports referred to in terms of this part of the study are the SCJS' First Interim Report on On-demand Platform Work in Australia (hereafter the First Interim Report), and second, The Job Insecurity Report.
1513 Select Committee on Job Security – First interim report 2021:x. See recommendation 6.
1514 Select Committee on Job Security – First interim report 2021:x. See recommendation 7.
1515 Select Committee on Job Security – First interim report 2021:x. See recommendation 8.
1516 Select Committee on Job Security – First interim report 2021:xi. See recommendation 9.
1517 Select Committee on Job Security – First interim report 2021:xi. See recommendation 10.
1518 Select Committee on Job Security – First interim report 2021:xi. See recommendation 11.

second highest number of gig workers operating in its jurisdiction.[1519] In addition, its inquiry's findings are comprehensive and referred to by several other federal states, and many of its recommendations are considered in the SCJS's interim reports. Secondly, New South Wales (NSW) is the state with the highest number of gig workers in Australia.[1520] Thirdly, Queensland and Western Australia are considered. However, their discussion is limited to the recommendations pertaining to on-demand work only. Lastly, the remaining federal states and territories are on discussed due to a lack of information and data about on-demand workers operating in their jurisdictions.

5.7.1 Federal State Inquiries

All the Australian jurisdictions have felt the impact of the gig economy.[1521] Some states, such as Victoria, NSW, Queensland, and Western Australia, have taken active steps to advocate for decent work for on-demand workers and continue to do so by considering various policy and legislative solutions. The following section aims to provide an overview of each state's inquiry by exploring their recommendations in relation to decent working conditions with reference to pay and working hours, decent collective bargaining structures, and decent worker classification.

5.7.1.1 Victoria

The Victorian government started its inquiry in 2018.[1522] The inquiry affirmed that some platforms blurred the lines between a person who is an independent contractor and someone who is an employee working as part of an organisation.[1523] The classification of on-demand workers, therefore, remains a central and recurring issue.[1524]

On a Commonwealth level, the Victorian inquiry recommends that the laws need to be amended to 'clarify and codify' the work status test that applies to the *FWA* and the

1519 See the discussion under heading 5.7.1.1.
1520 See the discussion under heading 5.7.1.2. for more detail on the size of the on-demand economy in NSW.
1521 Select Committee on Job Security – First interim report 2021:5.
1522 Select Committee on Job Security – First interim report 2021:6.
1523 Select Committee on Job Security – First interim report 2021:6.
1524 Victoria State Government: Consultation Paper on Fair Conduct and Accountability Standards for the Victorian On-demand Workforce 2021:18.

ICA.[1525] In addition, the inquiry recommends that a new category of 'entrepreneurial worker' be adopted that is distinguished from the 'self-employed' category of small businesses in terms of commercial laws.[1526] In other words, the commercial laws remove the barriers to collective bargaining for non-employee on-demand workers to improve their access to representation.[1527]

The Victorian government also committed to advocating for fair conduct by platforms by establishing 'Fair Conduct and Accountability Standards'.[1528] The aforesaid standards are principles-based and must be developed through consultation with all stakeholders.[1529] Furthermore, the Inquiry noted that the standards could establish principles, *inter alia*, for consultation related to workers' status, the consulting parties' bargaining position, arrangements for fair conditions of work, and fair pay.[1530]

In addition, the Victorian government proposed that platforms should ensure that non-employee on-demand workers understand their contractual rights and duties. Platforms must also ensure that non-employee on-demand workers have access to processes to challenge the decisions made by the platform that affect their terms and conditions of work,[1531] which typically include their working hours and pay. That said, the Victorian government is still engaging in its multi-stakeholder consultations and has yet to establish the aforesaid principles.[1532]

The Victorian inquiry noted that on-demand work resembles the characteristics of casual work arrangements, seeing that on-demand workers also choose to accept their 'shifts' and can work for multiple businesses at once.[1533] This said, the Victorian government noted its disappointment that the Commonwealth has enacted the *Fair*

1525 The Report of the Inquiry into the Victorian On-demand Workforce 2020:194.
1526 See heading 5.5.2 for a detailed discussion of the ACC and its protections afforded to independent contractors.
1527 Select Committee on Job Security – First interim report 2021:7.
1528 Select Committee on Job Security – First interim report 2021:7.
1529 Select Committee on Job Security – First interim report 2021:7.
1530 Victoria State Government: Consultation Paper on Fair Conduct and Accountability Standards for the Victorian On-demand Workforce 2021:9.
1531 Victoria State Government: Consultation Paper on Fair Conduct and Accountability Standards for the Victorian On-demand Workforce 2021:20.
1532 Engage Victoria 2022 "Inquiry into the Victorian On-Demand Workforce", https://engage.vic.gov.au/inquiry-on-demand-workforce. Accessed on 22 July 2022.
1533 Victoria State Government: Consultation Paper on Fair Conduct and Accountability Standards for the Victorian On-demand Workforce 2021:143.

Work (Supporting Australia's Jobs and Economic Recovery) Act[1534] (*FWSAJERA*) without specifically advocating for better support for on-demand workers.[1535] The *FWSAJERA* has changed several aspects relating to casual employment in Australia. It introduces a definition of casual employment. In this respect, section 15A states that:

> A person is a casual employee of an employer if:
> (a) an offer of employment made by the employer to the person is made on the basis that the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person; and
> (b) the person accepts the offer on that basis; and
> (c) the person is an employee as a result of that acceptance.

The *FWSAJERA* also provides for a list of factors to consider whether an employer 'makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person'.[1536] Most importantly, the *FWSAJERA* requires of employers to convert their casual employees to full-time or part-time employment in cases where they have worked for the employer for at least 12 months and have, during the past six months, worked a regular pattern of hours.[1537] However, the act makes it clear that the 'casual conversion' does not apply to small business employers.[1538]

5.7.1.2 New South Wales

The NSW Parliament established the Select Committee on the Impact of Technological Changes on the Future of Work and Workers in NSW (hereafter the NSW Committee) in 2020.[1539] Among other things, the NSW Committee was tasked to investigate if the current laws and labour protections are 'fit for purpose in the 21st century'[1540]. From the start, the NSW Committee acknowledged that the regulation of

1534 *Fair Work (Supporting Australia's Jobs and Economic Recovery) Act* 25/2021.
1535 Select Committee on Job Security – First interim report 2021:8.
1536 *FWSAJERA*:Sec. 15A(2)(a)-(d). This includes whether the employer can elect to offer work, and the person can choose to accept or reject the work, whether the person will work only as required, whether the employment is described as casual, and whether the person is entitled to a casual loading or a specific rate of pay for casual employees under the terms of the offer or a fair work instrument.
1537 *FWSAJERA*:Sec. 66B(1)(a)-(b). In terms of section 66B(2), the offer must be in writing and must be given to the employee within 21 days after the end of the 12 month period.
1538 *FWSAJERA*:Sec. 66AA. Section 23 of the *FWA* defines a small business employer as an employer who at a particular time employs fewer than 15 employees at that time.
1539 Select Committee on Job Security – First interim report 2021:8.
1540 Select Committee on Job Security – First interim report 2021:9.

the gig economy as a whole is left to the federal jurisdiction. This said, it noted that certain state laws could relate to platform work. This includes state legislation applicable to workers' health and safety, revenue and the transport sector.[1541] At this point, it must be kept in mind that selected recommendations will be highlighted to the extent that they relate to this research. Topics pertaining to health and safety and taxation laws are referred to but not discussed in detail.

Much like other jurisdictions and Federal states, NSW could not accurately determine the size of the gig economy workforce. This, unfortunately, includes reference to the average earnings of on-demand workers and the average hours worked.[1542] In addition, the NSW Committee found that NSW was falling behind other states in developing decent work in the gig economy.[1543] From their findings, the notion that all workers should have some degree of minimum entitlements and protections in the gig economy is not a reality for gig workers operating in NSW.[1544] This, in turn, significantly increased the inequalities experienced by gig workers.[1545]

On the matter of the correct classification of on-demand workers, the NSW Committee found that 'the ambiguity in the current legislation places an unfair onus on workers to challenge their classification'.[1546] The report noted that the current law is 'ill-suited' to fit the requirements of on-demand work and recommended that the NSW government commit to greater protections afforded to the general gig economy workers, regardless of their classification.[1547] Against this background, the establishment of a designated tribunal to set minimum conditions of work, which include minimum pay and working hours, must be considered.[1548] Bearing in mind the need for a specialist tribunal, the

1541 Select Committee on the Impact of Technological Changes on the Future of Work and Workers in NSW – First Report – The Gig Economy 2022:15.
1542 Select Committee on the Impact of Technological Changes on the Future of Work and Workers in NSW – First Report – The Gig Economy 2022:17.
1543 Select Committee on the Impact of Technological Changes on the Future of Work and Workers in NSW – First Report – The Gig Economy 2022:28
1544 Select Committee on the Impact of Technological Changes on the Future of Work and Workers in NSW – First Report – The Gig Economy 2022:29.
1545 Select Committee on the Impact of Technological Changes on the Future of Work and Workers in NSW – First Report – The Gig Economy 2022:29.
1546 Select Committee on the Impact of Technological Changes on the Future of Work and Workers in NSW – First Report – The Gig Economy 2022:45.
1547 Select Committee on the Impact of Technological Changes on the Future of Work and Workers in NSW – First Report – The Gig Economy 2022:46.
1548 Select Committee on the Impact of Technological Changes on the Future of Work and Workers in NSW – First Report – The Gig Economy 2022:47. The NSW Committee agreed that the

NSW Committee also agreed that on-demand workers need access to an accessible and affordable dispute resolution mechanism to resolve their disputes with the platform businesses.[1549] More crucial, the responsibility to provide suitable dispute resolution mechanisms should be seen as a Commonwealth responsibility.[1550] As discussed in Chapter 8 of this study, I opine that it must be seen as a proactive long-term goal that should be achieved on a national basis.

The issues of transparency concerning average pay, actual working hours and other data protections also require intervention.[1551] It is envisaged that improving transparency between the on-demand workers and the platform business will lead to greater accountability, which in turn can improve the fairness experienced in the entire on-demand sector.[1552]

The right to collective bargaining was noted as a fundamental right of all workers regardless of their classification. However, Australian labour laws continue to impose the traditional distinction of collective bargaining rights afforded to employees and independent contractors.[1553] Earlier on in this chapter, the notion of extending collective bargaining rights to the broader commercial law sector was explored. The NSW Committee critiques the amendment of the *CCA* provisions and describes it as a wrong that must be corrected.[1554] The question that may be raised is whether the limited commercial meaning of 'collective bargaining' is enough to allow vulnerable on-demand workers a forum to engage collectively on issues related directly to their working conditions. As a possible step in the right direction, the report recommends

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extension of Chapter 6 of the *Industrial Relations Act* 17/1996 is an option to strongly consider. Chapter 6 specifically deals with applies are contracts of bailment and contracts of carriage. Although the extension would not cover all types of on-demand work, it could allow a large portion of on-demand workers to have access to minimum rights and entitlements.

1549 Select Committee on the Impact of Technological Changes on the Future of Work and Workers in NSW – First Report – The Gig Economy 2022:58, 60. In terms of recommendation five, the tribunal must have the power to advise, oversee and make binding rulings on disputes between on-demand workers and platform businesses.

1550 Select Committee on the Impact of Technological Changes on the Future of Work and Workers in NSW – First Report – The Gig Economy 2022:59.

1551 Select Committee on the Impact of Technological Changes on the Future of Work and Workers in NSW – First Report – The Gig Economy 2022:60.

1552 Select Committee on the Impact of Technological Changes on the Future of Work and Workers in NSW – First Report – The Gig Economy 2022:60.

1553 Select Committee on the Impact of Technological Changes on the Future of Work and Workers in NSW – First Report – The Gig Economy 2022:66.

1554 Select Committee on the Impact of Technological Changes on the Future of Work and Workers in NSW – First Report – The Gig Economy 2022:66.

that the NSW government 'publicly' affirm the right of on-demand workers to 'freely associate by joining (or not joining) a union. I argue that the inclusion of 'publicly affirm' speaks directly to the notion of advocating for decent collective bargaining rights in the gig economy.

In conclusion, valuable lessons can be drawn from the NSW report. Moreover, it is important to heed the implications flowing from the NSW Committee's recommendations, seeing that South Africa has not yet engaged sufficiently with all stakeholders in the on-demand sector. As alluded to above, two main conclusions can be drawn. Firstly, the on-demand sector urgently requires a designated tribunal. Secondly, the allowance or extension of collective bargaining rights to on-demand workers could greatly improve their basic conditions of employment and access to proper collective bargaining structures that are broader than those prescribed by the *CCA* provisions and the ACCC.

5.7.1.3 Queensland

The Queensland government investigated extending worker's compensation coverage for on-demand workers back in 2019.[1555] Although the majority of the report's findings fall outside the scope of this research, some recommendations must be highlighted. The Queensland government shifted the bulk of the responsibility to the Australian government by arguing that reform of the *FWA* is required.[1556] In addition, the investigation advocated for the extension of the definition of a worker to accommodate new forms of employment. Accordingly, the scope of protections would be extended to include collective bargaining, minimum pay and working condition regulation, and access to the FWC.[1557]

1555 Queensland Government. 2019. "Consultation Regulatory Impact Statement: Workers' compensation entitlements for workers in the gig economy and the taxi and limousine industry in Queensland", www.worksafe.qld.gov.au/__data/assets/pdf_file/0026/19277/ris-gig-taxi-limo-industries.pdf. Accessed on 22 July 2022.

1556 Select Committee on Job Security – First interim report 2021:9.

1557 Queensland Government. 2019. "Consultation Regulatory Impact Statement: Workers' compensation entitlements for workers in the gig economy and the taxi and limousine industry in Queensland", www.worksafe.qld.gov.au/__data/assets/pdf_file/0026/19277/ris-gig-taxi-limo-industries.pdf. Accessed on 22 July 2022; Select Committee on Job Security – First interim report 2021:10.

In the absence of the aforesaid national approach, the Queensland government recently introduced the *Industrial Regulations and Other Legislation Amendment Bill*[1558] (*IROLAB*) which contains a designated chapter for independent couriers.[1559] The *IROLAB* advocates, *inter alia*, for a range of measures and protections for independent countries that were previously excluded due to their classification as independent contractors.[1560] In terms of the *IROLAB*, on-demand workers would be allowed to approach the Queensland Industrial Relations Commission (QIRC) for awards, in the form of contract determinations, relating to minimum pay entitlements and working conditions.[1561] In addition, it is proposed that groups of independent couriers, following good faith bargaining obligations, participate and conclude negotiated agreements on matters concerning their working conditions and remuneration.[1562] Other proposed changes would allow the QIRC to reinstate and pay compensation to independent couriers who have been unfairly dismissed, and to declare an order to void an independent couriers contract if it is unfair.[1563] This includes contracts that provide less remuneration for work agreed to in the contract[1564] or an industrial instrument.[1565] However, the proposed amendment only applies to those independent couriers who qualify in terms of the *IROLAB*. Thus it excludes on-demand workers operating as food delivery riders on major platforms such as Uber Eats and Deliveroo.[1566]

1558 *Industrial Regulations and Other Legislation Amendment Bill* 2022.

1559 *IROLAB* 2022: Chapter 10A. Sec. 406B defines an independent courier as 'a person who provides a service transporting goods using a courier vehicle if, in the course of providing the service, the courier vehicle is driven only by, if the person is an individual, the person; or if the person is a partnership, a partner in the partnership; or if the person is a corporation, and executive officer of the corporation or a member of the family of an executive officer of the corporation.

1560 Moy. 2022. "Australia: Proposed courier and gig economy changes in Queensland", https://www.mondaq.com/australia/employee-rights-labour-relations/1212760/proposed-courier-and-gig-economy-changes-in-queensland. Accessed on 25 July 2022.

1561 *IROLAB* 2022:Sec.406F, 406N; Moy. 2022. "Australia: Proposed courier and gig economy changes in Queensland", https://www.mondaq.com/australia/employee-rights-labour-relations/1212760/proposed-courier-and-gig-economy-changes-in-queensland. Accessed on 25 July 2022.

1562 *IROLAB* 2022:Sec. 406V.

1563 *IROLAB* 2022:Sec.406ZU defines an unfair contract as a contract that is harsh, unconscionable or unfair, against the public interest.

1564 For example, a contract determination or a negotiated agreement.

1565 *IROLAB* 2022:Sec.406ZU.

1566 Fair Work Claims. 2022. "Queensland government to introduce protections for gig delivery drivers", https://www.fairworkclaims.com.au/queensland-government-to-introduce-protections/. Accessed on 25 July 2022.

5.7.1.4 Western Australia

Much like all the other federal states, Western Australia's government established that there was a lack of information about the size of the gig economy.[1567] In addition, the Ministerial Review determined that the ability to improve the protection of gig workers can only be achieved by the Commonwealth.[1568] The government nevertheless showed its intention to examine how the health and safety rights of food delivery drivers could be changed to advocate for better protection of gig workers within its jurisdiction.[1569]

5.8 SUMMARY

This chapter has shown that the on-demand sector is steadily growing in Australia and that on-demand sectors are becoming more prevalent in all its Federal states, with roughly 250 000 people working in the broader gig economy. The start of the chapter elaborated on the Australian industrial relations framework, and it was found that several comparisons can be made with the South African position. Both countries are member states of the ILO and continue to play a crucial role in the realisation of decent work for all workers. In addition, Australia's sources of labour law are based on the common law, industrial instruments, legislation and the law of precedent. In terms of dispute resolution structures, both Australia and South Africa have a designated specialist tribunal for the resolution of labour disputes. In this regard, the working of the FWC and the FWO was discussed. [1570]

1567 Western Australia Government – Submission 100 to the Senate Select Committee on Job Security 2020:3. The full submission is available on the Parliament of Australia's website at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Job_Security/JobSecurity/Submissions. Select Committee on Job Security – First interim report 2021:10.

1568 Western Australia Government – Submission 100 to the Senate Select Committee on Job Security 2020:10; Select Committee on Job Security – First interim report 2021:10. The Western Australia Government noted that 'gig economy is mostly, if not entirely, constitutional corporations and therefore governed by the FW Act. Any State laws about the employment conditions of employees of constitutional corporations would be inoperative due to the FW Act 'covering the field'. If the relationship between a corporate gig economy operator and the worker is one of independent contract, then the Commonwealth has also covered the field by the *Independent Contractors Act* 2006 (Cth), and any WA legislation would be inoperative'.

1569 Select Committee on Job Security – First interim report 2021:10.

1570 See heading 5.2 where the FWC is compared to the CCMA.

The next part of the chapter sheds light on the classification of labour in Australia. This discussion has found that the classification of labour follows a binary approach and is mainly regulated by the *FWA* on a Commonwealth level. The most significant contribution that this chapter makes, in my opinion, can be seen in the way in which the multiple-factor test is interpreted and applied through an array of cases. Having discussed several cases advocating for and against the classification of on-demand workers as employees of the platform business, it was found that the *status quo* is that the contractual terms must be seen as the starting point for the application of the multi-factor test's criteria. This is especially important when considering the totality of the working relationship between the parties. I argue that this must be seen as a vital factor when considering the true relationship between the parties. In addition, I agree with the approach laid down in *Construction, Forestry, Maritime, Mining and Energy Union & Anor v Personnel Contracting Pty Ltd* and *ZG Operations Australia Pty Ltd & Anor v Jamsek & Ors.* South Africa can learn from the Australian courts' application of the aforesaid case law.[1571] For example, one of the leading arguments could be that a 'comprehensive contract' should be seen as the primary source of the contracting parties' legal rights and obligations.[1572] I maintain that this, in turn, could also be the starting point to afford on-demand workers decent pay, decent working hours and decent multi-stakeholder engagement structures.

While the future of on-demand workers and their classification remain in a state of uncertainty, the discussion on binding measures advocating for decent work found that alternative statutes could apply to the on-demand sector, be that in the commercial sector and not the labour sector.[1573] It may be argued that the protections included in both the *ICA* and the *CCA* could provide some recourse for on-demand workers working under harsh and unfair contracts. Despite the mentioning of some shortcomings in the *ICA* and the *CCA*, the operation of the ACCC is a viable alternative for 'collective bargaining' type multiparty engagement. It must be repeated that in the absence of a labour law collective bargaining structure, the ACCC provides a platform

1571 See heading 5.4.2 for a comprehensive discussion of relevant case law that illustrates the High Court and FWC's approach to classifying on-demand work.
1572 See heading 5.4.2. where the criteria of the multiple-factor test are applied in *Nawaz v Rasier Pacific Pty Ltd t/a Uber BV* [2022] FWC 1189.
1573 See heading 5.5.

for multi-parties to participate in multi-stakeholder engagement. I share the sentiment that a voluntary collective bargaining standard will provide the opportunity for on-demand workers and platform businesses to engage on issues related to decent pay, decent working hours, and decent multi-stakeholder engagement. If done adequately, I opine that the issue of classification becomes redundant, at least to some degree, seeing that negotiation could resolve many issues before they reach the Australian courts.

An appraisal of voluntary action and agreements between platform businesses and on-demand workers, or the organisations or trade unions acting on their behalf, reveals that negotiation is a vital tool to advocate for decent work for on-demand workers in Australia.[1574] Although they are in their infant stages of the ongoing negotiation between the TWU and platform businesses, such as Doordash and Uber, the set of standards and principles agreed to by both parties is significant for advocating for decent on-demand work. This part of the chapter highlighted the efforts made between two major platform businesses and the TWU regarding setting minimum voluntary standards and principles about minimum pay, conditions relating to working hours, enabling opportunities to enhance the collective voice of workers, and facilitating cost-effective disputes resolution for the deactivation of on-demand workers' profiles. In the context of voluntary actions, the efforts of Menulog were also discussed.

Even though a binding statutory framework for the on-demand sector is preferred, Australia is unfortunately still far from a final decision. In this respect, and in the absence of a precise binding regulatory framework, the last part of the chapter considers multiple non-binding instruments that advocate for decent on-demand work in Australia. This was done by examining the reports from the SCJS and the submissions made by Victoria, NSW, Queensland and Western Australia.[1575] In considering their findings and recommendations, the discussion revealed that the

1574 See heading 5.6. Of particular importance here is the role that negotiation can play between multi-stakeholders in the on-demand sector.
1575 See heading 5.7.

majority of the Federal states recommended a Commonwealth-led approach to regulate the on-demand sector by extending the scope of the *FWA* to include on-demand workers. In addition, the federal states called for an independent tribunal, for example the FWC, to resolve disputes in the on-demand sector. It must, however, be kept in mind that the aforesaid recommendations are non-binding and that the implementation of such is not as simple in practice.

The test for the classification of labour in Australia, together with the various binding and non-binding measures, shall be kept in mind when fashioning proposals for the South African approach, which will be discussed in the next chapter.

CHAPTER 6: PERSPECTIVES ON DECENT ON-DEMAND WORK IN SOUTH AFRICA

6.1 INTRODUCTION

During the ANC's 111th Anniversary, President Ramaphosa reiterated the need to adapt to the rapid technological change in South Africa.[1576] It is a fact that rapid technological changes are also increasing the diversification of work arrangements that include new forms of non-standard work.[1577] This could provide a fruitful platform for economic growth and job creation in a country already crippled by rising living costs and chronic unemployment.[1578] Moreover, the overlapping of informalisation and labour casualisation has had detrimental effects on workers' labour and safety nets.[1579] Mokofe and Van Eck state that the platform economy and new forms of work, such as on-demand work, continue to challenge South African labour relations.[1580] It seems that on-demand workers also find themselves in the 'twilight zone' work arrangement and that labour relations, in a broad sense, are also struggling to keep up with the consequences of new work relationships. Yet, the authors submit that proper labour relations are fundamental to navigating and managing the transition of the future of work.[1581] I agree that this is needed as part of a long-term process to advocate for adequate decent work for all, and not only those in traditional permanent employment relationships.

This said, many of the new forms of work with the characteristics of certain non-standard forms of work still need to be categorised correctly and, in the absence of such, they could remain precarious at best. Van Staden and Van Eck note that the

1576 President Ramaphosa 2023. "Statement Of the National Executive Committee on the occasion of the 111th Anniversary of the ANC", https://www.anc1912.org.za/anc-january-8-statement-2023/. Accessed on 6 January 2023.
1577 Govindjee 2020:49.
1578 President Ramaphosa 2023. "Statement Of the National Executive Committee on the occasion of the 111th Anniversary of the ANC", https://www.anc1912.org.za/anc-january-8-statement-2023/. Accessed on 6 January 2023.
1579 Mokofe & Van Eck 2021:1367. See Chapter 2, para. 2.3.5.3.2 for a detailed discussion on the vulnerabilities of on-demand workers.
1580 Mokofe & Van Eck 2021:1372.
1581 Mokofe & Van Eck 2021:1372.

increase in “precarious work” reduces the protection granted to these workers.[1582] Ironically, although the gig economy is a feature of the 4IR, the job precarity with which it is often associated does remind one of the early industrial revolutions, where working hours were also non-standard and work was more piecemeal.[1583] Left unregulated, the on-demand work relationship combines the worst of both worlds.[1584]

With the above in mind, this chapter investigates the theoretical foundation on which the study will consider the legal avenues that advocate for decent work for on-demand workers in the modern-day gig economy. The South African position in relation to the rights and protection afforded to on-demand workers must be challenged. In doing so, the question may arise if our labour framework sufficiently advocates for decent on-demand work if compared to the protections given to traditional employment.[1585]

An explanation of the international provisions in the South African context will first be considered. To this end, different constitutional provisions relevant to South Africa’s international obligations will be discussed. Secondly, the constitutional perspectives on labour and work are analysed. The *lacunae* in research pertaining to the classification of labour, from a constitutional point of view, are central to this discussion. Thirdly, an overview of the gig economy and on-demand work aims to illustrate the size and the projected growth of this emerging industry in South Africa. As in Chapters 4 and 5, the rest of this chapter will follow a similar order. The notion of employment and the classification of such will delineate the legal obstacles to achieving decent on-demand work. Accordingly, I investigate the common law principles of the notion of employment and the statutory definitions used to classify employment relationships. This includes an analysis of the definition of an ‘employee’, a ‘worker’, an ‘employer’ and the presumption of employment. It sets out to answer the

1582 Van Staden & Van Eck 2018:539.
1583 Churchill & Craig 2019:742.
1584 Pärly 2021:6. Regarding the ‘worst of both worlds’, Pärly refers to the platform workers being subject to the narrative pushed by the platform’s management while left with little to no labour and social protections as independent contractors.
1585 As will be seen in the discussion of this chapter, the modern-day gig economy and on-demand work remain unregulated *vis-à-vis* the strict classification of labour in South Africa. It should therefore be noted at this point that this chapter aims to investigate possible legal pathways that underpin decent on-demand work in South Africa.

research question if South Africa's statutory classification of labour can be extended to on-demand workers. A brief discussion on the non-standard forms of employment is also presented. This is required seeing that various labour law scholars argue that on-demand work resembles characteristics of casual work or part-time work.[1586]

The last sections of this chapter redirect the attention back to confirmed South African cases relating to on-demand work. The focus of this part of the chapter will be on discussing selected remarks from the Commission for Conciliation, Mediation and Arbitration (CCMA) and the Labour Court (LC). In addition, possible binding and non-binding measures to extend decent work to on-demand workers in South Africa are discussed. This includes an appraisal of existing labour statutes and bills that could extend to the broader gig economy. The last section explains voluntary action, agreements, standards, and principles that advocate for decent on-demand multi-stakeholder engagement structures, which have been identified in Chapter 3 as minimum decent on-demand indicators.[1587].

6.2 BACKGROUND AND INTERNATIONAL PERSPECTIVES

South Africa is a sovereign and democratic state founded on values such as human dignity, equality, and freedom,[1588] which include the full and equal enjoyment of all rights and freedoms.[1589] Section 2 of the *Constitution of South Africa* provides that the *Constitution* is the supreme law, and any law inconsistent with it is invalid and unenforceable. Additionally, the Bill of Rights prescribes various human rights that form "the broader context for the rights of employees *qua* employees".[1590] Section 9 particularly expresses these values and provides that everyone is equal before the law with equal protection and benefit of the law.[1591] Other rights relevant to the

1586 See para.2.3.3.4 in Chapter 2 for a discussion on the similarities that on-demand work has with non-standard forms of employment.
1587 See para. 3.6.5.
1588 *Constitution of South Africa*:sec 1.
1589 *Constitution of South Africa*:sec 9(2).
1590 Grogan 2019:4.
1591 *Constitution of South Africa*:sec 9(1).

employment context also flow from the right to equality. These include the right to freedom and security of the person, not to be subjected to forced labour, to freedom of religion, belief, opinion and expression, freedom of association, and the right to access to the courts.[1592]

The provisions of the Bill of Rights bind not only the judiciary, executive, legislature, and all organs of state, but also juristic and natural persons to the extent that a right is applicable.[1593] The rights in the Bill of Rights have, therefore, both a vertical and horizontal application. Section 39 confirms the previously mentioned principles in stating that when courts, tribunals and forums interpret the Bill of Rights, it must be done in a manner that promotes the values that underlie an open democratic society. In addition, section 39(1)(b) stipulates that international law must be considered. Further to this, section 3 of the *LRA* prescribes that the *LRA* must be interpreted in compliance with the public international law obligations of South Africa.[1594] Customary international law is also the law in the Republic unless it is inconsistent with the *Constitution* or an Act of Parliament.[1595] Lastly, section 233 of the *Constitution* states that every court must prefer any reasonable interpretation of legislation that is consistent with international law. Section 233 is given effect in the South African labour laws. For example, the *LRA* prescribes that its purpose is to give effect to the public international law obligations of the Republic[1596] and its ILO member state obligations.[1597]

6.3 CONSTITUTIONAL PERSPECTIVES ON LABOUR

1592 Grogan 2019:4.
1593 *Constitution of South Africa*:sec 8(1)-(2).
1594 *LRA*:sec. 3.
1595 *Constitution of South Africa*:sec 232.
1596 *LRA*:sec.3(c); Thoose 2022:23.
1597 *LRA*:sec.1(b). It still needs to be made clear if on-demand workers could be classified as employees, or if our current statutory protection can be extended to this effect. The labour standards generated by the International Labour Organisation (ILO), of which South Africa is a member state, therefore constitute a valuable source of customary international law. See Chapter 3, para.3.2 for a detailed discussion of South Africa's international obligations.

This section evaluates some constitutional perspectives on labour in our modern-day labour framework, which is necessary before a review of the statutory definitions relating to employment in South Africa can be given. In addition, the following part aims to identify and analyse some of the constitutional rights that are interlinked with the notion of 'labour'.

Constitutional rights can potentially influence the validity and interpretations of labour statutes and the development of common law to the extent that it concerns the employment relationship.[1598] The *Constitution of South Africa* is a value-laden document that enshrines the values of equality, human dignity, freedom, non-racialism, non-sexism and the advancement of human rights in the Republic.[1599] Moreover, one of the most important developments in South Africa's new democracy is the constitutionalisation of labour law.[1600] Fourie opines that labour rights, as human rights, are often closely connected to human dignity in international instruments relevant to labour and social protections.[1601] With this in mind, the following discussion considers the constitutional perspectives that apply to the employment relationship. Subsequent to this, the scope and interpretation of section 23 of the *Constitution*, insofar as it applies to new forms of work, will be analysed.

Labour law in South Arica has a vital function from broadening the scope of the individual work relationship 'to a constitutional task of contributing to a specific economic and social order'.[1602] Although section 23 of the *Constitution* is central to the world of work, and specifically the main stakeholders in the employment relationship, it should by no means be interpreted without considering other interlinked human rights.[1603] Van Niekerk *et al*. opine that constitutional rights can 'permeate each

1598 Van Niekerk *et al.* 2019:41
1599 *Constitution of South Africa* 1996:sec 1. The object of the *Constitution* is to establish a society that is reflective of these values. In a labour context, as is discussed later in this chapter, the purpose of the LRA is aligned with these values seeing that it aims to advance economic development, social justice, labour, peace and democratization of the workplace.
1600 Van Staden 2017:133.
1601 Fourie & Van Staden 2022:550; Fourie 2020:410-411.
1602 Fourie 2020:414.
1603 Van Niekerk *et al.* 2019:40. There is no doubt that Sec. 23 of the *Constitution* is central to the notion of 'work' in South Africa. However, it is by no means the only constitutional provision that applies to the contemporary work relationship. For example, there is an assortment of other

aspect of the work relationship'.[1604] To further examine this premise, the wording and categories of work used in section 23 must first be examined.

Labour rights and specific interlinked human rights[1605] thus play a vital part in achieving decent work.[1606] However, how the aforesaid rights are interpreted and applied varies according to the interpretation of the applicable constitutional provision. For example, section 23 of the *Constitution* affords "everyone" a right to fair labour practices. Sub-section (2) to (4) reserve the subsequent labour rights to specified categories, namely workers, employers, trade unions and employers' organisations.[1607] According to Grogan, the protection afforded by sec. 23(1) may also be extended to workers who are not sufficiently provided for by labour legislation.[1608] He also states that legislation must be interpreted in such a way as to be inclusive, rather than exclusive, to give effect to fundamental constitutional rights.[1609] For example, 'everyone' has the right to access social security protections.[1610] Similarly, 'everyone' has the right to freedom of association.[1611] The intent of the word "everyone", therefore, extends beyond the limitations of the traditional common law labour relationship. It is axiomatic that the scope of 'everyone' must be realistic and practically applied. For example, Du Toit asserts that it is well known that the term 'everyone' includes children and those working purely for themselves.[1612] There is also a broad consensus that a more defined term 'worker' refers to someone 'working for others'.[1613] From a narrower approach, it is thus evident that only persons defined as 'employees' are protected in terms of the LRA. This includes recourse to dispute resolution structures and protections against unfair labour practices and unfair dismissals.[1614]

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fundamental rights that guarantee the right to freedom of association, the right to freedom of profession, the right to privacy, and the right to equality, to name a few.

1604 Van Niekerk *et al.* 2019:40.
1605 Govindjee 2020:52.
1606 Fourie 2020:412.
1607 Le Roux 2009:52.
1608 Grogan 2019:4.
1609 Grogan 2020:19.
1610 *Constitution of South Africa*:sec 27.
1611 *Constitution of South Africa*:sec 18.
1612 Du Toit & Howson 2022:719.
1613 Du Toit & Howson 2022:719. Also see the sections in para. 6.7.1 for a discussion on the applicability of the *NMWA*.
1614 Govindjee 2020:52. See the discussion in para. 6.5.2 for more detail on the statutory classification of labour in South Africa.

In the past, our courts have commented that the focus should be on an existing employment relationship, rather than the term 'everyone'. [1615] Fourie and Van Staden state that the specific use of the term 'everyone' engages the relationship between workers and employers, thus referring to the broad employment relationship.[1616] This, however, does not apply to independent contractors.[1617] Furthermore, not everyone who works, qualifies as a 'worker' in terms of the statutory provision.[1618]

The concept of dependence and subordinate labour should be seen as the defining feature of a 'worker' for purposes of the constitutional provision and the definition of an 'employee' in terms of labour legislation. The aforementioned was confirmed by the Constitutional Court (CC) in *SANDU v Minister of Defence*[1619] (hereafter the SANDU case). The Court held that:[1620]

> It is clear from reading section 23 that it uses the term "worker" in the context of employers and employment. It seems therefore from the context of section 23 that the term "worker" refers to those who are working for an employer which would, primarily, be those who have entered into a contract of employment to provide services to such employer.

The CC also confirmed the principle of subsidiary by concluding: [1621]

> … where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the *Constitution* without challenging that legislation as falling short of the constitutional standard.

1615 See, for example, the interpretation of section 23 for purposes of extending labour protections to persons engaged in unlawful activities. In this regard, see the judgements of *Discovery Health v CCMA* (2008) 29 ILJ 1480 (LC) and *Kylie v CCMA* (2010) 31 ILJ 1600 (LAC).
1616 Fourie & Van Staden 2022:560, 561.
1617 Fourie & Van Staden 2022:560, 561.
1618 See the definition of a worker in terms of sec. 1 of the *NMWA*.
1619 *South African National Defence Union v Minister of Defence* 1999 (4) SA 469.
1620 *SANDU v Minister of Defence*:22.
1621 *SANDU v Minister of Defence*:51.

The aforesaid observation was applied in *Pretorius v Transnet Pension Fund*[1622] where the Constitutional Court held that it was important to take a broad view of sec. 23, and the interpretation of 'fair labour practices'. The Constitutional Court concluded that an increasing number of people were finding themselves in the 'twilight zone' of intermitted employment where they are exposed to multinational companies who operate via a 'web presence'.[1623] Unfortunately, the Constitutional Court did not suggest any clear guidelines to determine whether the principle of subsidiary can find any application in cases where a party claims that conduct that falls outside of the scope of unfair labour practices is actionable under the *Constitution*.[1624] It was, however, confirmed in *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others*[1625] that what was 'fair' in the context of section 23 of the *Constitution* required a value judgement when interpreting the right to fair labour practices.[1626]

Although the 'twilight zone' work arrangement is a reality for many informal workers, Van Niekerk J cautioned against the disregard of the principle of subsidiarity when an aggrieved party approaches the Constitutional Court without proper regard for the LRA and its provisions.[1627] Should the right to fair labour practice extend beyond the application of the LRA, the interpretation of the courts could allow fertile ground for the creation of a parallel development of labour law in South Africa.[1628] This, in turn, poses a risk for the integrated labour framework established by the LRA.[1629] In the context of the status quo, it is thus beneficial to challenge the constitutionality of the applicable LRA provision or prescribed process.[1630] Grogan opines that any person has the right

1622 *Pretorius and Another v Transport Pension Fund and Another* (2018) 39 ILJ 1937 (CC).
1623 *Pretorius and Another v Transport Pension Fund and Another* (2018) 39 ILJ 1937 (CC):48. The Constitutional Court noted that the case at hand did not necessarily concern the issue relating to its statement. That said, it confirmed that there were compelling reasons not to restrict the constitutional protections prescribed by sec. 23 of the *Constitution* to only those who are lucky enough to have a contract of employment.
1624 *Maoke & another v Telkom (SOC) Ltd & another* (2020) 41 ILJ 2414 (GP):30.
1625 *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others* 2003 (3) SA 1 (CC).
1626 *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others* 2003 (3) SA 1 (CC):33.
1627 *Kapari & others v Office of the Chief Justice & another* (2020) 41 ILJ 2473 (LC):15.
1628 *Kapari & others v Office of the Chief Justice & another*:15.
1629 *Kapari & others v Office of the Chief Justice & another*:15.
1630 *Kapari & others v Office of the Chief Justice & another*:16.

to a competent court if the constitutionality of an act's provisions or rights is not adequately protected.[1631] Labour legislation is described as subordinate constitutional legislation, and as such, all legislation must be interpreted to promote the spirit, purport and objects of the Bill of Rights.[1632]

Persons alleging that one or more of their rights have been infringed upon must seek relief comprehensively prescribed by the relevant act.[1633] Moreover, while a focus on human rights and dignity lies at the very foundation of South African labour law,[1634] the harsh reality is that most on-demand workers forgo their right to social security.[1635] This, however, does not mean that persons not covered by a specific statute do not have any recourse apart from what is prescribed by legislation.[1636] Moreover, while the South African courts may seem the obvious choice to resolve the current dilemma by simply having on-demand workers reclassified as employees, a bottom-up reworking of the labour law regime may, in the long run, be a more effective solution to remedy the unique vulnerabilities faced by on-demand workers.

This begs the following question, *i.e*., to what degree does the constitutional right to fair labour practices apply to South African on-demand workers, and whether section 23 of the *Constitution* plays a part in the structural vulnerability of on-demand workers. Although it might seem like it would be an impossible task to extend rights and protections to on-demand workers, it is not necessarily the case as our courts have dealt with the application of section 23 in cases relating to the extension of rights and protections to various types of workers.[1637]

1631 Grogan 2019:4.
1632 Van Staden 2017:65; *Constitution of South Africa*:sec. 39(2).
1633 Grogan 2019:4.
1634 Albin 2018:304.
1635 Ramaswamy 2019:296.
1636 Van Staden opines that subsidiary constitutional legislation can increase the protections prescribed by the *Constitution* and should, by no means, limit any constitutional protection, unless the limitation complies with section 36 of the *Constitution*. Van Staden 2017:66.
1637 Govindjee 2020:62; Grogan 2020:74.

I am of the opinion that the classification of labour followed by the South African labour laws excludes on-demand workers from complaining of possible infringements of their rights, seeing that the binary approach to the classification of labour excludes them from the application of most labour statutes in South Africa. It bears repeating that our labour laws must also continuously be developed effectively to 'protect workers and allow them to gain from new technological developments' in South Africa.[1638] A comprehensive discussion on the classification of labour is provided later in this chapter.[1639] The following section will first provide a birds-eye view of on-demand work in South Africa.

6.4 THE SIZE AND GROWTH OF ON-DEMAND WORK IN SOUTH AFRICA

Several multinational platform companies, such as Uber, Uber Eats and Bolt are currently providing services in South Africa.[1640] Due to the uniqueness of on-demand work and the inability of formal labour statistics to measure the size and growth of the gig economy in South Africa, Fairwork notes that there are no reliable statistics on the exact size of the on-demand workforce in the country.[1641] It is a fact, at least as far as this research is concerned, that the gig economy in South Africa consists of roughly 30 000 on-demand workers performing ridesharing, delivery, and domestic work tasks.[1642] It is furthermore estimated that South Africa has 135 000 platform workers,

1638 Mokofe & Van Eck 2021:1375. It must be stressed that different social structures place workers in varied positions of vulnerability. In South Africa, in particular, specific groups are rendered vulnerable because of racial exclusions, gender inequality and socio-economic disposition. The vulnerability associated with these factors has historically and systematically been exploited. Against this background, it is a fact that South Africa's extensive framework of labour legislation has been enacted to regulate the employment relationship and address the power imbalance between employer and worker, which puts employed individuals at risk of ongoing poverty and injustice. Unfortunately, on-demand workers currently have their backs to the wall, mainly due to structural vulnerabilities. In this context, structural vulnerability refers to the structural disadvantage that is created by the law itself.

1639 See paras. 6.5.1 and 6.5.2.

1640 Fairwork. Platform work amidst the cost-of-living crisis – South Africa Ratings 2022:15. Some of the other noticeable popular platforms include specific delivery services (Bottles), domestic work (SweepSouth), and crowdwork platforms such as Upwork. Ayentimi *et al.* 2022:4-5.

1641 Fairwork. Platform work amidst the cost-of-living crisis – South Africa Ratings 2022:15.

1642 Mokofe 2022:162; Fairwork. Platform work amidst the cost-of-living crisis – South Africa Ratings 2022:15.

of which only one per cent is in employment.[1643] This number is said to increase well above 10 per cent each year for the foreseeable future.[1644] In this context, Mokofe correctly notes that South Africa must increase its capacity to measure the growth of the on-demand workforce better to understand the emerging sector's regulatory needs.[1645]

In the absence of reliable statistics on on-demand work in South Africa, it would be sensible to briefly discuss the reasons for the sudden growth of on-demand work in the country. With the formal economy already struggling to provide sufficient work opportunities for a fast-growing working-age population, it is not surprising that many people globally have taken to on-demand work to earn a living.[1646] Fairwork notes that there has been an increase in the reliance on ridesharing "gigs" post-pandemic, with people returning to work, schools reopening and the travel ban lifted.[1647] However, on-demand drivers' earning capacity has fallen short mainly due to the instability of South Africa's current markets.[1648] This is particularly true for South Africa, where the unemployment rate is in the double digits, and young people are particularly hard hit.

At the time of writing this thesis, South Africa's unemployment rate was at a staggering 33,9 per cent,[1649] with the youth[1650] unemployment rate at an alarming 61,4 per cent in the second quarter of 2022.[1651] The author notes that the aforesaid rates were due

1643 Mokofe 2022:162. Fairwork estimates that roughly 100 000 workers are undertaking crowdwork. Fairwork. Platform work amidst the cost-of-living crisis – South Africa Ratings 2022:15.
1644 Fairwork. Platform work amidst the cost-of-living crisis – South Africa Ratings 2022:15.
1645 Mokofe 2022:177.
1646 Smit & Stopforth 2022:386.
1647 Fairwork. Platform work amidst the cost-of-living crisis – South Africa Ratings 2022:15.
1648 Fairwork. Platform work amidst the cost-of-living crisis – South Africa Ratings 2022:15. This has led to a stark increase in protest actions by on-demand workers from several platforms. The main reasons for the protest actions relate to their earning rates, health and safety concerns and employment classification. It is also established that on-demand workers are currently vulnerable to increasing high inflation and high fuel costs. As a result, many on-demand workers are faced with expenses exceeding their pay. See Tsibolane 2022. "RIP gig economy? How platform workers can survive a string of economic shocks", https://www.news24.com/fin24/opinion/opinion-rip-gig-economy-how-platform-workers-can-survive-a-string-of-economic-shocks-20221013. Accessed on 4 January 2023.
1649 Statssa 2022. https://www.statssa.gov.za/. Accessed on 10 November 2022.
1650 Unemployed youth refer to job-seekers between 15 and 24 years old.
1651 Stassa 2022. https://www.statssa.gov.za/. Accessed on 10 November 2022. South Africa has had an unemployment rate of over 20 per cent for at least two decades. This has been attributed

to the post-pandemic effects on the South African economy. Smit and Stopforth echo the findings in a 2020 ILO report, which confirmed that the youth were hardest hit by unemployment and that the Covid-19 pandemic had resulted in one in six young people being jobless worldwide.[1652] The future opportunities that on-demand work offers should not be done to the disadvantage of those who perform the work. Technological change and advancements must be done to reduce the current inequalities. However, the current realities at the time of writing this thesis are alarming and bear mentioning. South African on-demand workers' main concerns revolve around the reasons for protest actions over the past couple of years. It raises health and safety concerns while performing tasks, which include the likelihood of theft or assault.[1653] These reasons have also led to some platforms ending their operations in South Africa. [1654] This is a stark contrast to what some platform businesses promote, since the majority proclaims that on-demand work is the solution to the chronic unemployment crisis in South Africa.[1655] I agree with Du Toit in aptly stating that 'The vast majority of workers can't walk away and go to another job because there is no

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to an education system that needs to provide adequate skills, and laws that make it extremely difficult for job seekers to enter and remain in the formal sector.

1652 ILO 2020. "More than one in six young people out of work due to COVID-19", https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_745879/lang--en/index.htm. Accessed on 10 November 2022.

1653 Pheto 2022. "Uber SA says the safety of drivers using the app is a priority, just like the safety of riders", https://www.timeslive.co.za/news/south-africa/2022-07-14-uber-sa-says-the-safety-of-drivers-using-the-app-is-a-priority-just-like-the-safety-of-riders/. Accessed on 2 January 2023; MacMillan D 2022. "Uber promised South Africans better lives but knew drivers risked debt and danger", https://www.washingtonpost.com/business/2022/07/11/uber-driver-south-africa-attacks/. Accessed on 4 January 2022. Mac Millan notes that South African Uber drivers were burned when their cars were set on fire in 2016 and 2017. The aforesaid violence took place due to the ongoing conflict between taxi drivers and e-hailing drivers at the time. More recently in 2022, on-demand workers performing ridesharing tasks were hijacked, stabbed, pepper-sprayed, and tasered by passengers. See Solomons 2022. "Fearful Cape Town e-hailing drivers slam 'bizarre and quite scary attacks in some areas", https://www.news24.com/news24/southafrica/news/fearful-cape-town-e-hailing-drivers-slam-bizarre-and-quite-scary-attacks-in-some-areas-20221212. Accessed on 4 January 2022. Also, see Adebayo 2019:4-5 for a discussion on the conflict that arose between Uber drives and the rival taxi drivers in Cape Town.

1654 Magubane 2022. "Uber competitor DiDi seemingly ditches SA following driver strike", https://www.news24.com/fin24/companies/uber-competitor-didi-seemingly-ditches-sa-following-driver-strike-20220412. Accessed on 28 December 2022. For example, the Chinese ridesharing platform DiDi closed its doors after only 12 months of being operational. This decision was made amidst the ongoing strikes that occurred in the transport sector. It is also opined that DiDi could not keep up with its competitors such as Bolt and Uber. This decision subsequently left 15 000 platform drivers in Gqeberha, Cape Town and Johannesburg having to approach other ridesharing platforms to earn a living. See also Anon. 2022. "Didi shuts down operations in South Africa – report", https://businesstech.co.za/news/mobile/576148/didi-shuts-down-operations-in-south-africa-report/. Accessed on 28 December 2022.

1655 Malinga & Mungadze 2021. "Gig economy trumpeted as SA's solution to joblessness", https://www.itweb.co.za/content/GxwQDq1ZJ4XvlPVo. Accessed on 4 January 2023.

other job …'.[1656] In this respect, I argue that on-demand work must be seen as a pathway out of poverty and as alternative work to earn a living' instead of remaining unemployed while traditional forms of work remain scarce. This, however, begs for decent work standards for on-demand work.

The emergence of modern types of work relationships continues to test the limitations of current labour frameworks to afford labour and social protections. As will be discussed in the next section, the contentious classification of labour remains a barrier to the full protections prescribed by labour laws.

6.5 THE NOTION OF THE EMPLOYMENT RELATIONSHIP AND THE CLASSIFICATION OF LABOUR IN SOUTH AFRICA

As discussed in Chapter 2 of this thesis, the traditional business organisation has become fragmented, which in turn has resulted in the creation of new forms of work that do not fit the mould of traditional work arrangements.[1657] Fourie correctly states that the traditional focus of labour law in this modern time is no longer valid or sustainable.[1658] Furthermore, Fourie and Van Staden suggest that the current 'traditional' labour laws have been drafted to fit the paradigm of full-time employment[1659] and that legal intervention is required to extend protections to vulnerable informal workers.[1660] The question that arises is whether the traditional definitions prescribed by labour laws should be amended to 'reverse the eroding effects of new forms of work'.[1661]

Du Toit and Howson correctly assert that on-demand work is only partially novel to South Africa, as they argue that it is a new form of non-standard work, which has been

1656 Malinga 2022. "Calls for regulation to protect SA gig workers", https://www.itweb.co.za/content/dgp45MaB6o8qX9l8. Accessed on 4 January 2022.
1657 Du Toit & Howson 2022:717.
1658 Fourie 2020:398.
1659 Fourie & Van Staden 2022:556.
1660 Fourie 2020:399.
1661 Mokofe & Van Eck 2021:1374.

the focus of labour law scholarship for decades.[1662] In many ways, platform work resembles other 'traditional' forms of precarious work characterised by irregular scheduling, piecework compensation, or workers providing their own tools to the trade and workplace.[1663] However, while it shares certain traits with some forms of formalised non-standard work, such as fixed-term, part-time, or temporary employment services, fitting the practices of on-demand work into existing labour law models[1664] has been likened to "fitting a square peg into a round hole".[1665]

The subsequent sections start off with an overview of the common law considerations relating to the notion of employment in South Africa. This discussion is important since it lays the theoretical foundation to identify and discuss the legal problems associated with the classification of labour as it pertains to on-demand workers. It is an essential departure point to understand the barriers to full labour and social protection that these workers face. Following this discussion, the focus shifts to the statutory definition prescribed by South Africa's labour laws. Finally, selected binding and non-binding measures advocating for decent on-demand work are discussed.

Precisely because of the speed at which the world of work evolves, the legal classification of the employment relationship remains relevant and crucial as a gateway to the activation of prescribed statutory measures aimed at protecting both employer and employee.[1666] Now, more than ever before, clarity on who would qualify as employees is essential because of the different rights and duties that flow from the various types of modern-day work agreements and contracts.[1667] Without such a clear classification, digital platforms' tendency to serve as active labour and product intermediaries, and to classify on-demand workers as independent contractors,

1662 Du Toit & Howson 2022:717.
1663 Stewart & Stanford 2017:422.
1664 Hauben, Lenaerts & Waeyaert 2020:29.
1665 Farmer, Federico & Flo 2018. "Fitting a square peg into a round hole: Worker classification in the gig Economy", https://www.jdsupra.com/legalnews/fitting-a-square-peg-into-a-round-hole-55421/. Accessed on 28 November 2022.
1666 Black 2020:74; Grogan 2020:13, 15. Grogan argues that the definitions of "employee" prescribed by the LRA and the *BCEA* raise similar questions to those raised by the common law.
1667 Grogan 2020:13.

legislatively places the gig worker outside the realm of any organisation[1668] and, thus, outside the scope of current labour law protection.

In the meantime, whether those engaged in on-demand work are engaged in recognised classifications of work, and the extent to which labour protections can be afforded to this vulnerable group, remains subject to litigation in labour courts and tribunals in numerous jurisdictions, including South Africa.[1669] It must be reiterated that labour law aims to regulate the relationship between those who hire others for their labour, and those who hire out their labour to others.[1670] Yet labour legislation is never immune to critical reflection and, if necessary, revision.[1671] Indeed, most studies to date have focused on a reworking of the classification of labour to extend existing rights to on-demand workers as well.

Research on decent on-demand work in South Africa, compared to other comparative countries like Ireland and Australia, is still in its initial stage.[1672] Much needs to be done to understand the unique challenges of on-demand work in the country. For this reason, and in the absence of a clear legal response to eliminate on-demand workers' access to full rights and protection, the next parts provide a detailed overview of the legal considerations advocating for decent work for employees and workers in South Africa. It will be argued that some of the statutory protections could be extended to on-demand workers. However, this cannot be done without an appropriate review of the classification of labour.

1668 Barratt, Goods & Veen 2020:13.
1669 Van Niekerk *et al*. 2019:6. Also, see *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW)* 2018 39 ILJ 903 (LC) relating to the misclassification of Uber's drivers. However, since it was not in the labour court's powers to confirm these drivers' correct classification, this is yet to be done.
1670 Grogan 2020:1.
1671 Van Niekerk *et al.* 2019:17.
1672 Compared to other jurisdictions, South Africa still has much to do to research and consider a viable alternative to regulating on-demand work. This comes as no surprise given the abundance of other economic, political and social legal issues taking priority at this stage.

6.5.1 Common law principles applicable to the notion of an employment relationship

The modern-day employment relationship is mainly codified in various labour statutes that give effect to the *Constitution* and prescribe various rights and obligations in South Africa.[1673] Prior to the statutory framework that we see today, employment relation was regulated by the common law.[1674] In distinguishing between the two main categories of employment, South African courts have developed and applied different criteria in classifying traditional employment relationships. The first of these deals with the essence of the common law contract that conforms to the requirements of the common law contract of employment (*location conditio operarum*).[1675] The *locatio condition operarum* is defined as:[1676]

> …a contract between two persons, the master (employer) and the servant (employee), for the letting and hiring of the latter's services for reward, the master being able to supervise and control the servant's work.

It should be noted that fairness is not regarded as a constituent component of the common law contract of employment, and that employers and employees are consequently bound by the terms and conditions that they agree to.[1677] In *SA Maritime Safety Authority v McKenzie* the Supreme Court of Appeal (SCA) confirmed that the right to develop the common law to include an implied duty to fairness in previous cases was incorrect.[1678] Fairness, therefore, did not have much weight in the common law.[1679]

1673 Rammila & Van Staden 2020:295.
1674 Rammila & Van Staden 2020:295.
1675 Van Niekerk *et al.* 2019:60; Grogan 2020:14.
1676 Grogan 2020:14.
1677 Grogan 2019:5.
1678 *South African Maritime Safety Authority v McKenzie* (2010) 31 ILJ 529 (SCA):54.
1679 Louw 2018:9.

Rammila and Van Staden note that the common law is remised on the assumption that the parties to the employment contract are on equal footing.[1680] This might be true for parties in a commercial contract; however, the position shifts if the contract of employment is concerned.[1681] Wallis describes the common law contract of service as a process that is inherently unbalanced and favours the employer.[1682] With this in mind, it must be noted that unskilled workers desperate for job opportunities have been exploited and placed in a lower bargaining position. This, to some degree, is reminiscent of the current legal issues facing the modern-day gig economy in South Africa.[1683] However, if this is true, it is beneficial to consider a multi-party engagement process outside the scope of labour law's collective bargaining structures.[1684] This could, in the absence of a common law or statutory classification[1685] of on-demand work, provide a platform for on-demand workers or their representative to negotiate the terms of their agreement. This will, in turn, set the scene to collaborate on matters that advocate for decent work in the South African on-demand sector.

Our courts have relied on several judicial tests to distinguish between the requirements of a *location condition operarum* (Roman law contract of service) and *location condition operis* (the contract for work).[1686] These judicial tests include the control test, the organisation test and the "multiple" test,[1687] and it is established that the courts accept the "dominant impression test" to determine the actual working relationship between two parties.[1688] The application of the dominant impression test is furthermore confirmed in the Code of Good Practice.[1689]

1680 Rammila & Van Staden 2020:298.
1681 Rammila & Van Staden 2020:298.
1682 Wallis 2005:181.
1683 See the discussion in para 2.3.5.3.2.
1684 See para 8.4.
1685 See para. 6.5.2.
1686 Du Toit *et al.* 2015:104; Govindjee 2020:53; Van Niekerk *et al.* 2019:64.
1687 Grogan 2020:15; Van Niekerk *et al.* 2019:64.
1688 Van Niekerk *et al.* 2019:64.
1689 See para. 6.5.2.5.

In *State Information Technology Agency (SITA) (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[1690] (hereafter the SITA case), the Labour Appeal Court (hereafter the LAC) has confirmed that there are three criteria that must be considered to establish if an employment relationship exists between a punitive employer and a worker.[1691] These criteria include an employer's right to supervision and control, whether the employee forms an integral part of the organisation, and the degree to which the employee is economically dependent on the employer.[1692] In addition, the LAC also referred to the 'reality test', where one has to consider the 'substance of the relationship' between the parties.[1693] However, the LC has recently asserted that the test is not a 'discrete test' and described it as nothing more than a measure to combat disguised employment.[1694] Accordingly, Grogan argues that the true test required by the statutory definitions is to identify the true relationship between the parties and not solely on the contract of employment they agree upon.[1695] However, in the *Code of Good Practice*, item 28 confirms that the South African courts aim to determine the true relationship between the parties, which in most cases is evident from the wording of the employment contract.[1696] This statement seems to correlate with that of the Australian position.[1697]

In view of the above, the dominant impression test prevails as our common law test of employment in South Africa.[1698] The South African courts have applied the dominant

1690 *State Information Technology Agency (SITA) (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 2234 (LAC).
1691 *State Information Technology Agency (SITA) (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 2234 (LAC): 12.
1692 *State Information Technology Agency (SITA) (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 2234 (LAC):12.
1693 *State Information Technology Agency (SITA) (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 2234 (LAC):14. Also see *Denel (Pty) Limited v Gerber*, 2005 (26) ILJ 1256 (LAC).
1694 *Uber SA Technology Services (Pty) Ltd v National Union of Public Service & Allied Workers & others* (2018) 39 ILJ 903 (LC):75. Van Niekerk J also noted that a court was not prohibited from inquiring into the substance of the work relationship and from determining that an employment relationship exist.
1695 Grogan 2019:22.
1696 *Code of Good Practice*:Item 28. Item 45 of the Code also states that 'fixed payment at regular intervals which is made regardless of output or result tends to be a strong indication of an employment relationship'. Likewise, item 46 affirms that 'the fact that a person is a member of the same medical aid or pension scheme as other employees of the employer is an indication that they are an employee'. The Code also includes other factors to consider such as the provisioning of training (item 49) and the place at which work takes place (item 50).
1697 See para. 5.3.
1698 Mokofe 2022:166.

impression test to various work relationships stretching over various sectors.[1699] The *indicia* of the dominant impression test, as summarised in *SABC v McKenzie,*[1700] are as follows:

Locatio conductio operarum (Employment)	**Locatio conductio operis (Independent contractor)**
Object is the rendering of personal services between employer and employee	Object is the production of a certain specified service or the production of a certain specified result
Employee renders service at the behest of employer	Independent contractor is not obliged to perform work personally unless otherwise agreed
Employer may decide whether it wishes to have employee render service	Independent contractor is bound to perform specified work or produce specified result within a specified or reasonable time
Employee is obliged to obey lawful, reasonable instructions regarding work to be done and manner in which it is to be done	Independent contractor is not obliged to obey instructions regarding manner in which task is to be performed
Terminated by the death of the employee	Not terminated by the death of the contractor
Terminates on completion of the agreed period	Terminates on completion of the specified work or production of the specified result

Table 10: The *locatio conditio operarum* and the *locatio conditio operis*. Grogan 2022:16

Grogan notes that it is impossible to compile a complete list of factors to be considered to determine the true relationship between the parties.[1701] Nevertheless, Van Niekerk explains that the idea of an 'employment relationship', as opposed to a contract of employment, plays a vital role in labour classification.[1702] That said, Grogan confirms that our courts will gradually adopt a more flexible approach to applying the dominant impression test if one considers the changing nature of the future of work.[1703] It is noted that this notion corresponds with the Australian position prior to the *Nawaz* case.[1704]

1699 See, for example, *Tuck v SABC* (1985) 6 ILJ 570 (IC) where the Industrial Court concluded that a freelance scriptwriter was declared an employee of the SABC. In addition, it was decided in *ABSA Makelaars v Santam Versekeringsmaatskappy* (2003) 24 ILJ 1484 (T) that an insurance broker is an employee of the company for purposes of establishing vicarious liability. See also Grogan 2020:17.

1700 *SABC v McKenzie* (1999) 20 ILJ 585 (LAC); *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A); Van Niekerk *et al*. 2019:60; Grogan 2020:16.

1701 Grogan 2020:16.

1702 Van Niekerk *et al.* 2019:61.

1703 Grogan 2020:16.

1704 See 5.4.2 and *Nawaz v Rasier Pacific Pty Ltd t/a Uber BV* [2022] FWC 1189.

With the aforesaid in mind, Maloka and Okpaluba emphasise that the once clear distinction between an independent contractor and an employee continues to be undermined by novel forms of dependent self-employment and disguised employment.[1705] This reaffirms the previous statement that the traditional full-time employment relationship is continuously being tested by novel forms of work. Concurrently, as will be discussed next, statutory labour needs to adapt to the changing world of work as well. South Africa is a constitutional state, and the majority of our labour laws is statutory. However, Wallis asserts that we will never be able to "isolate and codify all the labour law in statutes" without duly taking into account the common law principles.[1706] From this perspective, the statutory classification of labour will be discussed in the part that follows.

6.5.2 The statutory classification of the employment relationship

6.5.2.1 Outline of applicable labour statutes

The employment relationship in South Africa is mainly regulated by virtue of labour statutes.[1707] Louw explains that the reason for this has been to infuse the individual labour relationship and the collective labour relationship with fairness.[1708] It is also on this premise that fairness finds expression in the various labour statutes that apply to the employment relationship. As alluded to in Chapter 3, this research is limited to the binding and non-binding measures advocating for decent worker classification, decent working conditions with reference to pay and working hours, and decent collective bargaining structures. In keeping with this line of reasoning, it is necessary to briefly outline the statutes that concern worker classification, working conditions, and collective bargaining.

1705 Maloka & Okpaluba 2021:709.
1706 Wallis 2005:28.
1707 Louw 2018:2.
1708 Louw 2018:2. It was noted in para 6.5.1 that fairness was not a fundamental component of the contract of service.

The principal statute that gives effect to statutory minimum terms and conditions of employment is the *BCEA*.[1709] The Act aims to advance economic development and social justice by fulfilling its primary objective of giving effect to and regulating the right to fair labour practices as enshrined in section 23 of the *Constitution*.[1710] The *BCEA* prescribes fundamental and other basic conditions of employment that the South African legislature regards as fundamental,[1711] and provides for their enforcement.[1712] These include provisions regulating the working time,[1713] statutory paid leave,[1714] the payment of remuneration,[1715] and the periods applicable to the termination of employment.[1716] The *BCEA* is supplemented by the *NMWA*,[1717] which entitles South African authorities to prescribe a national minimum wage, and also regulate it.

The *LRA* serves as the primary labour statute in South Africa. It prescribes the various individual and collective labour rights afforded to "employees" engaged in traditional employment relationships as well as several other non-standard forms of employment.[1718] The *LRA* has been amended a number of times in the past two decades to keep up with the growing demands of South Africa's dynamic labour market.[1719] The 2014 amendments, in particular, were aimed at broadening the scope of non-standard forms of employment and have drastically changed the status and protection afforded to employees not engaged in permanent employment

1709 *Basic Conditions of Employment Act* 75/1997. Van Niekerk *et al*. 2019:105.
1710 Du Toit *et al.* 2015: 289.
1711 Grogan 2020:6.
1712 Grogan 2020:6.
1713 Including provisions relating to ordinary working hours (secs. 9 and 9A), overtime (sec. 10), meal intervals (sec. 14), daily and weekly rest periods (sec. 15), Sunday work (sec. 16), work on public holidays (sec. 18) and night work (sec. 17).
1714 Including provisions relating to annual leave (secs. 20 and 21), sick leave (secs. 22 to 24), maternity leave (secs. 25 and 26), parental leave (secs. 25A), adoption leave (sec. 25B), commissioning parental leave (sec. 25C) and family responsibility leave (sec. 27).
1715 Including provisions relating to information about remuneration (sec. 33), deductions (secs. 34 and 34A) and the calculation of remuneration and wages (sec. 35).
1716 *BCEA*:Sec. 37.
1717 *National Minimum Wage Act* 9/2018. The *NMWA* establishes a minimum wage of R23,19 for every ordinary hour worked. The *NMWA's* definition of a worker must be noted. The *NMWA* defines a worker as "…any person who works for another and who receives, or is entitled to receive, any payment for that work whether in money or in kind." Unfortunately, is not possible to provide a comprehensive analysis of this definition as a possible 'third' category of employment in the South African context, due to the scope of the study. The definition could serve as a practical basis for a third category of employment in South Africa.
1718 Grogan 2020:6.
1719 Van Niekerk *et al*. 2019:17.

relationships.[1720] Yet only "employees" can be regarded as victims of unfair labour practices[1721] and be dismissed in terms of the *LRA's* definitions.[1722] A discussion on the statutory definition of an employee is provided below.

The primary statute safeguarding employees against discrimination in the South African workplace is the *Employment Equity Act* (*EEA*),[1723] which ensures that the country's international obligations and the provisions of the *Constitution* are adhered to.[1724] The *EEA* aims to correct the country's demographic imbalance in the workforce by advancing members from the designated groups[1725] through affirmative action measures.[1726] The Act applies to all "employees", as well as applicants for employment.[1727] As with the other South African labour laws, on-demand workers sadly do not fall within the scope of the *EEA* either, even though a considerable proportion in both the ridesharing and delivery sectors have experienced discrimination or harassment while providing their services, mostly from clients. Cognisance needs to be taken that algorithmic management,[1728] central to the gig economy model,[1729] is associated with an inherent vagueness and a lack of disclosure of data sources and algorithmic outcomes.[1730] In effect, therefore, platform workers are subject to algorithmic control by the platform, resulting in algorithmic discrimination.[1731] Although the occurrence of algorithmic discrimination raises several

1720 Van Niekerk *et al.* 2019:17, 19. Although the 2014 amendments sought to extend labour protections to non-standard forms of employment, labour legislation continues to reflect the interests of those in formal employment.
1721 See sec. 185(b) of the *LRA*.
1722 Grogan 2019: 7. See also secs. 185, 186 and 193 of the LRA for more in this regard.
1723 *Employment Equity Act* 55 of 1998.
1724 Van Niekerk *et al*. 2019:123.
1725 EEA:Sec. 1. Members from the designated groups refer to Africans, coloureds and Indians, women, and persons with disabilities.
1726 Grogan 2020:75.
1727 Van Niekerk *et al*. 2019:123. In addition to the *EEA*, the *Promotion of Equality and the Prevention of Unfair Discrimination Act* 4 of 2000 extends equivalent protection to all persons not covered by the *EEA*. Also see Du Toit, Fredman & Graham 2020:1515. The *BCEA* and the LRA contain provisions that protect employees against discrimination for exercising their rights in terms of the respective statutes. Du Toit *et al*. 2015:646. See secs. 5(1) and 187(1)(d) of the LRA and secs. 78 and 79 of the *BCEA*.
1728 The ILO defines algorithmic management as "giving the responsibility of assigning tasks and making decisions to an algorithmic system of control, with limited human involvement. The algorithmic management system improves through self-learning algorithms based on data." ILO (2021) "World employment" at 33.
1729 Vallas & Shor 2020:78.
1730 Bucher, Schou & Waldkirch 2021:45.
1731 ILO 2021 "World employment":179. In a recent ILO study, 37% of ridesharing workers and 48% of on-demand workers in the delivery sector indicated that they could not decline or cancel

legal questions about how platforms use their task allocation and location tracking systems, it does not fall within the scope of this thesis. It is, however, noted as a developing field in labour law that warrants future research.

6.5.2.2 The statutory definition of an 'employee'

Against the backdrop of the overview of the main labour statutes above, the following part introduces the first definition relevant to the study, namely that of an 'employee'. Since the enactment of the *LRA* and the *BCEA* there have been several authoritative judgements handed down by the South African courts on the matter of classifying persons as employees or independent contractors. In the following discussion, preference will be given to key case law in this regard. In doing so, I aim to provide a judicial timeline that explains the way in which the notion of an employment relationship has developed during recent years. Thereafter, two cases relating specifically to the classification of on-demand drivers will be discussed.[1732] In this way, the South African framework that applies to the classification of labour and its shortcomings with reference to on-demand work will be investigated with reference to the aforesaid cases.

South Africa follows a binary approach to the classification of the employment relationship by drawing a distinction between an employee and an independent contractor.[1733] If a person is classified as an independent contractor, the labour rights and protections do not apply to their work relationship.[1734] When interpreting the provisions of the *LRA*, it must be done in a manner that complies with the constitutional

tasks, as doing so would negatively affect their ratings. Declining or cancelling tasks via the platform could also result in reduced work opportunities, financial penalties or, in severe cases, deactivation by the platform. The control and monitoring done by the algorithm also play a significant role when on-demand workers are rated. Algorithms are mainly used to match workers and clients. The deactivation of workers if they are rated below a specific threshold is also algorithmically managed.

1732 See the discussion in para. 6.6 where the Uber decisions are examined.

1733 Diedericks 2017:4.

1734 Van Niekerk *et al*. 2019:59.

provisions and South Africa's international obligations.[1735] The *LRA* defines an employee as follows: [1736]

> Employee means:
> (a) any person, excluding an independent contractor, who works for another person or for the State, and who receives, or is entitled to receive, any remuneration; and
> (b) any other person who in any manner assists in carrying on or conducting the business of an employer.

At first glance, the definition of an 'employee' is said to be relatively wide and non-descriptive.[1737] Several considerations must be noted. Firstly, subsection 213(a) expressly excludes independent contractors from the application of the definition of an employee, and is consequently excluded from the scope and ambit of the labour statutes that prescribe the same definition.[1738] Secondly, Van Niekerk *et al.* emphasise that subsection 213(b) could open the door to include employment relationships beyond the traditional forms.[1739] This is an important fact to remember, considering that the traditional function of labour law is to ensure labour and social protection for those in an *employment relationship*.[1740] However, viewed through a constitutional lens, the existence of an employment relationship has been extended to unlawful contracts in the past. It must be noted at this point of the discussion that the legislature has attempted to assist the South African courts with a deeming provision that creates a presumption that, regardless of the employment contract, a person is deemed to be an employee of the employer if one or more of the listed grounds are met.[1741] A discussion on the presumption is included later in the chapter.[1742]

1735 *LRA*: sec 3.
1736 *LRA*: sec 213. The same definition of an 'employee' is included in the *BCEA*, the *EEA* and the *Skills Development Act* 97 of 1998 (hereafter the *SDA*).
1737 Van Niekerk *et al.* 2019:62.
1738 Van Niekerk *et al*. 2019:63.
1739 Van Niekerk *et al.* 2019:63.
1740 Own emphasis. See Van Niekerk *et al*. 2019:4. Labour law serves as a balancing measure by establishing minimum standards of employment and prescribing various procedural requirements aimed at counterbalancing employees' bargaining rights against employers' economic powers. See also in this regard the findings of *Kylie v Commission for Conciliation Mediation and Arbitration and Others* 2010 7 BLLR 705 LAC.
1741 See, for example, section 200A of the *LRA* and 83A of the *BCEA*.
1742 See para. 6.5.2.5 for more information in this regard.

6.5.2.3 The statutory definition of an 'employer'

South Africa does not have a formal statutory definition for an 'employer' in either the *LRA* or the *BCEA*. However, it has been the subject of many academic debates over the past few years. Despite this, the *LRA*, for example, uses the term 'employer' frequently when imposing legal duties.[1743] The purpose of this part of the chapter is to analyse what the term 'employer' could entail, and if parts of our current labour legislation could aid in identifying the true employer in a work relationship.

Grogan holds that in the absence of such, the term 'employer' should be described with reference to the definition of an 'employee'.[1744] He also explains that various entities could combine and form holding companies and subsidiaries.[1745] The contractual relationship is complicated further in cases where corporate groups hire out their services to another company.[1746] In addition, identifying the subsidiary becomes extraordinarily complex when dealing with multinational companies, for example, Uber SA and Uber BV.[1747]

The true employer of a worker can turn out to be a legal challenge, seeing that neither the *LRA* nor the *BCEA* has a statutory definition for an 'employer'. Moreover, this becomes particularly technical when you are dealing with workers who do not share a central workplace, such as on-demand workers. Although the Uber cases are discussed later in this chapter, it is important to note at this junction that this was a vital consideration in the LC's judgement. In short, the LC concluded that the Uber

1743 Sec. 16(2) of the LRA, for example, prescribes that 'an employer must disclose to a trade union representative all relevant information that will allow the trade union representative to perform effectively the functions referred to in section 14(4).' In the same way, reference to an 'employer' is made in several dismissal provisions of the *LRA*. See, for example, secs. 186 – 188.

1744 Grogan 2020:20. In other words any person who 'receives' service from another.

1745 Grogan 2020:20.

1746 Grogan 2020:20. The subsidiary on which books the employees appear is regarded as the employer of the employees.

1747 See the discussion of the Uber cases under the para. 6.6.

drivers were not employees of Uber SA since the SA division is merely performing administrative functions for the holding company in the Netherlands, Uber BV.[1748]

In view of this, it becomes necessary to ask whether Uber BV relies on stratagems to sidestep its labour obligations in South Africa as part of 'bogus' or 'sham' employment.[1749] If this is the case, Van Eck and Nemusimbori's argue that section 200B(1) of the LRA could apply. Grogan states that section 200B applies to cases where 'an employer acts fraudulently or dishonestly to hide behind the bogus corporate identity'.[1750] The section is divided into two main parts. First, subsection 200B(1) prescribes that an 'employer' 'includes one or more persons who carry on associated or related activity or business by or through an employer if the intent or effect of their doing so is or has been to directly or indirectly defeat the purposes of this Act or any other employment law.' Secondly, subsection 200B(2) prescribes the liability of such an employer by stating that 'those persons are jointly and severally liable for any failure to comply with the obligations of the employer in terms of this Act or any other employment law.'

The LAC has recently, in *Masoga & another v Pick n Pay Retailers (Pty) Ltd & others,*[1751] confirmed that the section must be applied fairly to 'scrutinise any conceivable relationship or arrangement for purposes of liability'.[1752] Therefore, a court must also carefully consider if the close association between a foreign holding company and a South African subsidiary is 'sinister' if viewed in a proper context.[1753]

1748 *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* 2018 39 ILJ 903 LC:27. See Grogan 2020:21.
1749 *Masoga & another v Pick n Pay Retailers (Pty) Ltd & others* (2019) 40 ILJ 2707 (LAC):50.
1750 Grogan 2020:20.
1751 *Masoga & another v Pick n Pay Retailers (Pty) Ltd & others* (2019) 40 ILJ 2707 (LAC).
1752 *Masoga & another v Pick n Pay Retailers (Pty) Ltd & others* (2019) 40 ILJ 2707 (LAC):50.
1753 *Masoga & another v Pick n Pay Retailers (Pty) Ltd & others* (2019) 40 ILJ 2707 (LAC):54. In 2019 the Labour Appeal Court had an opportunity to share its view and interpretation of sec. 200B of the LRA. The value of this decision, for purposes of this thesis, lies in the interpretation of sec. 200B. The LAC noted 'That sec. 200B was not intended as a general test is further borne out by the wording of that section.' In essence, the LAC confirmed that the section contains a deeming provision. With this in mind, the section does not have set criteria that a person is an employer other than that one party is in a 'simulated arrangement or sham' that aims to defeat the purpose of the LRA or any other employment law. If this is the case, any other person complicit in this subterfuge is treated as the employer of the employees. Grogan

6.5.2.4 The statutory definition of a 'worker'

In addition to the statutory definition of an employee in terms of the LRA, the *NMWA*[1754] defines a "worker" as any person who works for another and who receives or is entitled to receive, any payment for that work, whether in money or in kind. This scope is much wider than that of an "employee". Nevertheless, its application is limited to the application of the *NMWA* and selected sections of the *BCEA*. With the introduction of a new category of 'worker' in terms of the *NMWA*, I argue that on-demand workers could fall in the scope of the Act. It must be noted that the interpretation and application of the scope of the *NMWA* insofar as it applies to on-demand workers has not been tested by our courts and remains unchallenged. It is thus not clear how the definition would apply to on-demand workers working for more than one platform simultaneously and how their working hours will be calculated.[1755] However, keeping the earlier discussion in mind, on-demand workers would at least have a constitutional mechanism to rely on.[1756]

A legal solution could be the *NMWA*'s definition of a "worker" as a basis for extending minimum wage rights to on-demand workers. Cognisance needs to be taken of the fact that the definition, for purposes of extending minimum payment rights to on-demand workers, has yet to be tested in our courts. In the meantime, the time has come for lawmakers to engage all stakeholders to reconsider traditional work categories with a view to including new forms of work, such as on-demand work, which currently do not fit the traditional work model.[1757] Reflecting on the existing research having been done internationally, as well as in South Africa, Smit and Stopforth opine that the easiest interim regulation seems to be to expand on the definition of a "worker"

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holds that this may also be the case in the South African economy where identifying the true employer in multinational companies is becoming more complex. See also Grogan 2020:21.

1754 *National Minimum Wage Act* 9/2018: sec 1.

1755 For example, if an on-demand worker's pay is calculated according to the time spent performing a task or includes the actual time waiting for a task to be assigned.

1756 See para.6.3 on the constitutional mechanisms that could extend to on-demand workers.

1757 See para. 6.9 for a discussion on the multi-stakeholder approach to strengthen on-demand workers' collective voice.

as defined by the *NMWA*.[1758] In the interim, the time is ripe for gig businesses to consider ways in which they themselves can mitigate the identified structural vulnerabilities. This could include changes to their terms of service to extend certain minimum rights and protections to on-demand workers.

6.5.2.5 The presumption of employment

In compliance with the ILO's Employment Relationship Recommendation *(ERR)*, as discussed in Chapter 3 of this thesis, the South African legislature has created a presumption of employment.[1759] Section 200A of the *LRA* and section 83A of the *BCEA* were introduced as a rebuttable presumption to assist in the difficult task of identifying true employees. These sections provide that:[1760]

> Until the contrary is proved, a person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present:
> (a) the manner in which the person works is subject to the control or direction of another person;
> (b) the person's hours of work are subject to the control or direction of another person;
> (c) in the case of a person who works for an organisation, the person forms part of that organisation;
> (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;
> (e) the person is economically dependent on the other person for whom he or she works or renders services;
> (f) the person is provided with tools of trade or work equipment by the other person; or
> (g) the person only works for or renders services to one person.

The presumption excludes persons earning more than the threshold of R224 080.30 per year as of March 2022.[1761] The presumption will only apply if the true

1758 Smit & Stopforth 2023:Forthcoming; This argument is also made in the Fairwork *Code of Good Practice on the Regulation of Platform Work*. For more information see Fairwork 2020:6.
1759 See para. 3.5.1 in Chapter 3 for a discussion on the ERR.
1760 *LRA*: sec. 200A
1761 *LRA*: Sec 200A(3). Department of Employment and Labour. 2022. "Employment and Labour Minister TW Nxesi announces minimum wage increases",

nature of the contract between the parties is determined.[1762] In addition to the presumption as to who is an employee, and in an effort to extend further protection to individuals in precarious employment, the *Code of Good Practice: Who is an employee?*[1763] (the Code) was adopted in 2006. It has been noted in *Kylie v CCMA*[1764] that courts are required to consider the realities of the relationship between the parties, since the contract of employment may not always reflect the true employment relationship that exists between the parties. Calitz is of the opinion that both section 200A and the Code give effect to the objectives of the *ERR* by adopting special legislation aimed at protecting vulnerable employees.[1765]

6.5.2.6 Other non-standard forms of employment

The kaleidoscope of novel employment relationships continues to blur the once clear lines between traditional forms of work and non-standard forms of work.[1766] On top of this, I am of the opinion that the perplexities of platform work make it difficult to determine if it should be classified as one of the recognised forms of on-demand work in South Africa. However, to determine if on-demand work could be seen as a non-standard form of employment, an examination of the different non-standard forms of work is warranted. From this perspective, the following section provides an overview of the recognition given to the non-standard forms of employment in South Africa.

The *Labour Relations Amendment Act*[1767] (*LRAA)* regulates and provides protection for non-standard employment relationships earning below the threshold determined by the Minister of Labour. The amendments seek to extend specific

https://www.labour.gov.za/employment-and-labour-minister-tw-nxesi-announces-minimum-wage-increases. Accessed on 8 January 2023.

1762 *Universal Church of the Kingdom of God v Myeni and Others* 2015 36 ILJ 2832 LAC: 40.
1763 GN 1774 *Government Gazette* 2006:1774(29445).
1764 *Kylie v Commission for Conciliation Mediation and Arbitration and Others* 2010 7 BLLR 705 LAC:38.
1765 Calitz 2017:289.
1766 Maloka & Okpaluba 2021:710.
1767 *Labour Relations Amendment Act* 8/2018.

protection to informal and vulnerable groups of employees to ensure decent work conditions.[1768] Temporary employment service employees, fixed-term employees and part-time employees enjoy improved protection under the *LRA*.[1769]

Temporary employees are defined as "those who have been taken into employment for finite periods of relatively brief duration",[1770] whereas casual employees refer to "those employed on a daily basis – 'off the street' as it were."[1771] It has commonly been assumed that on-demand platform workers share many similarities with temporary workers and casual workers. It is therefore important to outline the current labour protection afforded to these categories of non-standard employment. It should be stressed that temporary work and casual work, as informal forms of employment, are not afforded extended protection and remains peculiar at best. There are, nonetheless, cases that afford some limited protection to temporary workers and casual workers. In *NUCCAWU v Transnet Ltd t/a Portnet*[1772] the LC had to decide whether employee status could be given to a group of casual employees who worked on a day-to-day basis for a maximum of three days per week. They did not receive any of the benefits accrued to permanent employees. The LC stated that:[1773]

> The fact that applicant's members were not entitled to employment beyond the day employed does not mean that there is no employment relationship between the parties. This relationship exists by virtue of the agreement concluded between the parties.

The LC consequently found that the group of casual workers constituted a special ad hoc class of "permanent casuals" and should be afforded labour protection. In addition, Grogan argues that: [1774]

1768 Van Niekerk *et al.* 2019:70.
1769 *LRA*:secs 198, 198A, 198B, 198C and 198D.
1770 Grogan 2019:48.
1771 Grogan 2019:49.
1772 *NUCCAWU v Transnet Limited t/a Portnet* 2000 ZALC 69.
1773 *NUCCAWU v Transnet Limited t/a Portnet* 2000 ZALC 69:10.
1774 Grogan 2019:49.

> … for purposes of labour law, all employees are entitled to protection, provided that there is a contract of employment. The concepts "temporary" and "casual" employment merely draw the attention to the fact that the contract may provide for the automatic termination of the employment relationship.

Permanent part-time employees are already entitled to protection against unfair labour practices and unlawful or unfair termination of employment contracts.[1775] Refusal to appoint a part-time employee to permanent staff is also declared an unfair labour practice.[1776]

At this point of the discussion, it must be kept in mind that the various legislative interventions, including the definitions that classify labour in the employment sphere, serve as a portal to both minimum conditions of employment and an established framework to engage in collective bargaining.[1777] Ironically, however, with regard to on-demand workers in the South African context, most aspects contributing to their vulnerability can be linked to the very laws designed to regulate work relationships, creating a common structural disadvantage that renders all platform workers exploitable.[1778] This is reminiscent of casual workers waiting in line or on the street for a job to be done.

While the South African courts may seem the obvious choice to resolve the current dilemma by simply having on-demand workers reclassified as employees, a bottom-up reworking of the labour law regime may, in the long run, be a more effective solution to remedy the unique vulnerabilities faced by on-demand workers. To this end, the next parts of the chapter discuss different binding and non-binding measures that advocate for decent work for on-demand workers in South Africa.[1779]

1775 Grogan 2019:49.
1776 Grogan 2019:49.
1777 Van Niekerk *et al*. 2019:5.
1778 Mantouvalou 2018:181.
1779 This follows the same structure as in the Ireland and Australia chapters to facilitate easier reading.

6.6 A SURVEY OF THE SOUTH AFRICAN UBER DECISIONS

In Chapter 2 of this thesis, I analysed the interactive gig business model by using Uber as a case study. My conclusion was that the Uber business model was one of the most notorious on-demand platform businesses and had changed the way in which we commute and how people earn a living.[1780] In addition, Uber sidesteps many of its labour law obligations by registering the platform company as a technological company instead of a ridesharing or delivery company. In doing so, the business objective is to connect and facilitate independent Uber drivers with their clients.[1781] The preceding discussion examined the applicable legal framework pertaining to the classification of labour in South Africa. This discussion was required to illustrate and grasp the legal complexities of affording a person 'worker' or 'employee' status.

The following section will examine the Uber I and Uber II decisions. The next section highlights selected comments from the Uber decisions and will not repeat a comprehensive overview of the Uber model and how the application operates.[1782]

As alluded to above, South Africa has two cases relating to the classification of on-demand drivers specifically, namely *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others*[1783] (hereafter referred to as the *Uber I* case), and *Uber SA Technology Services (Pty) Ltd v National Union of Public Service & Allied Workers*[1784] (hereafter referred to as the *Uber II* case) will be discussed.

In 2017 the CCMA had an opportunity to test if Uber drivers were indeed employees or independent contractors. In this case, several Uber drivers approached the CCMA

1780 See para. 2.3.4.
1781 See para. 2.3.4.
1782 See para. 2.3.4 for a detailed discussion on how the Uber application operates.
1783 *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others* [2017] ZACCMA 1.
1784 *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* (2018) 39 ILJ 903 (LC).

to institute an unfair dismissal dispute against Uber. From the facts before the CCMA, both Uber SA and Uber BV were possible employers of the Uber drivers.[1785] With this in mind, Uber SA denied any contractual liability and argued that the true contractual relationship existed between Uber BV and not Uber SA.[1786] Uber SA thus objected to the CCMA's jurisdiction to hear the matter based on the argument that the Uber drivers were not employees of Uber SA but instead independent contractors performing tasks via the Uber application.[1787]

The CCMA dismissed the jurisdictional challenge and concluded that the Uber drivers were indeed employees of Uber SA as prescribed in terms of the LRA.[1788] In reaching this decision, CCMA Commissioner Everett remarked the following when interpreting the *indicia* listed in the *Code of Good Practice*:

- The drivers rendered a personal service to Uber SA;[1789]
- The relationship was indefinite;[1790]
- Uber SA exercised a great degree of control over the Uber driver;[1791]
- The Uber drivers were economically dependent on Uber SA;[1792] and
- The Uber drivers form an essential part of Uber's service.[1793]

1785 *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others* [2017] ZACCMA 1:8.
1786 *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others* [2017] ZACCMA 1:20
1787 *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others* [2017] ZACCMA 1:9.
1788 *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others* [2017] ZACCMA 1:62.
1789 *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others* [2017] ZACCMA 1:43. Uber drivers were required to personally complete the on-boarding process, and they were prohibited from out-sourcing their duties.
1790 *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others* [2017] ZACCMA 143. This was, however, subject to the driver complying with all the agreed requirements.
1791 *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others* [2017] ZACCMA 145. This includes control over how they work and how they are rated through the Application. The control is also extended to the tasks Uber drivers receive and how their fair is calculated.
1792 *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others* [2017] ZACCMA 148.
1793 *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others* [2017] ZACCMA 149.

Based on a broad interpretation of section 213 of the *LRA* and the above-listed criteria, the Commissioner concluded that the Uber drivers' 'real' relationship was with Uber SA.[1794] At this point, it is important to keep in mind that the new 'reality of the relationship' test requires that, despite the contractual terms the parties agreed to, a person must consider the 'real relationship' between the parties by considering several factors of the dominant impression test.[1795] Following suit with several other jurisdictions, Uber referred the ruling to the LC for review.

Upon review, Van Niekerk J, in *Uber II*, emphasised that:[1796]

> The nature of the engagement of drivers who use the Uber App (and indeed the many others who provide services in what has been described as the 'gig economy'), poses a challenge to traditional conceptions of employment world wide, and has tested the boundaries of the protection extended to working people by domestic labour legislation.

Van Niekerk J confirmed that the LC was tasked to objectively determine if the CCMA had jurisdiction to entertain the unfair dismissal dispute referred by the Uber drivers.[1797] Van Eck and Nemusimbori explain that the CCMA faulted on three main grounds.[1798] First, the court relied on the LAC findings in *Universal Church of the Kingdom of God v Commission for Conciliation, Mediation & Arbitration & others* (hereafter the *Universal Church* case).[1799] It is apparent from the judgement of the *Universal Church* case, that the existence of a contractual relationship between an employee and putative employer is seen as a precondition to the existence of an employment relationship.[1800] For this reason, the CCMA should have upheld Uber

1794 Mokoena 2018:459.
1795 *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others* [2017] ZACCMA 1:41. See Van Eck and Nemusimbori 2018:476.
1796 *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* 2018 39 ILJ 903 LC:2.
1797 *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* 2018 39 ILJ 903 LC:65.
1798 Van Eck & Nemusimbori 2018:476.
1799 *Universal Church of the Kingdom of God v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 ILJ 1678 (LC).
1800 Van Eck & Nemusimbori 2018:476.

SA's jurisdictional challenge.[1801] Secondly, the LC found that the CCMA incorrectly conflated Uber BV and Uber SA when applying the reality test.[1802] Lastly, the LC held that, if the commissioner applied the Uber drivers' evidence of the existence of an employment relationship on Uber SA, the commissioner should have found that they had failed to prove the existence of an employment relationship.[1803]

The LC in the above matter thus overturned the CCMA's ruling affording Uber drivers employee status on the basis that there was no contractual relationship between the employee and the putative employer, nor was there an employment relationship on Uber SA.[1804] Unfortunately, the LC left the question open as to whether or not the Uber drivers were deemed to be employees or independent contractors of Uber BV, since it was not the legal question to be decided on.[1805] The LC also considered the commissioner's interpretation and application of the 'reality test' and concluded that the commissioner erred in adopting a generous interpretation of the prevailing provisions.[1806] Of importance here are the court's remarks on the applicability of certain legal principles and binding authority.[1807] Van Niekerk J asserted that the commissioner relied too much on the *Code of Good Practice, Who is an Employee?* and did not give enough thought to binding authority, and that the commissioner should have interpreted sec. 213 of the LRA to this effect.[1808] To this end, the court reaffirmed that 'the test to determine the existence of an employment relationship remains a multifactorial one'.[1809] This decision is not without criticism. Van Eck and Nemusimbori maintain that the LC has erred in applying the *Universal Church* case's

1801 *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* 2018 39 ILJ 903 LC:73.
1802 *Uber South Africa*:97; Van Eck and Nemusimbori 2018:477.
1803 Van Eck & Nemusimbori 2018:477.
1804 *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* 2018 39 ILJ 903 LC:93. See also Govindjee 2020:50.
1805 *Uber South Africa*:98.
1806 *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* 2018 39 ILJ 903 LC:79; Govindjee 2020:50-51.
1807 *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* 2018 39 ILJ 903 LC:77-78.
1808 *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* 2018 39 ILJ 903 LC:77-78.
1809 *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* 2018 39 ILJ 903 LC:79. The LC confirmed that the realities of the relationship between the parties cannot be reduced to a single substantive test.

'narrow contractual approach'.[1810] Instead, the authors suggest a 'broader constitutional approach' which takes cognisance of legal developments and authoritative cases that aim to extend the ambit of employment protection rather than limit it.[1811]

In addition, the legal consequences of the Uber II judgement transcend labour law into the field of consumer law as well. For example, if platform companies insist that the relationship between platform workers and themselves is a genuine business transaction, the platform workers could insist that they are consumers in terms of the *Consumer Protection Act* (hereafter the CPA).[1812] In *Mokhutswane v Uber South Africa (Pty) Ltd*[1813] the National Consumer Tribunal (NCT) applied the Uber II judgement to conclude that 'Uber South Africa Technology Services (Pty) Ltd was … a distinct and separate legal entity from Uber B.V.'[1814] Given this fact, the NCT held that they were 'unable to find that the Respondent that had been cited in this matter indeed existed and that the application was correctly served.'[1815] Interestingly, the NCT observed that various substantial challenges existed in defining the legal relationship between the on-demand worker and the platform company to argue a case under the CPA. The tribunal subsequently supported the view that the relationship between the applicant and the respondent was purely contractual and did not fall within the ambit of the CPA.[1816]

From the discussion of the Uber I and Uber II judgements, it is evident that there is a discrepancy with regard to the application of the judicial tests to be used to determine the existence of an employment relationship. Keeping in mind the LC's stance on the use of the dominant impression test, I am inclined to agree that the creation of a new

1810 Van Eck & Nemusimbori 2018:482.
1811 Van Eck & Nemusimbori 2018:482. A 'broader constitutional approach' would, for instance, give due regard to the principles laid down in *SANDU*, *SITA*, *Kylie*, and the *Discovery* cases. In all the aforesaid cases, the courts favoured an extension of labour protections to categories of workers who were not regarded as employees at the time they were decided.
1812 *Consumer Protection Act* 68/2008.
1813 *Mokhutswane v Uber South Africa (Pty) Ltd* (NCT/127401/2019/75(1)(b)) [2019] ZANCT 64.
1814 *Mokhutswane v Uber South Africa (Pty) Ltd* (NCT/127401/2019/75(1)(b)) [2019] ZANCT 64:18.
1815 *Mokhutswane v Uber South Africa (Pty) Ltd* (NCT/127401/2019/75(1)(b)) [2019] ZANCT 64:19.
1816 *Mokhutswane v Uber South Africa (Pty) Ltd* (NCT/127401/2019/75(1)(b)) [2019] ZANCT 64:20.

'reality test' is not entirely necessary. The *Code of Good Practice* already confirms that the dominant impression test is the prevailing test by prescribing that 'Courts, tribunals and officials must determine whether a person is an employee or independent contractor based on the dominant impression gained from considering all relevant factors that emerge from an examination of the realities of the parties' relationship.'[1817] Considering that the matter remains unresolved, on-demand Uber drivers remain outside the scope of 'employee'.

Be that as it may, one cannot deny the fact that the contract itself is drafted in such a manner that favours Uber BV. This, in turn, complicates the work relationship between the contractual parties even more. Moreover, seeing that the judicial interpretation of the dominant impression test remains uncertain, the position of on-demand workers remains in flux.[1818] With this in mind, Govindjee argues that a 'broad constitutional approach' could have legal implications for the transport industry and the broader gig economy workers.[1819] This said, I believe that South Africa needs a judicial interpretation of the principles that underlie these modern workplace disputes. In the absence of such, thousands of on-demand workers will be left vulnerable while waiting for policymakers to afford them decent work.[1820]

6.7 BINDING LEGISLATIVE RESPONSES ADVOCATING FOR DECENT ON-DEMAND WORK IN SOUTH AFRICA

6.7.1 The National Minimum Wage Act

1817 *Code of Good Practice*: Item 52.

1818 In 2021 two law firms announced that they would file a class action on behalf of Uber drivers against Uber. If successful, the position of on-demand workers, in general, could see major reform in South Africa. See Khumalo. 2021. "'We are not making any profit' – Uber, Bolt drivers on strike", https://www.news24.com/fin24/companies/we-are-not-making-any-profit-uber-bolt-drivers-on-strike-20220322. Accessed on 10 January 2023.

1819 Govindjee 2020:51.

1820 It must be noted that a UK law firm, Leigh Day, in collaboration with SA law firm Mbuyisa Moleele Attorneys, announced plans to introduce a class action on behalf of the on-demand workers against Uber. They mainly argue that on-demand workers should be provided with paid leave, overtime pay and unemployment insurance benefits. At the time of writing this thesis, it was not known when the class action would be launched. Nevertheless, the outcome of the potential class action will have significant legal consequences for both on-demand workers and platform businesses. For more information see Magubane 2022. "Class action lawsuit: 'Exploited' SA Uber drivers must be recognised as employees – lawyers", https://www.news24.com/fin24/companies/ict/class-action-lawsuit-exploited-sa-uber-drivers-must-be-recognised-as-employees-lawyers-20210223. Accessed on 18 January 2023.

The term ‘worker’ has a broader meaning in the world of work as compared to an ‘employee’. This section aims to consider to what degree the *NMWA’s* definition of a ‘worker’ could be extended to on-demand workers in South Africa. If successful, it would mean that on-demand workers are eligible for the limited protections afforded by the *NMWA* insofar as minimum wage is concerned.

As already mentioned earlier in this chapter, it is trite that the *NMWA* defines the term ‘worker’ as ‘any person who works for another and who receives, or is entitled to receive, any payment for that work whether in money or in kind.’[1821] The definition does not expressly exclude independent contractors as the case with the majority of the other labour statutes.[1822] It is important to note at this point that the *NMWA* could theoretically extend limited protections and measures to on-demand workers.[1823] However, the measures and protections apply to wages only,[1824] which could limit the application of the *NMWA* to on-demand workers who earn below the national minimum wage.[1825]

Keeping in mind the changing world of work and the labour framework’s ability to adapt to the changing times, I argue that it is now time to shift the focus to the concept ‘worker’ rather than the traditional focus of an employee, which fits the traditional box of employment. If this is true, I agree with the opinion of Fourie that the next step to broadening the scope of a ‘worker’ should be to broaden the application to workers who move between employment and unemployment and between the formal and informal economy.[1826]

1821 *NMWA* 9/2018:Sec.1.

1822 In this regard, see the definition of an employee as prescribed by the *BCEA*, *LRA*, *EEA* and *SDA*. See para 6.5.2.2.

1823 Mokofe & Van Eck 2021:1369-1370.

1824 *NMWA* 9/2018:Sec.2. ‘Wage’ is defined as ‘the amount of money paid or payable to a worker in respect of ordinary hours of work or, if they are shorter, the hours a worker ordinarily works in a day or a week’.

1825 See para. 2.3.5.3.2.1 for a discussion on on-demand workers’ vulnerabilities regarding pay. On-demand work offers increased flexibility, with on-demand workers working on several platforms simultaneously. This ‘benefit’ could pose a problem in determining the total earnings obtained from a specific platform business. In addition, the hours spent waiting for tasks are currently not seen as paid time performing work. It was previously noted that ongoing payment glitches are an ordinary occurrence on labour platforms. In addition, on-demand workers are sometimes paid in vouchers, which raises an ethical issue which is not typically found in the traditional employer-employee relationship.

1826 Fourie 2020:422.

Whether South African legislators will extend decent pay to on-demand workers remains to be seen and tested in our courts. Be it as it may, it remains a complex exercise without a clear way forward to calculate the true earnings of on-demand workers working on multiple platforms.

6.7.2 Sectoral determinations in terms of the Basic Conditions of Employment Act

Chapter 8 of the *BCEA* prescribes the statutory provisions relating to the promulgation of sectoral determinations that apply to specific sectors and areas.[1827] Du Toit *et al.* note that sectoral determinations specifically apply to sectors that are unregulated and unorganised.[1828] Van Niekerk *et al.* view sectoral determinations as a legal route equivalent to collective bargaining.[1829] If promulgated, a sectoral determination could regulate specific rights and protections that pertain directly to this study's minimum decent work standards. This consists of regulations relevant to decent working conditions with reference to minimum rates of pay and working hours.[1830] A sectoral determination could also define the parties of the work relationship and establish a platform for multi-party negotiations.[1831]

The *BCEA* empowers the Minister of Employment and Labour with the discretion to deem any category of persons to be employees.[1832] This could mean that the Minister could deem on-demand workers to be employees for purposes of selected sections of

1827 Van Niekerk *et al.* 2019:97.
1828 Du Toit *et al.* 2015:114. The authors note that sectoral determination can only be made if a proper investigation into the area or sector concerned has been conducted. Once the report is submitted, the National Minimum Wage Commission advises the Minister of Employment and Labour.
1829 Van Niekerk *et al.* 2019:97.
1830 *BCEA*:Sec 55(4).
1831 Sec. 1(d)(ii) prescribes that the LRA aims to promote and facilitate collective bargaining on a sectoral level. In addition, Van Niekerk *et al.* remark that sec. 21(8) of the *LRA* establishes that a sectoral determination may prescribe a threshold of representativeness for a registered trade union to acquire organizational rights. Du Toit *et al*. note that the organisational rights concerned relate to access to the workplace (sec. 12) and the deduction of membership fees (sec. 13). Also see Du Toit *et al.* 2015:637-638.
1832 *BCEA*:83(1).

labour statutes.[1833] Equally important, the *BCEA* could broaden on-demand workers' dispute resolution options. Sec. 73A provides that:[1834]

> … any *employee or worker* as defined in section 1 of the National Minimum Wage Act, 2018, may refer a dispute to the CCMA concerning the failure to pay any amount owing to that employee or worker in terms of this Act, the National Minimum Wage Act, 2018, a contract of employment, a sectoral determination or a collective agreement.

As per the discussion above, the section applies to 'workers' as defined by the *NMWA* or a sectoral determination. This, in turn, presupposes that on-demand workers could have access to the CCMA for wage disputes. It must, however, be noted that the section only applies to those who earn below the threshold[1835] determined by the Minister of Employment and Labour.[1836] This could be a problematic task, seeing that on-demand workers receive an income from multiple platforms. If such a dispute occurs, the on-demand worker and the platform company must have records of their true earnings over a 12-month cycle.

6.8 NON-BINDING MEASURES ADVOCATING FOR DECENT ON-DEMAND WORK IN SOUTH AFRICA

The prevalence of digital labour platforms in South Africa has gained traction in the past couple of years. Progress has yet to be made from a regulatory perspective to advocate for decent on-demand work in South Africa. Piecemeal recognition is made of forms of platform work and the broader platform sector in the *Employment Services Amendment Bill* (hereafter the *ESAB*),[1837] and the *National Land Transport Amendment Bill* (hereafter the *NLTAB*),[1838] respectively. The following section provides an overview of two ongoing draft bills that will likely impact the on-demand sector in South Africa. The applicable sections of the *ESAB* will be discussed first, after which a discussion on the *NLTAB* will follow.

1833 This could include the application of parts of the *BCEA* and the *LRA*.
1834 *BCEA*:73A.
1835 The current minimum threshold is R224 080.30 per year.
1836 *BCEA*:73A(2).
1837 GN 1801 Government Gazette 2022:46962; Mabanga, Coster & Bux. 2022. "The Employment Services Amendment Bill gives a glimpse into the future of digital labour platforms", https://www.polity.org.za/article/the-employment-services-amendment-bill-gives-a-glimpse-into-the-future-of-digital-labour-platforms-2022-11-09. Accessed on 4 January 2022.
1838 GG 1303 Government Gazette 2018:641(42060).

6.8.1 The Employment Services Amendment Bill

The *ESAB* aims to, *inter alia*, provide a legal framework that regulates the employment and protection of foreigners, which includes foreigners working via digital labour platforms.[1839] Section 1 introduces several definitions that could apply to the broader platform economy, and suggests valuable insights into the future of digital labour platforms in South Africa.[1840] Firstly, it defines 'digital labour platforms' as 'an electronic entity that enables the provision of work or services by a person to any other person in the Republic'.[1841] Secondly, the bill includes definitions of 'employer' and 'employment'. It must be noted that both the aforesaid definitions are broad and do not limit their scope to digital labour platforms only.[1842] In the wake of 4IR and the possibility of the gaps that digital labour platforms may fill in our fast-evolving world of work, work on platforms may become increasingly attractive.[1843]

Lastly, *ESAB* introduces section 50A, which intends to amend section 3A of the *Employment Services Act* (hereafter the *ESA*), and classifies a digital labour platform as an employer. In conformity with the definition of a worker, section 50A also states that a person is a worker of the digital labour platform if the payment for or the condition of service is determined by the digital labour platform.[1844] In addition, the section prescribes that the digital labour platform must remunerate the worker.[1845]

1839 GN 1801/2022:Sec.50A.
1840 Mabanga, Coster & Bux. 2022. "The Employment Services Amendment Bill gives a glimpse into the future of digital labour platforms", https://www.polity.org.za/article/the-employment-services-amendment-bill-gives-a-glimpse-into-the-future-of-digital-labour-platforms-2022-11-09. Accessed on 4 January 2022.
1841 GN 1801/2022:Sec.1.
1842 The *ESAB* defines 'employer' as any person who remunerates, or is liable to remunerate, an employee or worker. Following a similar approach, the proposed definition of 'employment' means employment as an employee or worker.
1843 Webber Wentzel "The Employment Services Amendment Bill gives a glimpse into the future of digital labour platforms", https://www.polity.org.za/article/the-employment-services-amendment-bill-gives-a-glimpse-into-the-future-of-digital-labour-platforms-2022-11-09#:~:text=The%20Employment%20Services%20Amendment%20Bill%20(the%20Bill)%20defines%20a%20DLP,part%20of%20the%20gig%20economy. Accessed on 2 February 2023.
1844 GN 1801/2022:Sec.50A.
1845 GN 1801/2022:Sec.50A.

It is worth repeating that the main purpose of the *ESAB* is not to propose a framework for the classification of on-demand workers specifically. Instead, it aims to expand the application of the *ESA* to cover employees and workers and to regulate the employment of foreign nationals in South Africa.[1846] In addition, the inclusion of 'worker' in both definitions correlates with the *NMWA's* definition of a worker, which means 'any person who works for another and who receives, or is entitled to receive, any payment for that work, whether in money or in kind.'[1847]

6.8.2 Possible regulatory reform in the South African transport industry

The ongoing conflict between on-demand workers and the transport industry has recently caught the attention of South African regulators.[1848] Several foreign jurisdictions[1849] and South Africa are considering different ways in which to regulate the 'e-haling' service under the existing road transportation framework. In this section of the chapter, I will highlight two specific proposals – firstly the ongoing discussions in the taxi industry, and secondly the proposal made in terms of the *NLTAB*.[1850]

The Department of Transport (hereafter DoT) has considered the impact that e-hailing services have on the industry in two of its discussion papers. The first discussion paper considers the taxi industry and its role in the broader transport industry.[1851] Although most of the discussion paper considers empowering taxi drivers, the last part sets out

1846 GN 1801/2022.

1847 See para. 6.7.1 for a discussion on the relevance of the *NMWA* on on-demand workers in South Africa.

1848 Mabanga, Coster & Bux. 2022. "The Employment Services Amendment Bill gives a glimpse into the future of digital labour platforms", https://www.polity.org.za/article/the-employment-services-amendment-bill-gives-a-glimpse-into-the-future-of-digital-labour-platforms-2022-11-09. Accessed on 4 January 2022; See also Phakathi 2020. "E-hailing taxi services face a bumpy road ahead", https://www.businesslive.co.za/bd/national/2020-03-10-e-hailing-taxi-services-face-a-bumpy-road-ahead/. Accessed on 15 January 2023. The former Minister of Transport, Fikile Mbalula, affirmed that most of the tension between the taxi industry and ridesharing drivers stems from the lack of regulation of the e-hailing industry.

1849 See, for example, the discussion on the recommendation of the application of transport awards in Chapter 5 of this thesis. Cognisance should also be taken of the extension of the Australian ICA that could extend to transport drivers as well.

1850 *National Land Transportation Amendment Bill* B7-2016.

1851 Department of Transport. Taxi Industry Empowerment Model: Re-imagining tomorrow's taxi-industry 2020. The discussion document is available at https://www.transport.gov.za/documents/11623/189609/empowerment_discussionSep2020.pdf/94469ce5-573c-4273-b226-5a87e8c7c8a9. Date accessed 25 February 2023.

a proposal for regulating emerging sectors such as e-hailing.[1852] In short, the document sets out regulatory proposals to which e-hailing services will have to adhere. This includes the following:

- E-hailing providers may only operate in the country if done so through a South African registered company;
- All its financial transactions must be through a South African registered bank; and
- At least 25 per cent equity must be held by the corporate entity chosen as the empowerment vehicle of choice.

The second discussion elaborates further by establishing that the taxi industry is continuously being challenged by ridesharing companies such as Uber and Bolt. The DoT acknowledges that the ridesharing companies are taking advantage of 'innovative technologies, marketing and a peculiar interpretation of current legislation' to offer services that in all respect are 'superior to the traditional one'.[1853] With this in mind, the DoT recommended that e-hailing platforms register for a mobility service,[1854] and that car operators register to receive a permit to offer their services and contribute to a government transportation fund.[1855] This, however, would be to the advantage of the government and not necessarily to the direct advantage of the on-demand worker. It is, nevertheless, seen as progress in regulating the on-demand sector.

South Africa is in the process of proposing regulatory intervention in the e-hailing industry by means of the *NLTAB*.[1856] The *NLTAB* is aimed at bringing e-haling services

1852 In this context e-hailing is used synonymously with ridesharing.

1853 Department of Transport. Taxi Industry Regulation: Re-imagining tomorrow's taxi-industry 2020. The discussion document is available at https://www.transport.gov.za/documents/11623/189609/regulation_discussion_Sep2020.pdf/786c1d7f-65e3-4932-8563-0415d27b8b99. Date accessed 25 February 2023. See page 6.

1854 In 2020, the recommended mobility service was R3 594.45.

1855 Department of Transport. Taxi Industry Regulation: Re-imagining tomorrow's taxi-industry 2020. The discussion document is available at https://www.transport.gov.za/documents/11623/189609/regulation_discussion_Sep2020.pdf/786c1d7f-65e3-4932-8563-0415d27b8b99. Date accessed 25 February 2023. See page 6-7. The DoT has noted that there are several factors to consider before taking decisive steps towards regulating an e-haling sector in South Africa. This includes balancing the interest of the public, the need for a coordination of all forms of public transport and the choices available to transport users, and lastly, the need to achieve 'an economically sound balance between the different transportation modes.

1856 *National Land Transportation Amendment Bill* B7-2016. The *NLTAB* was passed by the Nasional Assembly in 2022 and transmitted to the National Council of Provinces for concurrence.

into the same regulatory arena as metered taxis, and effectively creates a sub-category of metered taxis for purposes of operating licences.[1857] Of note for this part of the discussion is the legal definition of e-haling services and the proposed provision relating to electronic billing services. The *NLTAB* defines 'electronic hailing service'[1858] as a 'public transport service operated by means of a motor vehicle, which is available for hire while roaming, may stand for hire at rank, and is equipped with an electronic e-hailing technology enabled application'.[1859]

With reference to the part referring to 'technology-enabled application' in the definition of electronic hailing services, section 66A of the *NLTAB* proposes some limitations in respect of granting operating licences and prescribing designated operational areas.[1860] In addition, section 3 empowers the Minister of Transport to create regulations for electronic hailing applications.[1861] The remainder of the section relates to the special markings that must be visible on vehicles.[1862] Most notably, operators who are allowed to use an e-hailing platform without a licence will be liable for a fine not exceeding R100 000.[1863]

Although the inclusion of e-hailing services proposed by the *NLTAB* is appreciated, it does nothing more than clarify roles and powers. Unfortunately, it falls short of advocating for decent work for on-demand drivers. In addition, although the amendments apply to 'electronic hailing' or 'e-hailing', it is silent on other forms of on-demand work outside of ridesharing. This has the potential of creating a parallel sector in the on-demand sector that could see differentiated regulations applying to each on-demand sub-sector.

1857 Department of Transport. Taxi Industry Regulation: Re-imagining tomorrow's taxi-industry 2020. The discussion document is available at https://www.transport.gov.za/documents/11623/189609/regulation_discussion_Sep2020.pdf/786c1d7f-65e3-4932-8563-0415d27b8b99. Date accessed 25 February 2023. See page 7.
1858 Or e-hailing service.
1859 *National Land Transportation Amendment Bill* B7-2016:Sec. 1(c).
1860 *National Land Transportation Amendment Bill* B7-2016:Sec. 66A(1)(a)-(b).
1861 This includes regulations relating to the accuracy of the readings of the technology-enabled application, information in respect of the driver and the vehicle that must be communicated to the passenger, and other matters affecting the standard and quality of the operation of the electronic hailing service.
1862 *National Land Transportation Amendment Bill* B7-2016:Sec. 66A(3)(b).
1863 *National Land Transportation Amendment Bill* B7-2016:Sec. 90(2)(a).

On-demand work is not limited to ridesharing gigs only. Consider, for example, the different types of on-demand work discussed in Chapter 2 of this thesis. With this in mind, I argue that, for the purposes of this thesis, a preferred solution would be to place decent work at the centre of any regulatory responses. It seems that many of the legislative proposals are centred around the employment of foreign nationals and the issuing of operating licences. Although these aspects will become increasingly important sooner or later, more is needed to advocate for decent work of on-demand workers in South Africa.

6.8.3 Fairwork Code of Good Practice

This study would only be complete with an appraisal of the research conducted by the Fairwork Group. Earlier in Chapter 3 of this thesis, I discussed the Fairwork Group's approach to establishing fair work principles for the gig economy. The Fairwork Group, through their collaboration with the University of the Western Cape, the University of Cape Town, Oxford University, and the University of Manchester, has established a comprehensive Code of Practice for applying the law to the gig economy in South Africa. In this part of the discussion, attention is shifted to the *Code of Good Practice for the Regulation of Platform Work in South Africa* (hereafter the *Platform Code*).[1864] The Platform Code aims to determine how South Africa could interpret its labour laws to provide better protection to platform workers,[1865] keeping in mind the constitutional principles that apply.[1866] As a point of departure, the question may arise to what degree the *Platform Code* could assist in advancing the main theme of this thesis, namely, how South African labour laws can sufficiently advocate for decent work for on-

1864 The full *Platform Code* is available at Fairwork 2020. "Code of Good Practice for the Regulation of Platform Work in South Africa", https://fair.work/en/fw/publications/code-of-good-practice-for-the-regulation-of-platform-work-in-south-africa/#:~:text=The%20Code%20draws%20on%20legal,in%20order%20to%20address%20the. Accessed on 17 January 2023.

1865 Platform workers and on-demand workers are used interchangeably in this section of the chapter.

1866 Fairwork 2020. "Code of Good Practice for the Regulation of Platform Work in South Africa", https://fair.work/en/fw/publications/code-of-good-practice-for-the-regulation-of-platform-work-in-south-africa/. Accessed on 16 January 2023. The *Platform Code* is specifically intended as a guideline to improve the protections afforded to on-demand workers who 'fall through the cracks' of regulation.

demand workers in the modern-day gig economy. Like Chapters 4 and 5, the succeeding discussion will focus on the main themes identified in Chapter 3.[1867]

The *Platform Code* follows the same principles discussed earlier in this thesis, namely fair pay, fair conditions, fair contracts, fair management, and fair representation.[1868] From the outset, the *Platform Code* endorses the notion that workers' rights, in terms of decent work, should apply regardless of employment status, including independent contractors.[1869] It must, however, be noted that under the heading 'Scope and Application', the *Platform Code* excludes 'genuine independent contractors'.[1870] This statement is followed by criteria that prescribe that the 'courts and tribunals should focus on the substance of the relationship in the same way as when distinguishing between employees and independent contractors'.[1871]

The *Platform Code* also correctly note that it serves as an immediate guideline for protecting platform workers' rights in the absence of a formal regulatory framework.[1872] For purposes of this discussion, fair pay, fair conditions, and fair representation will be discussed next.

The idea of fair pay recognises two main aspects that link it to the legal paradigm. It is cognisant of the prescribed minimum wages of the *NMWA*,[1873] and the issuing of sectoral determinations and ministerial determinations must be considered.[1874] In addition, the aforesaid function of the state is bound by Constitutional principles and

1867 This includes achieving decent working conditions with reference to pay and working hours, decent collective bargaining structures, and decent worker classification.
1868 *Code of Good Practice for the Regulation of Platform Work in South Africa* 2020:6.
1869 *Code of Good Practice for the Regulation of Platform Work in South Africa* 2020:6. The *Platform Code* makes particular reference to independent contractors by stating, 'whether employee or independent contractor'.
1870 *Code of Good Practice for the Regulation of Platform Work in South Africa* 2020:13.
1871 The suggested criteria relate to the designing and marketing conducted by the platform, which party determines any additional pricing and other conditions linked to the service, the wearing of branded uniforms (badges of employment), and lastly the degree of control exercised by the platform. See *Code of Good Practice for the Regulation of Platform Work in South Africa* 2020:13-14 for more detail in this regard.
1872 *Code of Good Practice for the Regulation of Platform Work in South Africa* 2020:12.
1873 See the discussion in para.6.7.1.
1874 *Code of Good Practice for the Regulation of Platform Work in South Africa* 2020:14.

international law.[1875] The following points pertaining to the fair pay criterion are noteworthy:

- When considering the fair pay criterion, the relevant Minister must consider whether platform workers are operational in a sector where a sectoral determination applies.[1876]
- The 'working hours' of platform workers should include time spent waiting for tasks.[1877]
- Domestic workers performing tasks through platforms should be remunerated for the time they leave their homes until they reach their homes after performing the task. This also includes time spent moving from one task to the next.[1878]
- Net minimal earnings for platform workers should be based on a living wage and not a national minimum wage.[1879]

It must be kept in mind that this thesis aims to identify minimum decent on-demand work indicators. From the above summary, it is evident that the *Platform Code* goes beyond what is deemed basic or minimum. The *Platform Code's* explanatory note does, nevertheless, acknowledge this fact and argues that a platform company represents a 'well-structured segment of work providers and, on this premise, offers a living wage as opposed to a minimum wage.[1880] This said, it is unclear how a sectoral determination would apply to the wide spectrum of the different types of on-demand work. I thus contend that although this may be seen to be a route to be followed, it may present practical problems due to the wide spectrum of the types of work performed by platform workers.

Working hours remains a contentious issue in the gig economy, and the matter of actual working hours of on-demand workers is no different.

1875 See the discussion in para. 6.3 for a detailed discussion of the *Constitution* and relevant international law.
1876 *Code of Good Practice for the Regulation of Platform Work in South Africa* 2020:15.
1877 *Code of Good Practice for the Regulation of Platform Work in South Africa* 2020:15.
1878 *Code of Good Practice for the Regulation of Platform Work in South Africa* 2020:15.
1879 *Code of Good Practice for the Regulation of Platform Work in South Africa* 2020:15.
1880 *Code of Good Practice for the Regulation of Platform Work in South Africa* 2020:40.

In the interest of the limitation of this thesis, the *Platform Code* states that the working hours of platform workers should be regulated in accordance with the *BCEA* provisions.[1881] Item 29 does make provision for 'limited exceptions' and a degree of 'flexibility'.[1882] However, the specific exceptions and the criteria for flexibility are not explained. This important building block of decent work remains unaddressed.

The last discussion point revolves around "fair representation", as referred to by the *Platform Code*. The *Platform Code* provides a detailed account of the constitutional rights associated with collective bargaining and the freedom of association. Seeing that many of these rights were already discussed above, this section will elaborate on specific additional legislative rights that could be extended to on-demand workers in South Africa. Firstly, the *Platform Code* recommends that the *Regulation of Gatherings Act*[1883] prescribe an official structure for on-demand workers to gather and participate in consultations to negotiate their rights.[1884] Secondly, it is recognised that platform work is not appropriate for traditional trade union organisation in terms of the *LRA*.[1885] New forms of engagement and organisation are thus required for platform workers to engage in collective bargaining structures. The following part further investigates the possibility of alternative decent multi-stakeholder engagement structures.

6.9 VOLUNTARY ACTION, AGREEMENTS, STANDARDS AND PRINCIPLES ADVOCATING FOR DECENT MULTI-STAKEHOLDER ENGAGEMENT STRUCTURES FOR ON-DEMAND WORKERS

A good example of how platforms could encourage multi-stakeholder engagement is by using interactive mobile applications. For example, Webster notes that collective action by roughly 1 000 food delivery on-demand workers in Johannesburg was possible using WhatsApp's discussion group function.[1886] In doing so, the on-demand

1881 Sec. 9 of the *BCEA* prescribes a maximum of 45 ordinary working hours per week. The *Platform Code* states that ordinary working hours should exclude meal intervals and daily and weekly rest periods.
1882 *Code of Good Practice for the Regulation of Platform Work in South Africa* 2020:17.
1883 *Regulation of Gatherings Act* 205 of 1993.
1884 *Code of Good Practice for the Regulation of Platform Work in South Africa* 2020:63.
1885 *Code of Good Practice for the Regulation of Platform Work in South Africa* 2020:63.
1886 Webster E. 2020. "'Uberisation' takes us back to a regime without worker rights: The rise of platform capitalism allows companies to bypass labour laws",

workers were able to collectively log out of the delivery platform's application, resulting in the platform ceasing operation.

The *Constitution* guarantees the right to freedom of association in relation to a general human right and within an employment context.[1887] South Africa has continued to adopt the traditional collective bargaining institutions intended for the traditional employer-employee relationship, with many non-standard forms of work left outside the scope of their bargaining structures.[1888] As discussed earlier in this chapter, platform workers' classification as independent contractors expressly exclude them from the majority of labour statutes in South Africa.[1889] Du Toit and Howson recognise that the aforesaid is still one of the main reasons why platform workers still need decent multi-stakeholder engagement structures.[1890]

The question that may be raised at this point is whether all this attention is warranted for a problem that falls outside the scope of labour regulation. A further question may also be asked as to why it is necessary at this point to expand established bargaining structures to informal work.[1891]

Fourie acknowledges that 'the redistributive function of labour law, namely equalising the bargaining power, remains a cornerstone of labour law'.[1892] To achieve this goal, we need to scrutinise informal forms of work and seek an answer outside the contract of employment and the current labour paradigm.[1893] This could include voluntary action from all the stakeholders directed at improving decent classification fit for purpose, decent working conditions in relation to pay and working hours, and lastly, decent collective bargaining structures.[1894]

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https://www.businesslive.co.za/bd/opinion/2021-04-08-edward-webst/. Accessed on 28 December 2022.

1887 Sec. 18 of the *Constitution* guarantees everyone the right to freedom of association. In addition, sec. 23 of the *Constitution* provides for every worker to form and join a trade union and for every trade union the right to organise. In addition, trade unions have the constitutional right to engage in collective bargaining.

1888 Du Toit & Howson 2022:718.

1889 See para. 6.5.2.

1890 Du Toit & Howson 2022:718.

1891 It was previously established that on-demand work is seen as an informal type of work that falls outside the scope of the traditional employment model.

1892 Fourie 2020:423.

1893 Fourie 2020:423.

1894 This limitation correlates with the conclusion reached in Chapter 3 of the thesis. See para. 3.6.5.

Given the reality that on-demand workers are placed at various levels of vulnerability, one of which is a lack of a collective voice , the possibility of a *quasi*-platform for multi-parties to participate in multi-stakeholder engagement will be discussed next. It must be kept in mind that there has yet to be a clear solution to this legal conundrum. Taking this into account, I will provide evidence of specific cases where on-demand workers could collectively participate in either negotiations or protest actions in South Africa. Suggestions will be made on the strengths and weaknesses of each case, where applicable.

Trade unions find themselves in a particular bind with South Africa's chronic unemployment, coupled with new forms of work emerging due to technological advancements and dwindling trade union membership in the past decade.[1895] Despite the decline in trade union membership and the rise in unemployment, trade unions continue to play a crucial part in equalising the bargaining power by promoting collective bargaining.[1896] However, it is established that trade union membership is the lowest for workers in the gig economy.[1897] With this in mind, it is recommended that trade unions in South Africa, especially within the transport sector, consider working with on-demand workers and platform companies offering e-hailing as per the *NLTAB* to consider ways to negotiate for better terms of services for the on-demand workers in this unregulated sector. South Africa stands to learn from the agreement that has been reached between the Australian TWU and platform companies within its jurisdiction.[1898]

1895 ILO 2021. "Trade unions in transition: What will be their role in the future of work?", https://www.ilo.org/infostories/en-GB/Stories/Labour-Relations/trade-unions#introduction. Accessed on 10 January 2023. The ILO stresses that trade union membership worldwide is in decline due to the shift from manufacturing to service jobs, the informalisation of work, automation, and the changing employment relationship.

1896 Skenjana & Kute 2020. "What happens to labour bargaining as the gig economy takes off?", https://www.news24.com/fin24/opinion/opinion-what-happens-to-labour-bargaining-as-the-gig-economy-takes-off-20200731. Accessed 10 January 2023.

1897 ILO 2021. "Trade unions in transition: What will be their role in the future of work?", https://www.ilo.org/infostories/en-GB/Stories/Labour-Relations/trade-unions#introduction. Accessed on 10 January 2023.

1898 See the discussion of the agreements between TWU and Doordash, and TWU and Uber in para. 5.6.

Fairwork supports the view that non-profit organisations[1899] (hereafter NPOs) and cooperatives[1900] could advocate for decent multi-stakeholder engagement for on-demand workers.[1901] NPOs could represent on-demand workers if they enter into agreements with the platform company. This would entitle them to similar organisational rights as those provided by the LRA.[1902] By the same token, worker cooperatives[1903] are emerging as an alternative to the challenges that the world of work is facing.[1904] On a practical level, cooperatives provide a 'democratic governance structure of member-worker-owners, where decisions are made by those directly involved in the enterprise.'[1905] The *Platform Code* emphasises that worker cooperatives also offer a structure for collective negotiation separate from the established labour collective bargaining structures.[1906]

Mokofe affirms that the low trade union membership of on-demand workers could be due to the special separation of workers.[1907] Another point of view suggests, however, that it is easier for on-demand workers to engage collectively than crowdworkers.[1908] It can also be seen that on-demand workers' protests are often self-organised by groups of platform workers and not necessarily by trade unions.[1909] It seems that the

1899 Sec. 1 of the *Non-profit Organisation Act* 71 of 1997 defines a non-profit organisation as 'a trust, company or association of persons established for a public purpose, and the income and property of which are not distributable to its members or office-bearers except as reasonable compensation for services rendered.

1900 A cooperative is defined as an "autonomous association of persons united voluntarily to meet their common economic and social needs and aspirations through a jointly owned and democratically controlled enterprise organised and operated on co-operative principles. *Co-operatives Act* 14/2005: Sec. 1.

1901 *Code of Good Practice for the Regulation of Platform Work in South Africa* 2020:27.

1902 *Code of Good Practice for the Regulation of Platform Work in South Africa* 2020:27. This includes the right to engage in negotiations, to access information to enable purposeful negotiation, the right to stop-order facilities, and most importantly, the right to represent their members in disciplinary matters.

1903 Sec 1 of the *Co-operatives Act* 14 of 2005 defines a worker cooperative as 'a primary co-operative whose main objectives are to provide employment to its members, or a secondary co-operative providing services to primary worker co-operatives.'

1904 ILO 2023. "Worker Cooperatives and the wider social and solidarity economy (SSE)", https://www.ilo.org/global/topics/cooperatives/areas-of-work/WCMS_553558/lang--en/index.htm. Accessed on 17 January 2023.

1905 ILO 2023. "Worker Cooperatives and the wider social and solidarity economy (SSE)", https://www.ilo.org/global/topics/cooperatives/areas-of-work/WCMS_553558/lang--en/index.htm. Accessed on 17 January 2023.

1906 *Code of Good Practice for the Regulation of Platform Work in South Africa* 2020:28.

1907 Mokofe 2022:173.

1908 Mokofe 2022:173.

1909 Bessa *et al.* 2022:10. It is noted that non-unionised organisation of workers has become prevalent in the global South. Mokofe confirms that on-demand workers continue to create

online organisation of on-demand workers have become the best option for offline protest action.[1910] For example, Smit and Stopforth point out that problems with on-demand work have led to sporadic strike action in South Africa in the past couple of years.[1911] Some of the significant protest actions occurred in 2021 and 2022 respectively. In January 2021, Uber Eats drivers laid down their 'tools' during a nationwide protest action due to the low fees paid to drivers per delivery.[1912] Disgruntled e-hailing drivers have also recently protested the platforms' fee increases, health and safety concerns, and the lack of sector-specific regulation.[1913]

Considering that the protests have occurred almost annually, similar to a 'striking season'[1914] in the labour context, we can expect that protest action in the on-demand sector will follow suit. One point of view is that the best option would be by way of government intervention and law reform. While this is true, I argue that it would be a time-consuming process at the expense of on-demand workers' livelihoods. Moreover, I agree with Mokofe when saying that on-demand workers are unlikely to succeed if they wait for trade unions to come to their aid.[1915] With the aforesaid in mind, I suggest that meaningful multi-stakeholder engagement through negotiation could assist in advocating for decent work in a faster and more inclusive way.

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novel types of organisation by establishing worker committees and councils on plant level. See Mokofe 2022:173.

1910 Bessa *et al*. 2022:10

1911 Smit and Stopforth 2021. "The two faces of the gig economy", https://kznindustrialnews.co.za/the-two-faces-of-the-gig-economy/. Accessed on 15 January 2023.

1912 Wasserman 2021. "Uber Eats drivers strike in protest against fee cut", https://www.businessinsider.co.za/uber-eats-strike-and-pickets-at-fast-food-outlets-2021-1. Accessed on 15 January 2023.

1913 Thukwana 2021. "Some Uber and Bolt drivers embark on strike", https://www.businessinsider.co.za/some-uber-and-bolt-drivers-have-embarked-on-a-two-day-strike-over-fees-and-safety-2021-3. Accessed on 15 January 2023; Masilela 2022. "Bolt increases prices as Gauteng Transport MEC threatens e-hailing drivers with court interdict if they strike", https://www.iol.co.za/news/south-africa/gauteng/bolt-increases-prices-as-gauteng-transport-mec-threatens-e-hailing-drivers-with-court-interdict-if-they%E2%80%A6. Accessed on 16 January 2023.; and Banda 2022. "Uber, Bolt, Didi and Indrive drivers protest over lack of regulation and app firm exploitation", https://www.dailymaverick.co.za/article/2022-03-22-uber-bolt-didi-and-indrive-drivers-protest-over-lack-of-regulation-and-app-firm-exploitation/. Accessed on 16 January 2023.

1914 Lechman 2022. "Strike season begins in SA as employers disregard employee financial wellness", https://www.iol.co.za/business-report/economy/strike-season-begins-in-sa-as-employers-disregard-employee-financial-wellness-d7e00694-70de-4008-aa63-33bf44bf5c53. Accessed on 16 January 2023.

1915 Mokofe 2022:177.

6.10 SUMMARY

This chapter set out to determine the *lacunae* in the South African labour law framework in advocating for decent on-demand work. In this examination, the aim was to determine if South Africa was able to extend certain rights and protections to on-demand workers. In essence, I asked the question if the domestic legal framework sufficiently advocated for decent on-demand work. This included an investigation into whether the common law and statutory classification of labour could be extended to afford on-demand workers labour protection for purposes of achieving decent work.

Having discussed what the gig economy is and what the different types of platform work entail, having alluded to the extent that on-demand workers are excluded form decent work, and having dissected the ILO and EU policy approaches, a focus on the specifics in South Africa was undertaken.

The following summary includes three main parts. The first summarises the constitutional perspectives on on-demand work. This includes a summary of whether the common law tests could be developed to extend labour protections to on-demand workers. The second part considersthe statutory classification of labour. The last part provides an overview of the findings on binding and non-binding measures that advocate for decent on-demand work.

A review of the South African gig economy suggests that there is a gradual increase in the number of on-demand workers. One of the leading contributors is linked to the ongoing increase in employment opportunities in the formal sector. Linked thereto is the aftermath of the Covid-19 pandemic, which further has exacerbated on-demand workers' vulnerabilities. This, in turn, has led to several protest actions over the past couple of years.[1916]

It has been concluded that different structural disadvantages that are created by law exist in South Africa. The investigation into the legal structures confirms that the root

1916 It is important at this point to keep Du Toit and Howson's remarks pertaining to the similarities between on-demand work and other forms of non-standard work in mind. See heading 6.5.

of these structural vulnerabilities is found in the wording of the labour statutes themselves. One of the most significant findings to emerge from this section of the chapter is that the notion of what is meant by 'work' versus 'employment' is intricately classified with statutory definitions that are most suited for traditional formal employment.

The first section of the chapter confirms that the constitutional rights linked to employment continue to play a pivotal role in navigating the uncertainties in the future of work context. Bearing this in mind, an analysis of the constitutional perspectives on labour has found that the emerging forms of work continue to test the boundaries of section 23 and other interlinked human rights. It also appears that the constitutional interpretation of the aforesaid section broadens the scope to work and employment relationships that would have been excluded from traditional labour protection if not for the *Constitution*.[1917]

A review of the definitions linked to on-demand work reveals that the binary approach to classifying employment is a major barrier to achieving decent on-demand work. In addition, it is found that employment contracts under the common law have been strictly based on general contract law principles and that the terms of the contract reflect the interests of the parties. However, although parties in a commercial contract are regarded as equal, the same cannot be said for parties to the common law employment contract, which favours the employer.

Although the common law notion of an "employment relationship" is noted, South Africa has yet to comprehensively consider extending its judicial test criteria to on-demand work. It bears repeating that the once clear distinction between an independent contractor and an employee is getting blurred with new modern types of work such as on-demand work. However, I argue that if the provisions of a commercial contract are revised to balance out the unequal positions of the parties, it could make a significant contribution to achieving decent work. In the absence of such, the chapter considers the statutory classification of labour as an alternative.

1917 For more on this topic, see the discussion on the *SANDU*, the *Discovery*, and the *Kylie* cases in para. 6.3.

The findings with reference to the statutory definitions are considered next. Firstly, the statutory definition of an employee expressly excludes independent contractors, which limits the majority of labour protections to employees only. Secondly, it would seem that the *NMWA's* definition of a 'worker' could serve as a starting point to extend rights and protections in relation to minimum pay to on-demand workers. It may be argued that the definition can be used to create a third 'worker' category that extends limited rights in terms of other labour statutes such as the *BCEA*. Be it as it may, the absence of adequate case law about whether on-demand work fits the criteria of the aforesaid definitions, remains problematic.

With these legal shortcomings in mind, the chapter investigated different binding and non-binding measures to advocate for decent on-demand work. As mentioned above, the *NMWA* appears to be the best route to advocate for a decent minimum income in South Africa. A further investigation also considered establishing a sectoral determination to apply to on-demand work. This, however, has its shortcomings. It needs to be clarified how a sectoral determination could accommodate the unique characteristics of on-demand work. More importantly, overlapping with existing sectors could occur. Consider, for example, the different types of on-demand work, such as domestic work, cleaning services, and the taxi industry. Further investigation into the limitations of such a sectoral determination is thus recommended.

I submit that the most meaningful contribution to this chapter lies in the non-binding measures that advocate for decent on-demand work. There appear to be four noteworthy considerations:

- The *ESAB* could provide a basis to define an 'employer' in the on-demand work relationship. However, the bill does not specifically advocate for decent on-demand work and is more directed towards regulating foreign nationals in South Africa.
- The *NLTAB's* inclusion of electronic hailing services could provide a sensible regulatory framework to align ridesharing on-demand work with that of metered taxis in South Africa. The proposed definition could see the sector becoming more formalised insofar as licensing and designated areas of operation are concerned.

This, in turn, could level the playing field for competing tasks in specific high-demand areas.

- The *Platform Code* is a comprehensive guideline for advocating decent on-demand work in South Africa. It provides a detailed set of principles closely associated with decent work, and thus serves as an immediate guideline for protecting platform workers' rights. However, the guidelines prescribed by the *Platform Act* portray an ideal picture for regulating platform work in South Africa, but appear not to consider a practical account of regulating minimum rights and protections.
- There is a need to be sensitive to the local needs and context of on-demand drivers in South Africa. It has been shown that it is difficult for on-demand drivers to participate in collective action, mainly due to the absence of a central workplace. In addition, it is established that the traditional collective bargaining structure is not best suited for on-demand work. Instead, it is suggested that a meaningful multi-stakeholder engagement by means of negotiation could achieve quicker results in advocating for decent on-demand work. This requires further investigation.

To conclude the summary, it must be kept in mind that the current legislative interventions in the employment sphere serve as a portal to two main themes considered in this thesis, namely entitlement to minimum conditions of employment, and access to participate in an established framework for collective bargaining. Sadly, the very laws designed to regulate work relationships need to be reviewed in a legal sense to align with the current reality. Without proper consideration for establishing minimum rights and protections, on-demand workers will remain in the 'twilight zone' of legal protection.

CHAPTER 7: COMPARATIVE NOTES ON DECENT ON-DEMAND WORK

7.1 INTRODUCTION

The aim of this chapter is to identify best practices for advocating for decent on-demand work in Ireland and Australia and compare them to those of South Africa. It must be repeated that this includes classification of labour practices, and binding and non-binding measures that advocate for decent on-demand work. Note that the discussion is not meant to be a complete and detailed account of the legal framework and the regulatory labour framework in these countries. Instead, the discussion is aimed at identifying and discussing practical lessons for advocating for decent on-demand work in the South African context. The succeeding sections will draw this comparison based on the following themes:[1918] the notion of the employment relationship and the classification of labour; binding measures advocating for decent on-demand work; decent multi-stakeholder engagement for on-demand workers; and non-binding measures advocating for decent on-demand work.

Before continuing with the best practices for advocating minimum decent on-demand work, the size and growth of the on-demand workforce, the notion of the employment relationship and the classification of labour in each jurisdiction will be compared first. Later in this chapter, the binding and non-binding measures as best practices in Ireland, Australia and South Africa are discussed.

7.2 THE SIZE AND GROWTH OF THE ON-DEMAND WORKFORCE

Much like most countries globally, the exact number of on-demand workers in Ireland has yet to be discovered. It is established that Ireland has the fourth-highest prevalence of platform workers across 16 EU countries with a total of 200 000 persons

1918 See para. 3.6.5.

engaged in casual work arrangements.[1919] However, a smaller portion of the aforesaid number forms part of the on-demand workforce, seeing that not all forms of temporary work are regarded as platform work.[1920] It is suggested that platform work provides workers from rural areas access to the labour market.[1921] In addition, the profile of an average Irish on-demand worker is typically low-skilled, such as delivery work.[1922] Ridesharing platforms are limited in Ireland, mainly because of the country's established National Transport Authority.[1923] Australia follows in a similar vein.

It is estimated that roughly 250 000 Australians form part of the broader gig economy.[1924] This, however, is also just an estimate due to the need for more information and official statistics on the Australian gig economy. There are, nonetheless, some statistics on a federal level. In NSW, more than 45 000 people were performing platform work by 2019.[1925] On-demand workers' pay also differs depending on one's geographical location. For example, a 2021 report suggests that on-demand workers from Melbourne made roughly AU$12.88 per hour, whereas Brisbane workers received AU$17.50 per hour.[1926] There is also an array of different platform businesses operating in multiple sectors that include ridesharing, food delivery, care providers, cleaning services, and delivery of goods.[1927] Like both countries discussed above, South Africa needs reliable statistics on the exact number of on-demand workers within its jurisdiction. Around 135 000 platform workers perform work in the South African gig economy, of which approximately 30 000 are part of the on-demand workforce.[1928]

1919 See para. 4.3.
1920 Burke-Kennedy 2020. "Gig economy: What is it? Who works in it? Why is it in the news?", https://www.irishtimes.com/business/economy/gig-economy-what-is-it-who-works-in-it-why-is-it-in-the-news-1.4346555. Accessed on 17 March 2022.
1921 See para. 4.3.
1922 See para. 4.3.
1923 See para. 4.3. It was noted that platform companies such as Uber and Bolt are limited in Ireland due to their operations being halted by Ireland's National Transport Authority.
1924 See para. 5.3.
1925 See para. 5.3.
1926 See para. 5.3.
1927 See para. 5.3.
1928 See para. 6.4.

Ireland, Australia and South Africa need reliable statistics on the exact size and growth of their respective on-demand sectors. It was, however, noted that on-demand work forms part of a small percentage of each country's workforce. In this context, the question may be raised whether all this attention is warranted for an issue that is so relatively small in comparison to casual work. Through the lens of vulnerable workers, I argue that the future opportunities that on-demand work offers should not be done to the disadvantage of those who perform the work however small the industry might be. For these reasons, it is contended that an increase in each country's capacity to measure the growth of the on-demand workforce is needed to better understand the emerging sector's regulatory needs. Without such, on-demand workers could be left exploitable.

7.3 THE NOTION OF THE EMPLOYMENT RELATIONSHIP AND THE CLASSIFICATION OF LABOUR

7.3.1 Introduction

South Africa, Ireland and Australia have their legal systems rooted in the common law.[1929] It is a fact that each country has a unique approach to drafting and interpreting its labour laws. However, as the discussion will show, many similarities exist with regard to each country's approach to the classification of labour within its borders.

7.3.1.1 Ireland

Traditionally, the common law distinguishes between an employment contract *of* service (employee) and a contract *for* service (independent contractor). As with the case in South Africa and Australia, this twofold approach is based on the traditional "master-servant" relationship and does not fit the criteria for modern-day employment relationships.[1930]

1929 See paras. 6.5, 5.4, and 4.4.
1930 See para.4.4.

Similar to South Africa, Ireland still follows a strict binary divide in its classification of labour by drawing a distinction between 'employees' and 'independent contractors'.[1931] Likewise, the Irish *National Minimum Wage Act* defines an 'employee' as 'a person of any age who has entered into, or works or has worked under a contract of employment'.[1932] Furthermore, the same Act defines a contract of employment to include 'any other contract whereby an individual agrees with another person to do or perform personally any work or service for that person or a third person (whether or not the third person is a party to the contract).'[1933] It was found that the broader definition could include workers who enter into contracts with a person or a business on a casual basis. On this premise, the same argument can be made to extend limited protections to on-demand workers who perform tasks for a single platform over a specific period of time.[1934] The statutory protections and rights afforded to persons thus vary according to the statute that applies. Even more, the strong reliance on the contract of service reinforces the opinion that the contract itself should be the starting point to classify the work relationship between the contracting parties.

In the absence of a precise and clear definition of an employee, the Irish courts have developed various legal tests to determine the employment status of parties in cases where new forms of work relationships do not fit the statutory definition of an employee. This includes the control test, integration test, economic test, and mutual obligation test. It bears repeating that none of the tests is decisive, that they are used together with one or more of the other tests.[1935]

1931 See para. 4.4.
1932 See para. 4.4.
1933 See para. 4.4.
1934 See para. 4.4.
1935 See para. 4.4.

7.3.1.2 Australia

Australia follows a binary approach to the classification of labour by distinguishing between an employee in a contract *of* service and an independent contractor in a contract *for* service.[1936] Similar to the Irish position, the contractual relationship lies at the heart of the employment relationship. In turn, it is governed by the common law principles applicable to the formation of the legal agreement between the contracting parties.[1937] The evidence shows that parties are in a better position to choose the legal relationship that fits their need as long as the contract is aligned with other regulator regulations like the payment of taxes.[1938]

Similar to Ireland, the employment relationship within its statutory meaning remains undefined to a large extent. Instead, most Australian labour statutes, such as the *FWA*, refer to an 'employee' within its 'ordinary' meaning.[1939] Taking this into account, the Australian courts consider the reality of the parties' relationship when deciding if they are in an employment relationship. In doing so, attention is given to the true relationship between the parties.[1940] However, the contract of employment remains the starting point when determining if a contract is a contract *of* services or a contract *for* services.

It has been found that the reference to an 'employee' within its 'ordinary' meaning presumes the import of the common law meaning into an applicable statute.[1941] However, like in South Africa and Ireland, the binary divide between the common law forms of employment is not always as clear with new forms of work. It is fair to say that Australia is no different. Australian courts, therefore, rely on the multi-factor test to determine the classification of labour.[1942] Having discussed multiple cases that provide

1936 See para. 5.4.
1937 See para. 5.4.
1938 See para. 5.4.
1939 See para. 5.4.
1940 See para. 5.4.2.
1941 See para. 5.4.1.
1942 See para. 5.4.2.

a timeline of how the Australian courts have advocated for and against the classification of on-demand workers as employees of the platform business, it was found that the *status quo* is that the contractual terms must be seen as the starting point for the application of the multi-factor test's criteria and to determine the totality of the relationship.[1943]

7.3.1.3 South Africa

Compared with the Australian and Irish positions above, the South African common law contract distinguishes between a contract *of* service and a contract *for* service.[1944] Furthermore, fairness is not the sole component of the common law contract of employment.[1945] Parties are thus bound by the conditions they freely agree to. I share Du Toit's statement that given the realities in South Africa, the common law's reliance on the *pacta sunt servanda* (agreements are binding) has created forms of 'oppressive subordination under the disguise of freely chosen agreements."[1946]

The South African courts have also relied on a variety of judicial tests such as the control test, organisation test, economic test, and the dominant impression test, to determine the actual working relationship between parties.[1947] The dominant impression test prevails as the common law test of employment In South Africa, and is furthermore confirmed in the *Code of Good Practice: Who is an employee*?.[1948] The *Code of Good Practice: Who is an employee?* provides certainty and guidelines as to who is an employee for purposes of the *LRA*, *EEA*, *BCEA* and SDA.[1949] In terms of the aforesaid judicial test, courts are tasked to consider the substance of the

1943 See para. 5.4.2.
1944 See paras.6.5, 6.5.1.
1945 See para. 6.5.1.
1946 Du Toit *et al*. 2015:105.
1947 See para. 6.5.1.
1948 See para. 6.5.1.
1949 See para. 6.5.1.

relationship between the parties. In addition, the test is not a discrete test and is aimed at combatting disguised employment relationships.[1950]

Apart from the common notion of employment, South Africa has a set of statutory definitions that define an employee and a worker.[1951] The main statutes that prescribe the definition of an employee were discussed in Chapter 6 of the study. The definition of an employee explicitly excludes independent contractors from its application.[1952] This, in turn, excludes on-demand works in South Africa from the majority of the labour rights and protections due to their classification. Nevertheless, it must be kept in mind that our courts have extended the rights and protections afforded to those lucky enough to be in an employment relationship to certain unlawful contracts.[1953] In addition, the legislature has established a rebuttable presumption of employment in terms of section 200A of the LRA and 83A of the *BCEA*, respectively. This presumption will only apply if the true nature of the contract between the parties is determined.[1954] The classification of on-demand workers remain in limbo, and as such they remain to be independent contractors. It has therefore yet to be determined if they are in a true employment relationship. However, aspects such as the threshold applicable to the application of the presumption could pose a legal hurdle for on-demand workers.[1955]

It has been noted that the *NMWA* defines a 'worker', which is much broader than the definition of an employee.[1956] Unlike the definition of an employee, the definition of a worker does not expressly exclude an independent contractor. It has been found that a legal solution could be that the definition of a "worker", as a basis for extending minimum wage rights to on-demand workers, could be a viable solution and would thus be a gateway to advocating for minimum decent on-demand work in respect of pay.[1957]

1950 See para. 6.5.1.
1951 See paras. 6.5.2.1, 6.5.2.2, and 6.5.2.4.
1952 See para. 6.5.2.2.
1953 See para. 6.5.2.2. The unlawful contracts referred to in this section relate to the *Discovery* case and the *Kylie* case respectively.
1954 See para. 6.5.2.5.
1955 See para. 6.5.2.5.
1956 See para. 6.5.2.4.
1957 See para. 6.5.2.4.

In accordance with the opinion of Fourie and Van Staden, I agree that the current 'traditional' labour laws have been drafted to fit the paradigm of full-time employment, and that legal intervention is required to extend protections to vulnerable workers.[1958] Although it might seem that the courts are the obvious choice to resolve the classification issue, it has been argued that a reworking of the labour regime, in general, would be more effective. This is particularly true considering the growing informality of work in South Africa.[1959]

It is noted, however, that the binary classification of labour in South Africa remains a significant barrier to achieving decent on-demand work inclusive of minimum rights and protections and full decent work.

7.4 BINDING LEGISLATIVE RESPONSES AS BEST PRACTICE FOR ADVOCATING FOR DECENT ON-DEMAND WORK

7.4.1 Ireland

The *EMPA* has been identified as a binding measure that advocates for decent on-demand work in Ireland. This act aims to amend several employment statutes in Ireland, such as the *Unfair Dismissal Act*, the *National Minimum Wage Act*, and the *WRA*, by improving the predictability and security of those working unpredictable working hours.[1960] In this context, it has been noted that the *EMPA* prescribes rights and protections that advance decent working hours and decent pay by virtue of the conditions of employment itself.[1961] Section 7 hereof obligates the employer to furnish an employee with core terms of employment within five days after employment has commenced. This is also the case if employment ends before the fifth day.[1962]

1958 See para. 6.5.
1959 See para. 6.5.
1960 See para. 4.5.1.
1961 See para. 4.5.1.
1962 See para. 4.5.1.1.

The *EMPA* also prohibits zero-hour contracts.[1963] Section 15 applies to employees who avail themselves to work a certain number of hours for an employer, and the employer may require them to work for a certain number of hours.[1964] It has been found that the prohibition of zero-hour contracts, linked with a minimum prescribed payment, guarantees on-demand workers a minimum weekly payment.[1965] If employees' employment contracts do not correlate with their actual hours worked, they will be placed on a band of weekly working hours, calculated based on the average weekly working hours of the previous 12 months.[1966] It has been argued that this enables on-demand workers to access a system that allocates an average working hour set based on their actual working hours over 12 months. The aforesaid 12-month period is based on the minimum term prescribed by the *EMPA*. However, it remains to be seen how the calculation of actual working hours will be judicially tested.[1967]

7.4.2 Australia

The fact that Australian on-demand workers are classified as independent contractors places them under the application of two statutes, namely the *ICA* and the *CCA*.[1968]

Firstly, the *ICA* has been found to be a valuable binding measure to protect on-demand workers against unfair contractual terms.[1969] This includes contracts that are unfair, are harsh and unconscionable, unjust, against the public interest, that prescribe remuneration that is less than the rate afforded to an employee in the same position, and contracts designed to avoid the obligations imposed by the *FWA*, *WRA* or any other State or Territory industrial law, award or agreement.[1970] Although not yet tested

1963 See para. 4.5.1.2.
1964 See para. 4.5.1.2.
1965 See para. 4.5.1.2.
1966 See para. 4.5.1.2.
1967 See para. 4.5.1.2.
1968 See para. 5.5.
1969 See para. 5.5.1.
1970 See para. 5.5.1.

by the Australian courts, it is argued that the *ICA* could be extended to on-demand workers, providing them with a legal remedy against unfair contractual terms.

Secondly, the *CCA* prescribes a remedy to eligible parties, which includes the self-employed, to challenge unfair contractual terms.[1971] In terms of the *CCA*, a provision is seen as unfair if it causes an imbalance in the rights and obligations provided for in the contract, if it is not needed to protect the 'legitimate interest' of a party who is advantaged by the provision, and lastly, if a provision is to the detriment of a party.[1972] The legal consequence of the aforesaid is that if a provision is 'unfair' in terms of the *CCA*, the contract could be deemed void.[1973] In addition, the ACCC introduced a 'class exemption' for the self-employed to be eligible to engage in 'collective bargaining' like arrangements.[1974]

7.4.3 South Africa

The investigation has identified two binding measures that could be extended to on-demand workers in South Africa. The first is the extension of the definition of 'worker' in terms of the *NMWA*.[1975] The second concerns establishing a sectoral determination for the on-demand sector.[1976]

As noted earlier in this chapter, the broader meaning of a 'worker' for purposes of the *NMWA* could extend to on-demand workers, thus granting them limited minimum wage entitlements.[1977] Of importance here is that the definition of a worker, unlike the definition of an employee, does not explicitly exclude independent contractors.[1978] Several issues are, however, identified. It is unclear how actual working hours will be

1971 See para. 5.5.2.
1972 See para. 5.5.2.
1973 See para. 5.5.2.
1974 See para. 5.5.2 for additional information relating to the *CCA* and the ACCC's class exemption.
1975 See paras. 6.5.2.4; 6.7.1.
1976 See para. 6.7.2.
1977 See paras. 6.5.2.4; 6.7.1.
1978 See para. 6.7.1.

calculated for time spent performing tasks in the on-demand sector, which will require further research.[1979] In addition, the occurrence of on-demand workers working on multiple platforms interchangeably or simultaneously could further complicate the calculation of their true earnings.[1980]

Sectoral determinations could also be a viable alternative for advocating for decent on-demand work in South Africa.[1981] This could greatly benefit the on-demand sector since it needs to be more regulated and organised.[1982] A sectoral determination could provide a comprehensive framework to extend existing rights and protections in the *BCEA* and the *LRA*.[1983] A vital consideration is that a sectoral determination could define the parties to this unique work relationship and provide a forum to engage in multi-party negotiations.[1984] In the absence of a clear way forward in respect of the classification of on-demand workers as employees, it would appear that the sectoral determination approach could provide a tailor-made solution to advocate for decent on-demand work in South Africa.[1985] Having said this, it must be kept in mind that several pitfalls exist, and that it will require further research. The different categories of on-demand work must first be examined, as they could overlap with other existing sectors. Consider, for example, the overlap that occurs between on-demand work and work performed in established sectors, such as domestic work, taxi drivers, and cleaning services.

7.5 DECENT MULTI-STAKEHOLDER ENGAGEMENT AS BEST PRACTICE FOR ADVOCATING FOR DECENT ON-DEMAND WORK

7.5.1 Ireland

Trade union involvement in Ireland is still focused on traditional employment.[1986] Cognisance must be taken of alternative forms of civil society organisations, as this

1979 See para. 6.7.1.
1980 See para. 6.7.1.
1981 See para. 6.7.2.
1982 See para. 6.7.2.
1983 See para. 6.7.2.
1984 See para. 6.7.2.
1985 See para. 6.7.2.
1986 See para. 4.5.2.

ultimately contributes to decent multi-stakeholder engagement in Ireland. In the Irish context, an alternative has been suggested by means of competition laws.[1987] Prior to 2017, the *Competition Act* did not apply to categories of workers usually associated with the gig economy that included freelance journalists, session musicians, and voice-over actors. [1988] This said, the *2017 Competition Amendment Act* created a new category of 'fully dependent self-employed worker'. The act extends certain rights to trade unions to bargain on behalf of the so-called fully independent self-employed worker, but only if the trade union's application is approved by the relevant Minister.[1989] In terms of the criteria for such an application, it was argued that collective bargaining relating to decent pay and decent working hours could improve the overall market in which on-demand workers operate in Ireland, seeing that it could bring about stability within this vulnerable category.[1990] Moreover, in theory, classifying on-demand workers as fully dependent self-employed will not result in additional cost to the state, seeing that most platform businesses form part of the private sector.[1991]

7.5.2 Australia

The previous section explained the relevance of both the *CCA* and the ACCC.[1992] Against this background, it was found that the application of the *CCA* provisions related to unfair contractual terms, and that the extended operations of the ACCC provided a suitable platform for on-demand workers to engage with other stakeholders.[1993] Furthermore, the recent developments pertaining to the ACCC could become the driving force to advocate for decent work for on-demand workers in the modern-day gig economy.[1994] This could take the form of a multi-stakeholder engagement similar to 'collective bargaining' type mechanisms, which in turn can result in an agreement being reached by the parties on matters relating to decent work,

1987 See para. 4.5.2.
1988 See para. 4.5.2.
1989 See para. 4.5.2.
1990 See para. 4.5.2.
1991 See para. 4.5.2.
1992 See para. 5.5.3.
1993 See para. 5.5.3.
1994 See para. 5.5.3.

decent pay and future engagements. In this regard, the stakeholders are limited to the platform company and the platform workers and their representatives.[1995]

The class exemption notice, in terms of the *CCCECBD*, was found to be a beneficial route for advocating for decent on-demand work conditions in Australia.[1996] The reasoning behind this finding is explained as follows: Firstly, the class exemption exempts participants from cartel restrictions.[1997] Secondly, a purposeful negotiation process will save time and costs in reaching an agreement. It creates an opportunity to negotiate a platform's terms of service, and it advances access to information and information sharing.[1998] The class exemption also does not prohibit collective boycotts, which could be similar to strike action in the labour law context.

7.5.3 South Africa

The *Constitution* guarantees the right to freedom of association as a human right and within the employment context.[1999] However, due to their classification as independent contractors, on-demand workers are excluded from participating in the collective bargaining structures.[2000] It is for this reason that it is held that South Africa currently needs an official collective bargaining structure for on-demand workers in which to participate. As with Ireland and Australia, the question may be asked if attention is warranted for a problem that falls outside the scope of labour regulation.[2001] More specifically, the study has considered seeking an answer outside the scope of the labour framework. The reality is that thousands of on-demand workers are placed in varied levels of vulnerability based on the decent work deficit they are experiencing.[2002]

1995 See para. 1.8.8 for the definition of a multi-stakeholder engagement process.
1996 See para. 5.5.3. It must be repeated that the class exemption does not prevent a trade union from acting as a representative of a small business during the bargaining process.
1997 See para. 5.5.3.
1998 See para. 5.5.3.
1999 See para. 6.3; 6.9.
2000 See paras. 6.3; 6.9.
2001 See para. 6.9.
2002 See para. 6.9.

This study has revealed that trade union involvement is the lowest for a worker in the gig economy. The following section explains two alternatives to create the circumstances for decent multi-stakeholder engagement.[2003]

Due to the lack of collective bargaining rights for on-demand workers in South Africa, it would be wise to take cognisance of an alternative way to strengthen multi-stakeholder engagement between social partners by virtue of legislation outside of the labour law framework. Thus it seems that a practical solution and best practice could be found outside the scope of labour law and its collective bargaining process. In this context, Fairwork suggests that NPOs and cooperatives could advocate for decent multi-stakeholder engagement for on-demand workers.[2004] This is particularly important because the NPO could represent a group of on-demand workers when entering into an agreement with the platform company.[2005] It thus creates a structure for collective negotiation that is entirely separate from the labour laws' collective bargaining structures.[2006]

Several self-organised protest actions have been planned by on-demand workers in the past couple of years.[2007] Even though some obstacles have been identified, it seems that online organisation through the use of mobile platforms remains the best option for offline protest in the South African on-demand sector.[2008] Furthermore, considering that the protests have taken place in a way similar to a 'striking season' in the labour context, South Africa can expect that protest action in the on-demand sector will continue to occur.[2009]

2003 See para. 6.9.
2004 See para. 6.9.
2005 See para. 6.9.
2006 See para. 6.9.
2007 See para. 6.9.
2008 See para. 6.9.
2009 See para. 6.9.

Government intervention and law reform is undoubtedly the best option for full rights and protection. I argue that it would be a major time-consuming process at the expense of on-demand workers' livelihoods in the long term before legal reform takes place. In the short term. However, a meaningful multi-stakeholder engagement through negotiation would be a quicker option to advocate for minimum decent on-demand work standards in South Africa.[2010] For this to be successful, one will need the support of both the platform company and the on-demand worker.

7.6 NON-BINDING MEASURES AS BEST PRACTICE FOR ADVOCATING FOR DECENT ON-DEMAND WORK

A comparison of best practices would not be complete without considering each country's non-binding measures that already advocate for decent on-demand work. An explanation of each country's non-binding measures is provided in the next section.

7.6.1 Ireland

Ireland has drafted the *CPDES* due to the inability of legal tests to determine modern employment relationships, as well as to ensure consistency when interpreting the legal tests.[2011] Like South Africa, the *CPDES* prescribes factors to consider when determining the employment status of a person.[2012] Several important considerations are highlighted. The *CPDES* acknowledges new forms of work; however, it needs to elaborate on a possible solution to classify on-demand workers correctly.[2013] In addition to the *CPDES*, the *Protection of Employment (Platform Workers and Bogus Self-Employment) Bill* aims to create clarity for on-demand workers by introducing a presumption of employment.[2014] However, the presumption is not accompanied by specific criteria. It is thus argued that Ireland must learn from South Africa in this

2010 See para. 6.9.
2011 See para. 4.6.
2012 See para. 4.6.1.
2013 See para. 4.6.1.
2014 See para. 4.6.2.

respect on how to identify factors to distinguish between an employee and independent contractors.

7.6.2 Australia

Australia has conducted several federal state inquiries that could provide valuable insight into advocating for decent on-demand work in each of their federal states.[2015] This research has shown that some states such as Victoria, New South Wales, Queensland and Western Australia have taken decisive steps to advocate for decent on-demand work.[2016] The following section provides a brief overview of each.

The Victorian inquiry recommended that a new category of 'entrepreneurial worker' be adopted and for it to be distinguished from those who are self-employed.[2017] They also advocated for fair conduct and accountability standards.[2018] The Victoria inquiry also argued that the standards must relate to workers' classification, the parties' bargaining positions and arrangements for fair work and pay.[2019] The Victorian government also urged platforms to ensure non-employee on-demand workers have access to resolution processes to challenge the platform's decision if necessary.[2020]

New South Wales' Select Committee on the Impact of Technological Changes on the Future of Work considered if labour protections were fit for purpose in the 21st century.[2021] The federal state took an honest approach and indicated that they were falling behind where advocating for decent on-demand work was concerned.[2022] The Select Committee too stressed the need for a designated tribunal for the resolution of

2015 See para. 5.7.
2016 See para. 5.7.
2017 See para. 5.7.1.1.
2018 See para. 5.7.1.1.
2019 See para. 5.7.1.1.
2020 See para. 5.7.1.1.
2021 See para. 5.7.1.2.
2022 See para. 5.7.1.2.

disputes, and secondly, that extending collective bargaining rights to on-demand workers would improve their basic conditions of employment significantly.[2023]

The Queensland government has recently introduced the *IROLAB*, which contains a designated chapter for independent couriers.[2024] *IROLAB* prescribes that on-demand workers are allowed to approach the QIRC for an award relating to minimum pay entitlements and working conditions.[2025] It also provides for several other protections. However, the proposed amendment only applies to independent couriers and no other categories of on-demand work.[2026]

Western Australia's Ministerial Review confirmed that the ability to improve the protection of gig workers could only be achieved by the Commonwealth. That said, the government showed interest in exploring how the health and safety of food delivery drivers could be improved.[2027]

7.6.3 South Africa

South Africa is gradually recognising on-demand work and the broader gig economy. In this respect, piecemeal recognition is made of forms of platform work and the broader platform sector in the *ESAB* and the *NLTAB*, respectively.[2028] However, after considering their aims and application, it seems that the bills' intentions are more directed at regulating aspects linked to the gig economy and on-demand work that do not directly advocate for decent on-demand work in South Africa.[2029] For example, the *ESA* aims to cover employees and workers and regulates the employment of

2023 See para. 5.7.1.2.
2024 See para. 5.7.1.3.
2025 See para. 5.7.1.3.
2026 See para. 5.7.1.3.
2027 For purposes of this part of the section it should be noted that Western Australia's Ministerial Review limited the scope of its review to food delivery drivers operational in its federal state. The statement does not extend to all forms of platform work.
2028 See para. 6.8.
2029 See para. 6.8.

foreign nationals in South Africa.[2030] In addition, the *NLTAB* is more concerned with bringing e-haling services into the same regulatory arena as metered taxis, and effectively creates a sub-category of metered taxis for purposes of operating licences.[2031] Considered together, it is found that the *ESAB* and the *NLTAB* contribute towards a more formalised approach to regulating on-demand work in the transportation sector.[2032] For example, the *ESAB* proposes a basis for defining an 'employer' in the on-demand work relationship.[2033] The *NLTAB* proposes a formal structure that could affect the mode of operation in the on-demand sector by regulating the licensing of on-demand vehicles.[2034] Moreover, the *NLTAB* could see a fairer distribution of operational areas where an on-demand worker will perform tasks. This, in turn, could mitigate the oversupply of on-demand workers in certain high-demand areas, thus improving on-demand workers' working hours and pay.[2035]

As stated previously, Fairwork's *Platform Code* is an ideal option that advocates for decent on-demand work in a comprehensive way.[2036] The emphasis on workers' rights regardless of employment status echoes the ILO notion of decent work for all workers, and not only employees.[2037] It is also noted that the *Platform Code* is a better fit if compared to the *CPDES* because it includes evidence-based contributions for regulating platform work.[2038] It is noted that the *Platform Code* goes beyond what is deemed basic or minimum for the purposes of this study. In the long term, the *Platform Code* paints an ideal picture for regulating platform work in South Africa[2039] but,

2030 See para. 6.8.1.
2031 See para. 6.8.2.
2032 See para. 6.10. It must be noted that the *ESAB* application is much broader than the *NLTAB*, which aims to regulate electronic hailing services in the transport sector.
2033 See para. 6.8.1.
2034 See para. 6.8.2.
2035 See para. 6.8.2.
2036 See para. 6.8.3.
2037 See para. 3.3.2.2.
2038 See para. 6.8.3.
2039 See para. 6.8.3. For example, the Platform Code serves as a guideline for the full achievement of decent work in South Africa. It therefore serves as a good referencing point for the majority of the decent work indicators. However, it does not provide for best practices on aspects relating to decent pay, decent working hours, and decent multi-stakeholder engagement.

unfortunately, does not in all instances provide a practical account of regulating minimum rights and protections.[2040]

2040 See para. 6.8.3.

CHAPTER 8: CONCLUDING REMARKS AND RECOMMENDATIONS

8.1 GENERAL BACKGROUND

The rise in technological advancements, linked with globalisation and mobile technology, has facilitated new forms of work that disrupt the notion of a traditional employment relationship.[2041] In addition, the online environment driven by Artificial Intelligence (AI), machine learning and algorithmic decision-making software continue to revolutionise what it means to work, how we perform work, and how work-related decisions are made.[2042] Proponents of 4IR argue that these new forms of work have the potential to bring about a significant socio-economic shift.[2043] However, this is argued to be a utopian view that is disconnected from the real world, where work has become increasingly flexible and in certain cases more peculiar.[2044] Nevertheless, the reality does not correspond with this ideal. It is found that our current labour law framework needs more adaptability to be able to advocate for decent work for all. Although labour law has been able to adapt to the challenges in the previous revolutions, it seems that we are again at a critical turning point[2045] where we need to challenge our labour laws' objectives and reflect on whether it is fit for purpose given the realities of millions of South African workers.

This study has discovered that the notion of a 'lifelong job' is outdated, with many workers performing tasks on a casual basis.[2046] With this in mind, many major companies have adapted their core business model to accommodate and capitalise on the growing informality of work. In doing so, they are able to shift a significant portion of the responsibility from the company to the individual.[2047] As the use of the

2041 See para. 2.3.2.4.
2042 See paras. 2.3.2.4 and 2.3.3.
2043 See para. 2.3.2.4.
2044 See para. 2.3.3.
2045 See para. 2.3.3.
2046 See para. 2.3.3.
2047 See para. 2.3.3.

aforesaid technologies continues to grow, so do the legal challenges that come with using them.

Given the high unemployment rate and the need for access to job opportunities, it is safe to say that technology-facilitated types of work, including on-demand work, are here to stay and will continue to impact the economy and the labour market in South Africa.[2048] It is thus not surprising that there has been considerable academic interest in the rise of the modern-day gig economy and its influence on national and international labour markets. This interest has sparked a debate that has gained prominence on the topic of whether in-demand work is decent work. It is theorised that South Africa could sufficiently advocate for decent work regulation for on-demand workers by extending existing labour provisions regulating the different standard and non-standard forms of employment.[2049] Additionally, decent work regulation for on-demand workers can be achieved by introducing appropriate but innovative measures to afford basic standard protection to on-demand workers in South Africa. At this point I argue that it may be worthwhile to consider achieving decent on-demand work, both as a short-term and a long-term objective. Further findings and recommendations in this regard are provided later in this chapter.

8.2 REVISITING THE RESEARCH QUESTIONS

The primary purpose of the study was to investigate if South Africa is sufficiently advocating for decent on-demand work in the modern-day gig economy.[2050] The motivation behind this stems from the inability of the traditional labour relationship to afford decent work to those working in the modern-day gig economy. The answer to this question will draw on the study and conclusions pertaining to the secondary research questions indicated in Chapter 1. To be able to answer the primary research

2048 See para. 2.3.3.
2049 See para. 1.3.
2050 See para. 1.3.

question, I had to consider several secondary research questions. For ease of reference, the secondary questions are as follows:

- What does the concept 'modern-day gig economy' entail and which categories of work does it include?
- To what extent are on-demand workers excluded from decent work?
- How can the international policy approaches of the ILO and the EU counter the decent work deficit experienced by on-demand workers?
- Can the common law and statutory classification of employment be extended to afford on-demand workers labour protection for purposes of achieving decent work?
- What are the best practices for the classification of on-demand works in Australia and Ireland, and how can binding and non-binding measures that advocate for minimum decent on-demand work contribute towards affording sufficient decent work to on-demand workers in South Africa?

Thus, the purpose of the thesis was to conceptualise 'modern-day gig economy'. I distinguished its categories of work, critiqued the current classification of labour, and determined to what extent on-demand workers are excluded from decent work. I examined the ILO and EU policy approaches that limit the decent work deficit of on-demand workers, identified and examined best practices for the classification of labour in Ireland and Australia, and appraised the extent to which binding and non-binding measures could contribute towards advocating for decent on-demand work in South Africa.[2051]

This concluding chapter brings together the significant issues raised by this thesis. It must be noted that this chapter sets out key findings related to each of the chapters. Hence it serves as a concluding chapter. In the final section, recommendations in respect of advocating for decent on-demand work in South Africa are provided. The recommendations are put forward with reference to binding and non-binding measures

2051 See para. 1.3. In considering the aforesaid questions, it bears repeating that none of the current national instruments deals with the decent work deficit endured by on-demand workers in South Africa; therefore it warrants further investigation.

that policymakers and stakeholders should consider in an effort to table short-term and long-terms solutions for advocating for decent on-demand work in the modern-day gig economy in South Africa.

8.3 MAIN FINDINGS

8.3.1 Conceptualising 'modern-day gig economy'

The term 'modern-day' refers to something current or ongoing. This implies that the gig economy is a novel phenomenon that must be understood against the background of its present realities. Nonetheless, the conceptualisation of 'gig economy' is subject to further analysis.[2052]

The concept 'gig economy' is used interchangeably with other types of economies that are linked to platform work.[2053] This includes economies such as the digital economy,[2054] collaborative economy,[2055] sharing economy,[2056] platform economy,[2057] and on-demand economy.[2058] Although some similarities occur, it has been found that each of the economies has a unique character which brings with it its own legal obligations.[2059] Some of the vital findings relating to each economy are summarised below.

Firstly, the digital economy consists of three components connected to IT and ICT at its core, the platform economy in a narrow sense, and the digitised economy in a broad sense. It regards the gig economy as a midway between the platform economy and the digitised economy.[2060] This economic model seems to lean more towards

2052 See para. 2.4.
2053 See para. 2.3.2.
2054 See para. 2.3.2.1.
2055 See para. 2.3.2.3.
2056 See para. 2.3.2.2.
2057 See para. 2.3.2.4.
2058 See para. 2.3.2.5.
2059 See para. 2.4.
2060 See para. 2.3.2.1.

emerging economic activities coupled with the platform economy.[2061] Secondly, the sharing economy, on the other hand, encapsulates the idea of sharing goods that would otherwise be unused. Its purpose, therefore, is not to receive a financial incentive.[2062] In light of this characteristic, it is maintained that this model does not correlate with platform work, but relates more to the sharing or trading of unutilised assets instead of paying for a person's skill or labour, This is more of a characteristic of on-demand work, as will be discussed below.[2063]

In the third instance, the collaborative economy encompasses an economic model where technologies enable people to participate in commercial activities.[2064] Its ability to utilise the value of assets, skills, utilities, and time makes it ideal for entering various sectors in the economy, including the labour sector. Consequently, it has a closer correlation with the platform economy, which is described as an economic model consisting of a commercial sector and a collective sector.[2065] The commercial sector is particularly relevant to this study since it comprises a triangular relationship consisting of a consumer, the platform provider, and the end-user.[2066] It is maintained that the platform economy still needs to be narrowed down because it covers multiple markets other than labour. This includes platforms for crowdfunding, communication, entertainment, and information.[2067]

The gig economy, on the other hand, finds its origin in the music industry where musicians perform 'gigs' in exchange for money.[2068] It includes an array of platform-facilitated arrangements and is built on the principles of independent contracting and flexible work arrangements. However, this comes at a price, as discussed later in this chapter. A key finding is that the gig economy in low- and middle-income countries is regarded as an alternative to formal employment.[2069] Of importance here are two

2061 See para. 2.3.2.1.
2062 See para. 2.3.2.2.
2063 See para. 2.3.2.2.
2064 See para. 2.3.2.3.
2065 See para. 2.3.2.4.
2066 See para. 2.3.2.4.
2067 See para. 2.3.2.4.
2068 See para. 2.4.2.7.
2069 See para. 2.3.2.4.

aspects: Firstly, work performed as part of the gig economy does not enjoy parallel protection. Secondly, insinuating that it is an 'alternative' to formal employment does not put it on the same legislative standing insofar as being decent is concerned.[2070] Lastly, the on-demand economy is regarded as a sub-division of the gig economy that refers to location-based tasks. It has been noted that the term 'gig economy' is preferred for the purposes of this study as it is universally accepted.[2071]

The gig business relationship can occur in different sectors, but it shares three main characteristics: a client who requires a service, a person offering a service, and the online third-party platform that facilitates the transaction.[2072] Although the aforementioned relationship can be applied to gig-classified and gig-employer businesses, the focus of this study revolves around the interactive gig business. It entails a contractual agreement between the platform business and the on-demand worker, where the latter contractually agrees to be classified as an independent contractor.[2073]

Chapter 2 provided a detailed account of the Uber relationship to illustrate the intricacies of the interactive gig business relationship.[2074] The Uber model is merely used as an example for demonstration purposes and does not include the wide array of on-demand work available on all the platforms. Hence it sets the scene for the classification dilemma. Accordingly, this contributes to answering the research question if the common law and statutory classification of employment can be extended to afford on-demand workers labour protection for purposes of achieving decent work. What is clear from the examination of the relationship is that it is reminiscent of a temporary employment service (TES) relationship in South Africa. It is clear from the discussion that companies, such as Uber in this case, skilfully and purposefully limit the company's contractual responsibilities, thus placing the bulk of the responsibilities on the on-demand driver.[2075] The literature reviewed also indicates

2070 See paras. 4.2 and 6.3.
2071 See para. 2.4.2.7.
2072 See para. 2.3.3.4.
2073 See para. 2.3.3.4.
2074 See para. 2.3.4.
2075 See para. 2.3.3.4.

that although on-demand workers and TES share similarities, on-demand work as part of the gig economy falls outside the scope of the labour statutes in South Africa.

Based on the findings in Chapter 2, the thesis distinguishes two categories of platform work, namely crowdwork and on-demand work.[2076] Both forms of online labour share several features apart from one factor: crowdwork refers to work performed digitally from anywhere on the globe[2077] whereas on-demand work is localised and performed in a specific geographical area.[2078] The domestic laws applicable to the geographical area thus apply to the on-demand work relationship, which complicates the prospect of a universal approach to regulating on-demand work further.[2079]

The research shows that although some similarities and overlapping characteristics exist, the gig economy is unique in the sense that it concerns labour performed via online platforms.[2080] Given the discrepancies regarding the conceptualisation of the gig economy and the different forms of platform work, it is recommended that South Africa be more proactive in the changing world of work. Accordingly, it is recommended that South Africa commits itself to investigating the theoretical framework that informs the understanding of on-demand work in the modern-day gig economy.

8.3.2 Identifying the decent work deficits of on-demand workers

Examining on-demand work's advantages and vulnerabilities were relevant in leading up to the identification of general decent work deficits experienced by on-demand workers.[2081] It may be recalled that leave and other important decent work deficits were not discussed due to the limited focus of the study as explained in Chapter 1 and

2076 See para. 2.3.5. It bears repeating that the term 'platform work' is preferred and is used to refer to both crowdwork and on-demand work.
2077 See para. 2.3.5.2.
2078 See para. 2.3.5.3.
2079 See para. 2.3.5.3.
2080 See para. 2.4.
2081 See paras. 2.4.5.3.1 and 2.4.5.3.2.

Chapter 3.[2082] As discussed in Chapter 2, the areas of vulnerability are categorised into four main themes.[2083] Firstly, on-demand workers are rendered vulnerable in respect of basic conditions of employment, having little to no control over (or insight into) unilateral changes to the contractual terms that regulate their relationship.[2084] Secondly, due to limitations prescribed by the statutory definition of an employee and other labour laws, they lack protection at the level of both individual and collective labour rights, and as a result experience unfair deactivation, discrimination by both clients and the platform, and poor collective bargaining power.[2085] In the third instance, dispute resolution for on-demand workers is highly technical and mostly occurs through time-consuming and costly civil legal action, putting it beyond the average individual platform worker's reach.[2086] Finally, with inefficient social security protection, on-demand workers are unable to invest in housing and pensions, lack skills development opportunities, and have little if any career progression prospects. This leads to excessive stress that puts them at risk of occupational health and safety issues.[2087]

It must be noted that most of the vulnerabilities indicated above stem from the labour statutes that follow a strictly binary approach to the classification of labour.[2088] This results in a structural vulnerability that renders on-demand workers open to exploitation.[2089] Moreover, it excludes on-demand workers from enjoying decent work in the gig economy. The lack of rights and protection for on-demand workers warrants urgent regulatory intervention that could entail proactive steps in the form of policy considerations from the platform company side. It is recommended that advocating for decent on-demand work does not rest solely on the shoulders of any one stakeholder. A multi-stakeholder approach to negotiate, and subsequently advocate for minimum

2082 See paras. 1.6 and 3.6.5. It is worth repeating that this research aims to identify and analyse minimum decent on-demand work indicators by considering decent work conditions inclusive of decent working hours and decent pay, decent worker classification, and decent multi-stakeholder engagement. Leave entitlements do not form part of this thesis. Nevertheless, it is an aspect that warrants future research.
2083 See para. 2.3.5.3.2.
2084 See para. 2.3.5.3.2.1.
2085 See para. 2.3.5.3.2.2.
2086 See para. 2.3.5.3.2.3.
2087 See para. 2.3.5.3.2.4.
2088 See para. 2.3.5.3.2.
2089 See para. 2.3.5.3.2.

decent work in the on-demand sector is preferred. This process must at the very least include all stakeholders to the on-demand work relationship, *i.e.* the platform company and the on-demand workers or their representatives.[2090]

The aforesaid is the preferred process but not the only solution that is recommended. A workable solution to the decent work deficit in the on-demand sector can be proposed by either the legislator by way of legal reform, or by the platform company by means of policy measures and revised terms and conditions. What must be noted here is that the timeframe that applies to the aforesaid solutions differs significantly. For example, it is sensible to adopt a voluntary multi-stakeholder engagement process in the short term. Accordingly, this will realise measures advocating for decent on-demand work in South Africa soon after the parties voluntarily agree to a set of principles that applies to their working relationship.

8.3.3 International policy approaches of the ILO and the EU

The different international policy approaches were discussed in Chapter 3. This chapter focused on answering the research question of how international policy approaches of the ILO and the EU can counter the decent work deficit experienced by on-demand workers. Although international bodies and organisations have yet to reach an agreement on a universal approach to regulating on-demand work, both the ILO and the EU have taken progressive steps to achieve decent work for and extend basic labour and social protection to those working in the gig economy.

From the ILO's perspective, the study confirms that several instruments could be extended to on-demand workers if one considers the degree to which they extend to 'workers' rather than 'employees'.[2091] It is thus a broader approach, compared to the binary approach, to the classification of labour in the South African context. The study

2090 See para. 1.9 for the explanation of multi-stakeholder engagement.
2091 See para. 3.1.2.

has revealed that the ILO's Declaration on Fundamental Principles and Rights at Work remains a decisive step towards universal respect of the ILO's core standards, regardless of a member state ratifying a convention.[2092] Rooted in the principles of the aforesaid declaration, the ILO's Employment Relationship Recommendation *(*ERR) recognises the challenges of establishing the existence of an employment relationship.[2093] However, the ERR is silent on solutions on how decent work in the on-demand sector can be achieved.[2094]

The study has also identified several conventions relating to the protection of vulnerable groups of workers. However, this study has not concerned itself with a comprehensive discussion of all conventions. Instead, it focuses on key instruments pertaining to two themes, namely the ILO's position on the future of work, and the decent work indicators.[2095] The first key instrument that advocates for a human-centred approach to the future of work, and arguably also advocates for decent work in new types of work, is the Centenary Declaration of the Future of Work.[2096] The declaration reaffirms the important role of the Decent Work Agenda and advocates for adequate protection in respect of fundamental rights, minimum wage, the regulation of working time and social protection for all workers.[2097] The specific reference to 'all workers' confirms the ILO's commitment to decent work for all, regardless of the classification of labour.[2098]

A timeline for the development of decent work as a concept is discussed in Chapter 3. The notion of decent work for all, especially within the context of new forms of work, does not relate to the creation of job opportunities only. It also refers to the creation of job opportunities that are of acceptable quality.[2099] It is also shown that what is deemed to be of acceptable quality differs because of each country's economic and social

2092 See para. 3.1.2.
2093 See para. 3.1.2.
2094 See para. 3.5.1.
2095 See figure 7.
2096 See para. 3.2.1.2.
2097 See para. 3.2.1.2.
2098 See para. 3.2.1.2.
2099 See para. 3.4.

context.[2100] The Decent Work Agenda provides a theoretical framework for what constitutes 'good work' and forms an integral part of the 2030 Agenda for Sustainable Development Goals.[2101] For purposes of achieving decent work, Sustainable Development Goal 8 calls on all countries to 'take measures to promote decent work, productive and sustainable employment'.[2102]

It has been demonstrated that establishing a full framework for measuring decent work requires an analysis of a national regime in addition to the context in which it functions.[2103] It should also be highlighted that it is crucial to consider a country's broad legal issues when measuring decent work. Consequently, it strengthens my argument that legal intervention or policy reform cannot disregard the true reality of a country's labour market and socio-economic circumstances. To this end, decent work indicators play a vital role in determining to what degree a country is advocating or achieving decent work.

A list of decent work indicators was comprehensively discussed in Chapter 3.[2104] It was concluded that decent work indicators provided broad statistical and legal criteria to consider. In this regard, a distinction was drawn between statistical and legal indicators. An examination of the legal indicators revealed that South Africa was on the right trajectory insofar as advocating for decent work, in general, was concerned.[2105] However, as will be explained below, South Africa must increase its efforts to advocate for decent on-demand work in the modern-day gig economy.

On-demand work remains excluded from most decent work indicators due to the classification of labour in the South African context.[2106] The legal indicators,

2100 See para. 3.4.
2101 See para. 3.4.2.1.
2102 See para. 3.4.2.3. It is important to keep in mind that SDG 8 does not specifically refer to either an employee or a worker, but rather calls for "full and productive employment and decent work for all".
2103 See para. 3.4.3.
2104 See para. 3.4.3.
2105 See para. 3.9.
2106 See para. 3.5.

nevertheless, provide a suitable theoretical framework from which minimum decent work indicators can be identified. Considering the list of 11 decent work indicators discussed in Chapter 2, South Africa's compliance with achieving decent work, in general, is appraised briefly. It is clear from the discussions in Chapters 2 and 6 that South Africa has made progress in advocating for decent work, but this does not necessarily equate to advocating for decent work for on-demand workers. Based on the findings of the 2018 Decent Work Country Programme (DWCP) it can be argued that South Africa needs to narrow down its priorities to a few focus areas.[2107] These include promoting more and better jobs, broadening social protection coverage, and promoting strong and representative employers' and workers' organisations.[2108] It should be noted that the current decent work development plan covers the period of 2018 to 2023. Keeping this in mind, and against the backdrop of the vulnerabilities discussed in Chapter 2, on-demand workers are still seen as independent contract workers and are thus excluded from much of the aforesaid progress. Moreover, the process of legal reform is laborious, during which time on-demand workers are left vulnerable. It is therefore crucial to consider solutions that can benefit them in the shortest possible time.

it has been found that the ILO's decent work indicators are "fiendishly difficult to implement'.[2109] It is thus necessary to consider other contributions aligned with the ILO decent work indicators. An analysis of Heeks' decent digital gig economy standards, the World Economic Forum's charter of principles for good platform work, and lastly the Fairwork gig work principles, shows that they prove a good fit for identifying minimum decent work indicators for South African on-demand work.[2110]

The following list sets out the findings relating to the contributions. Firstly, an analysis of Heeks' digital gig standards reveals that most ILO decent work indicators could be extended to platform work.[2111] On further inspection, the research has found that the

2107 See para. 3.4.2.2.
2108 See para. 3.4.2.2.
2109 See para. 3.6.1.
2110 See para. 3.6.
2111 See para. 3.6.2.

gig economy requires novel decent work indicators that are not currently provided for in the ILO's decent work indicators.[2112] This includes the provision of 'portable and shared' social security benefits and greater flexibility pertaining to collective bargaining. Heeks also proposes additional standards concerning data protection, privacy, and data security.[2113] Secondly, the WEF's charter of principles confirms that there is a need for enhanced principles relating to 'reasonable pay and fees', 'clear terms of conditions', and 'proper channels, processes or forums' for worker participation and representation. The WEF also indicates that there is a need for ongoing collaboration on data management in the gig economy.[2114] Thirdly, the Fairwork principles for fair gig work present a good referencing point to identify minimum decent indicators for on-demand work, considering that it distinguishes between basic indicators and advanced indicators.[2115]

An overview of the EU instruments advocating for decent on-demand work serves as a useful roadmap to not only provide a theoretical foundation for Chapter 4, but also to direct our domestic responses to the regulation of on-demand work in South Africa.[2116] More specifically, the EU discussion has focused on answering the research question of how EU policy approaches counter the decent work deficit experienced by on-demand workers. In this regard, the EU has made significant progress in regulating platform work in its member states. However, how the various EU member states regulate platform work remains to be seen, as it is not possible to provide an analysis of such in this thesis. Keeping in mind that the policy approaches suggested by the EU are not binding to South Africa, it is found that South Africa could learn a great deal from the way in which the social partners are consulted.[2117] It is therefore recommended that South Africa consider international policy approaches to determine what constitutes decent work in the broader gig economy.

2112 See para. 3.6.2.
2113 See para. 3.6.2.
2114 See para. 3.6.3.
2115 See para. 3.6.4.
2116 See paras. 3.7 and 3.7.1.
2117 See para. 3.7.2.5.1.

Uniform approaches and policy considerations to regulate platform work still need improvement. Moreover, from a practical point of view, it is not possible to provide a comprehensive review of all the decent work indicators.[2118] However, in the absence of a full set of decent work indicators, the study suggests that a limited list of minimum decent work indicators would greatly benefit on-demand workers.[2119] The selected list serves as a benchmark for identifying binding and non-binding practices that advocate for decent on-demand work. It has thus been used as a comparative component between Ireland, Australia and South Africa. With this in mind, three minimum decent on-demand indicators have emerged, namely decent worker classification, decent working conditions with reference to pay and working hours, and decent collective bargaining structures.[2120]

8.3.4 The classification of labour

This study set out to determine if the common law and the statutory classification of labour could be extended to on-demand workers for the purposes of achieving decent work. The comparison in Chapter 7 revealed that South Africa, Australia and Ireland's legal systems were deeply rooted in the common law. With regard to the common law notion of employment, the main findings can be summarised as follows: Firstly, all three jurisdictions follow a binary divide between the contract of service and the contract for service.[2121] Secondly, it is noted that the contractual relationship between the parties lies at the root of the common law employment relationship.[2122] Thirdly, the parties are bound by the conditions to which they have agreed. This creates fertile ground for exploiting vulnerable workers under the guise of contractual freedom and informed consent.[2123]

2118 See para. 3.6.5.
2119 See para. 3.6.5.
2120 See para. 3.6.5.
2121 See para. 7.3.1.1.
2122 See paras. 7.3.1.1, 7.3.1.2, and 7.3.1.3.
2123 See para. 7.3.1.

The multi-factor test is preferred in Australia.[2124] After a survey of several cases relating to the classification of on-demand workers in its jurisdiction, the status quo has been found to be that the contractual terms must be seen as the starting point for the application of the aforesaid test.[2125] This is particularly important if the parties concluded a comprehensive contract that sets out the parties' rights and obligations. Hence it appears that the Australian position favours an approach that is more in line with the common law position. The judicial and legal tests to establish the existence of an employment relationship have also experienced several developments over the years, mainly due to novel forms of work testing their limitations.[2126] A detailed timeline of each country's case law was discussed from which the following points emerged. The Irish jurisprudence determines that no single test is definitive and that the 'employment relationship' as a whole must be considered.[2127] This seems to correlate with the South African position, seeing that our courts must determine the true relationship between the parties, and that it is not based solely on the contractual terms to which the parties agreed.[2128]

The statutory classification of labour remains a barrier to advocating for decent on-demand work in all the comparative jurisdictions.[2129] As discussed in Chapter 7 of this study, the binary divide between an 'employee' and an 'independent contractor' excludes on-demand workers from enjoying the bulk of protections and rights that the labour framework provides. All three jurisdictions provide a comprehensive labour framework that advocates for decent work. However, most of the aforesaid rights are reserved for 'employees' rather than for 'workers'. It has nevertheless been found that specific legislation providing for minimum wages includes a broader definition of a 'worker' that could be extended to on-demand workers.[2130] It is recommended that the legislator consider extending minimum labour protections by broadening the legislative scope of the *BCEA* and *LRA* to categories of 'workers' in South Africa. The definition of a 'worker' in the *NMWA* could serve as a point of reference.

2124 See para. 7.3.1.2.
2125 See paras. 5.4.2 and 7.3.1.2.
2126 See paras. 5.4.1 and 5.4.2.
2127 See paras. 4.4.1 and 4.4.2.
2128 See para. 6.5.1.
2129 See para. 7.3.
2130 See in this regard the discussion on the *NMWA* in Chapter 6.

8.3.5 Overview of the best practices that advocate for decent on-demand work in Ireland and Australia

This research includes a comparative study of best practices for achieving decent on-demand work in Ireland and Australia. Best practices in foreign jurisdictions can play a vital part when advocating for decent work in the on-demand sector. Accordingly, Chapter 1 of the thesis motivates the reasons for choosing Ireland and Australia as comparable jurisdictions.[2131] In addition, Chapter 7 provides a detailed discussion of the best practices in Ireland and Australia. As explained in Chapter 3 and Chapter 7, this study identifies best practices for advocating for decent on-demand work relating to decent classification, decent working conditions with reference to pay and working hours, and decent multi-stakeholder engagement.[2132] The key findings of the identified best practices follow below.

8.3.5.1 Best practices in Ireland

Ireland's labour framework is deeply rooted in the common law, and distinguishes between a contract of service and a contract for service. Irish statutes use the contract of employment as the basis for defining an 'employee'.[2133] For example, the *Unfair Dismissals Act* defines an 'employee' as an 'individual who has entered into or works under a *contract of employment*'.[2134] This definitional requirement is repeated in other legislation, such as the *National Minimum Wage Act*, *Minimum Notice and Terms of Employment Act, Parental Leave Act, Organisation of Working Time Act* and the *Maternity Protection Acts,* to name a few.[2135] It should be noted, however, that the portions of the aforesaid statutes' definition of an employee differs according to the aim of each act.[2136] Moreover, the absence of specific forms of non-standard work in their labour statutes limits the scope to only those fortunate enough to be deemed

2131 See paras. 1.2.5 and 1.5.
2132 See para. 3.6.5.
2133 See paras. 4.4.1 and 7.3.1.1.
2134 See para. 4.4.1.
2135 See paras. 4.4.1 and 4.4.2.
2136 See para. 4.4.1.

employees. It furthermore excludes any form of self-employed workers who are dependent on the income of a single employer.[2137] Ireland's binary approach to the classification of labour remains a major barrier to achieving decent on-demand work in the Republic, and thus requires legal reform.[2138]

Ireland has relied on several legal tests to determine the correct employment status of persons who are either employees or independent contractors. This includes the control test,[2139] the integration test,[2140] the economic reality test,[2141] and the mutuality of obligation test.[2142] It must be repeated that none of the aforesaid tests is determinative on their own. Consideration of all the tests is required when deciding on the employment status of a person.[2143] To ease this task, the Ministry for Social Protection published the *CPDES*. In addition to a list of factors to distinguish employees from the self-employed, the *CPDES* acknowledges new forms of work, such as 'gig work'. Unfortunately, the *CPDES* does not explain how on-demand workers can be classified. It merely states that 'the binary approach continues to apply in Ireland'.[2144] It is recommended that South Africa give recognition to on-demand work by either amending its existing *Code of Good Practice: Who is an employee*?, or to promulgate a new code of good practice that regulates the on-demand sector. A summary of the *Fairwork Platform Code* was discussed in Chapter 6 of this study and serves as a point of reference.

The discussion on best practices emanating from binding and non-binding measures that advocate for decent work in Ireland presents various alternative ways to advocate for decent on-demand work in the country.[2145]

2137 See para. 4.4.1.
2138 In this context, legal reform refers to the process of examining existing laws and advocating and implementing changes in a legal system.
2139 See para. 4.4.2.1.
2140 See para. 4.4.2.2.
2141 See para. 4.4.2.3.
2142 See para. 4.4.2.4.
2143 See para. 4.6.1.
2144 See para. 4.6.1.
2145 See Chapter 4, paras. 4.5 and 4.6.

As for binding measures, Irish lawmakers have enacted specific legislation that affect on-demand workers' working hours, wages, and multi-stakeholder engagement structures.[2146] As discussed in Chapter 4, the *EMPA* provides for a written copy of an employee's conditions of employment, the prohibition of zero-hours contracts, and the inclusion of bands of weekly working hours.[2147] The corresponding rights thus establish minimum working hours according to the prescribed bands of weekly working hours, which in turn results in a fixed minimum income per week.[2148] Chapter 4 has also found that decent multi-stakeholder engagement could be achieved by means of the competition law framework and statutes.[2149] The *CAA*'s definition and criteria for trade union involvement to represent 'fully dependent self-employed' individuals could be extended to cover on-demand workers as well.[2150] It is recommended that South Africa investigate to what degree its competition laws apply to the broader gig economy and platform companies. The non-binding measures in Ireland are discussed in the section that follows.

The *CPDES* is a step forward in the classification of on-demand workers in Ireland. Nonetheless, it must be kept in mind that the application of the *CPDES* set of factors is still subject to judicial interpretation.[2151] The discussions in Chapter 4 and chapter 7 show that the *CPDES* and the *Platform Workers Bill* are practical examples of how on-demand workers could get access to certain minimum decent work entitlements, such as decent pay and decent working hours.[2152]

In addition to the *CPDES*, the *Platform Workers Bill* brings the Irish position on par with South Africa to the extent that it relates to the presumption of employment.[2153] A significant contribution of the *Platform Workers Bill* is that it brings on-demand work into the realm of the employment relationship framework.[2154] South Africa stands to

2146 See para. 4.5
2147 See paras. 4.5.1.1 and 4.5.1.2.
2148 See para. 4.5.1.2.
2149 See para. 4.5.2.
2150 See para. 4.5.2.
2151 See paras. 4.6 and 4.6.1.
2152 See paras. 4.6.1 and 7.6.1.
2153 See para. 4.6.2.
2154 See para. 4.6.2.

learn from the way in which Ireland eliminates misconceptions in respect of the employment status of on-demand workers. This also serves as a guideline for applying the criteria for the South African presumption of employment.

8.3.5.2 Best practices from Australia

Australia's main sources of labour law are deeply rooted in the common law. As discussed in Chapter 5, the Australian *FWA* confers national rights and obligations to 'employees' and 'employers'. Comparable to the South African *BCEA*, the *FWA* makes provision for leave entitlements, minimum notice periods in relation to termination of employment, and entitlement to redundancy pay for an employee upon termination of employment.[2155]

Chapter 5 also confirms that the contract of employment lies at the heart of the employment relationship.[2156] Likewise, it is found that the contractual employment relationship is governed by the common law principles that apply to the formation of the contract.[2157] Furthermore, the common law definition of a contract of service is described as one of control and dependency.[2158] This aspect will become increasingly important for the findings in respect of the multi-*indicia* test discussed below. However, as seen with new forms of work blurring the lines between the common law contract of service and a contract for service, it has been necessary for the Australian courts to consider the true relationship as a practical matter. Accordingly, Bromberg J poses two questions: Is the person performing the work an entrepreneur who operates a business? In addition, is the person performing the work a representative of that business? If the answer is yes, then the person is likely to be an independent contractor.[2159]

2155 Para 5.4.
2156 See paras. 5.4 and 7.3.1.2.
2157 See para. 5.4.
2158 See para. 5.4.1.
2159 See para. 5.4.1.

Parties are thus free to choose the legal relationship that fits their circumstances if the agreement adheres to the contractual principles and any other regulatory obligation.[2160] It is important to keep this finding in mind when comparing the terms of service between an on-demand worker and a platform company. The reasons are summarised as follows: The on-demand work relationship is based on the idea of flexibility. This implies that an on-demand worker has the flexibility to work for more than one employer at any time by way of multi-apping.[2161] Consequently, it could be argued that the bulk of the statutory obligations should not rest on a single platform 'employer'.[2162] In this regard, the opposite applies during the course of the on-demand work relationship, seeing that the bulk of the power rests on the platform. For example, an on-demand worker has reduced power to engage with the platform on matters relating to the payment of fees, work allocation, and the allowance of multi-apping.[2163]

From a statutory perspective, the employment relationship remains vague if compared to the South African classification of labour. In Australia, the *FWA* defines an 'employee' within its 'ordinary meaning'. This statutory definition presumes the import of the common law definition into an applicable statute.[2164] The *FWA* also distinguishes long-term casual employees from permanent employees.[2165]

Australia has also enacted the *ICA* to ensure the independent contractor relationship. The *ICA* does not provide a detailed statutory definition of an independent contractor. Instead, it defines the term as 'not limited to a natural person'.[2166] In the absence of a clear definition, the meaning of an independent contractor is left to the common law notion of an employment relationship and the application of the multi-factor test.

2160 For example, tax obligations.
2161 See para. 5.4.
2162 See para. 5.4.
2163 See para. 5.4.
2164 See para. 5.4.1.
2165 See para. 5.4.1.
2166 See paras. 5.4.1 and 7.4.2.

The multi-factor test entails an examination of several factors when determining the 'totality of the relationship'.[2167] The factors are detailed in Chapter 5. Of note here is that the Australian courts must be 'impressionistic' and 'intuitive' when considering the factors.[2168] The part below summarises how the Australian courts' approach has developed over the past few years. In 2017, the FWC affirmed that an Uber driver was an independent contractor after considering the multi-factor test. The FWC held that the applicant exercised control over his working hours, supplied his own tools and did not wear a uniform while performing tasks.[2169] This reasoning was followed in 2018 when the FWC again had to decide if an Uber driver was an employee or an independent contractor. The FWC held that the assessment of the multi-factor test was not a 'mechanical exercise' and that not all factors are of equal weight. That said, the FWC found that the Uber driver was not an employee of the platform company. This decision was followed by another case where the FWC reached the opposite finding that a driver of Foodora was an employee of the platform company.

In *Joshua Klooger v Foodora Australia Pty Ltd,* the FWC found that Foodora endorsed the substitution scheme followed by the applicant and therefore could not rely on the substitution scheme as an acceptable basis to classify the relationship as that of an independent contractor relationship.[2170] Moving on to the FWC, they considered the complete picture of the on-demand relationship 2021 in *Franco v Deliveroo Australia Pty Ltd.*[2171] The FWC held that Deliveroo's service agreement was nothing other than a 'contract of adhesion' and that the Deliveroo driver had little to no negotiation power with regard to the terms of the agreement.[2172]

Recently in 2022, the FWC followed the approach laid down in two cases relating to the independent contract relationship. It was noted that the cases did not deal with platform work specifically. As was discussed in Chapter 5, the ratio was applied in the

2167 See para. 5.4.2.
2168 See para. 5.4.2.
2169 See para. 5.4.2. See the case discussion of *Kaseris v Rasier Pacific* VOF 2017 FWC 6610.
2170 See para. 5.4.2. See the *Joshua Klooger v Foodora Australia Pty Ltd* U2018/2625 case discussion.
2171 *Franco v Deliveroo Australia Pty Ltd* [2021] FWC 2818.
2172 See para. 5.4.2.

Nawaz v Rasier Pacific Pty Ltd t/a Uber BV case.[2173] Reverting to the previous position, the FWC held that the 'totality of the relationship' had to be considered with reference to the indicia related to the express terms and the comprehensive agreement between the parties. An overview of the relevant principles that apply was presented in Chapter 5. In short, the FWC confirmed that unless the contract was a sham or legally ineffective, the comprehensive contract remained the primary source of the parties' rights and duties.[2174]

Interestingly, the FWC argued that the conduct of the parties after entering the agreement was not relevant. In addition, the degree of control exercisable by the deemed employer and the question of whether a person engaged in work for another is an employee or an independent contractor, as per their written contract, is particularly important.[2175] This, in my opinion, will not be a valid argument in the South African context, considering the emphasis on the true relationship between the parties.[2176] Nevertheless, it is recommended that South Africa consider the FWC's interpretation of its multi-factor test's factors when interpreting and applying its own dominant impression test or the criteria of the presumption of employment provision. A summary of the binding and non-binding measures follows below.

A discussion on the binding measures advocating for decent on-demand work was provided in Chapters 5 and 7 and revealed several significant findings. The *ICA* and the *CCA* prescribe provisions that could be extended to on-demand workers who work under harsh and unfair contracts.[2177] Some shortcomings related to the *ICA* were noted earlier in this section. In addition, the operation of the ACCC can establish an alternative to collective bargaining through multiparty engagement. This would mean that on-demand workers have access to a process like collective bargaining, but outside the scope of labour law. Instead, it would be done in terms of the competition

2173 See para. 5.4.2. See the *Nawaz v Rasier Pacific Pty Ltd t/a Uber BV* [2022] FWC 1189 case discussion.
2174 See para. 7.3.1.2.
2175 See paras. 5.4.2 and 7.3.1.2.
2176 See para 6.5.1.
2177 See paras. 5.5, 5.5.1, 5.5.2 and 5.5.3.

and consumer framework.[2178] It is submitted that South Africa stands to gain from exploring alternative forums, such as to be discussed below, that advocate for multi-stakeholder engagement inclusive of on-demand workers.[2179]

Despite some shortcomings in the *ICA* and the *CCA*, the operation of the ACCC is a viable alternative for 'collective bargaining' type multiparty engagement.[2180] It must be repeated that in the absence of a labour law collective bargaining structure, the ACCC provides a platform for multiparties to engage in multi-stakeholder engagement. There are, however, limitations that must be noted. The *CCA* prohibits collective bargaining types of conduct that could amount to price fixing, boycotts, and anti-competitive information sharing.[2181] In principle, it means that when trade unions are involved in reaching agreements with labour engagers outside the scope of labour law, the ACCC could declare their conduct as cartel behaviour.[2182] South Africa stands to learn from this approach since it is unclear to what degree the competition and consumer laws could apply to the gig economy and on-demand work. Further research in this regard is needed.

Binding measures do not have to come from the national or federal state only. Recognition must be given to the voluntary actions taken by platform companies and trade unions. Chapter 5 provides a discussion of three such instances.[2183] TWU together with Doordash established a set of principles that advocate for appropriate rights and entitlements, transparency, a forum for engagement, access to dispute resolution processes, and skills development standards.[2184] It is important to note that the aforesaid principles only applied to food-delivery workers. Uber followed in their footsteps and signed a set of principles that covered both food-delivery workers and ridesharing workers. In summary, the agreement advocates for minimum and transparent enforceable earnings and conditions for on-demand workers, effective and

2178 See paras. 5.5.2 and 7.4.2.
2179 See para. 6.6. See the discussion of *Mokhutswane v Uber South Africa (Pty) Ltd.*
2180 See para. 7.5.2.
2181 See para. 5.5.2.
2182 See para. 5.5.2.
2183 See para. 5.6.
2184 See para. 5.6.1.

competent dispute resolution structures, a forum for workers to participate in collective bargaining structures, and the proper enforcement of standards.[2185] It is submitted that a phased constructive negotiation process could form the basis to advocate for decent work conditions, inclusive of decent pay and working hours, decent classification of on-demand workers, and decent multi-stakeholder engagement. Furthermore, it is recommended that such a process consider the best alternatives to the negotiated agreement to identify and discuss possible issues that may occur in the future.

Different from the two examples explained above, platform companies can advocate for decent on-demand work by reviewing their own business model. For example, Menulog became one of the first platforms to take progressive steps to employ its on-demand workforce.[2186] This, however, comes with an additional financial burden to the company. This could result in fewer workers being employed, or lead to a hike in fees.[2187] From the above, it is clear that Australia has made significant progress with research and multi-stakeholder discussions in respect of conceptualising the gig economy, and proposals for regulating on-demand work in its federal states.

Seeing that the Australian Government aims to extend the powers of the FWC in the near future, the voluntary agreements serve as an alternative and appropriate approach which could lead to better outcomes as opposed to ongoing litigation regarding the reclassification of on-demand workers as employees. It must thus be acknowledged as a comparative best practice for South Africa. It is therefore recommended that platform companies operational in South Africa consider the proactive steps taken by Doordash, Menulog, and Uber to work together with the TWU to advocate for minimum decent protections in Australia.

Several federal state reports also serve as a non-binding comparative for this study.[2188] The following best practices emanate from the findings and

2185 See para. 5.6.2.
2186 See para. 5.6.3.
2187 See para. 5.6.3.
2188 See paras. 5.7.1 and 7.6.2.

recommendations of the SCFWW.[2189] An overview of the reports and recommendations reveals that the majority of the Federal States are in favour of a Commonwealth-led approach to regulating on-demand work.[2190] In addition, they call for extending the scope of the *FWA* and the establishment of an independent tribunal to resolve disputes in the on-demand sector.[2191]

Similar to Australia and Ireland, South Africa distinguishes between a contract of service and a contract for service. Chapter 6 revealed that fairness was not an inherent requirement of the common law contract of service.[2192] Although employers and employees were bound by the contract that they agree to, Wallis noted that process in itself was 'inherently unbalanced' and favoured the employer.[2193] This has led to the exploitation of unskilled workers in search of a job in the past, which is unfortunately the position in which many South African find themselves in current times.

8.3.5.3 Best practices in South Africa

South Africa has made substantial progress in respect of advocating for general decent work in its jurisdiction. Several social, economic, and labour market-related issues are identified in Chapters 2 and 6.[2194] From a regulatory perspective, South Africa has broadened the scope of its labour framework to extend labour protection and entitlements to categories of 'employees', including non-standard forms of work, and workers. However, it is found that labour statutes cannot be detached from the common law principles that inform the employment relationship.[2195] In addition, it is also clear from the definition of an employee that the labour statutes continue to distinguish traditional permanent employment from an independent contractor.[2196] The discussion in Chapter 6 demonstrates that labour statutes, such as the *LRA* and the

2189 See para. 5.7.1.
2190 See para. 7.6.2.
2191 See para. 5.7.1.
2192 See para. 6.5.1.
2193 See para. 6.5.1.
2194 See paras. 2.4.5.3.2 and 6.4.
2195 See para. 6.5.1.
2196 See para. 6.5.2.2.

BCEA, must comply with their constitutional interpretation. In this case, it would mean that the employment relationship could be extended to a contractual relationship based on contracts that are unlawful. In this regard, the findings of the *Kylie* and *Discovery Health* cases have been noted.[2197]

The limitations of the *LRA's* definition of an employee are discussed in Chapters 6 and 7. It is clear from the definition that independent contractors remain excluded from the application of the *LRA*.[2198] The same applies to the provisions of the *BCEA*. Based on this exclusion and as mentioned before, on-demand workers remain excluded due to their classification as independent contractors.[2199] The classification of Uber drivers is discussed in detail in Chapter 6. The analysis of the two judgements has shown that on-demand work in the South African context is undecided.[2200] However, against the backdrop of the above discussion relating to the common law, the position of Uber drivers would have been clear, seeing that courts would have relied on the contractual terms to which the parties have agreed.[2201] Currently, with the infusion of the constitutional principle of fairness into the labour statutes, this argument will not stand. The reasons for this statement are discussed next.

First, the presumption of employment must be considered.[2202] In terms of the presumption, *regardless of the employment contract,*[2203] a person is deemed an employee of the employer if one or more of the listed grounds are met.[2204] An overview of the listed grounds is provided in Chapter 6.[2205] However, in the absence of a juridical interpretation of the presumption of employment and how it applies to on-demand work, it is evident that on-demand workers fall outside the scope of national legislation, at least for the foreseeable future.

2197 See paras. 6.3 and 6.5.2.5.
2198 See paras. 6.5.2, 6.5.2.2 and 7.4.3.
2199 See paras. 6.5.2.2 and 7.4.3.
2200 See para. 6.6.
2201 See para. 6.6.
2202 See para. 6.5.2.5.
2203 See para. 6.5.2.5.
2204 See para. 6.5.2.5.
2205 See para. 6.5.2.5.

An examination of the binding and non-binding measures that advocate for decent on-demand work shows that South Africa has other means to extend minimum protections to on-demand workers through the application of the *NMWA*.[2206] The definition of a 'worker' in terms of the *NMWA* can theoretically be extended to on-demand workers who earn below the threshold amount of R224 080.30 per year. However, calculating the true earnings of on-demand workers could pose a significant problem, considering the income derived from working on several platform companies simultaneously.

Establishing a sectoral determination for the on-demand sector is also a binding measure to advocate for decent on-demand work. A sectoral determination can, for example, regulate specific rights and protections tailor-made for the on-demand sector. It can, amongst others, regulate working conditions related to pay, working hours and the classification of on-demand workers.[2207] However, this may or may not be feasible in the long term if one considers a formal on-demand sector inclusive of full rights and protections.

Various non-binding measures in South Africa serve as guidelines for achieving decent on-demand work. The following point has emerged from the discussions in Chapters 6 and 7. First, *ESAB* and the *NLTAB* provide a basis for regulating the modern-day gig economy.[2208] Although these bills do not specifically define on-demand work, they aid in conceptualising the gig economy in South Africa. Given the proposal to include on-demand work under the transport sector, it is recommended that the transport unions in South Africa take active steps to advocate for decent on-demand work.[2209] It is suggested that the aforesaid active steps can take place as a means to advocate for decent on-demand work in an immediate sense and as part of a long-term strategy. It is also suggested that the cooperation between TWU, Uber and Doordash be considered as a practical approach to establish minimum standards

2206 See paras. 6.7.1 and 7.4.3.
2207 See paras. 6.7.2 and 7.4.3.
2208 See para. 6.8.
2209 See para. 6.8.2.

outside the scope of labour law's collective bargaining. It bears repeating that the commitment of the immediate parties to the on-demand work relationship, in other words the platform company and the on-demand worker, is crucial.[2210]

The Platform Code is the most comprehensive guideline for advocating for decent on-demand work, since it explains the ideal protections for the on-demand sector.[2211] However, although the Fairwork Group's Platform Code is commendable, further refinement is recommended for regulating minimum rights and protections. NPOs and cooperatives could advocate for decent multi-stakeholder engagement for on-demand workers. This is particularly important because the NPO could represent a group of on-demand workers when entering into an agreement with the platform company.[2212]

As is evident from the findings discussed above, on-demand workers are truly in a 'twilight zone' with minimal labour protections at their disposal. Existing labour laws still reflect the rights and protections afforded to traditional forms of work and do not sufficiently advocate for on-demand work in the modern-day context of the gig economy. Given the severity of the decent work deficits in the on-demand sector, it would not be the best solution in the interim to rush new legal reform and its enforcement without taking proper steps to ensure that it is suitable for a novel emerging on-demand sector. It is thus also apparent that there is a need for South Africa to consider solutions that provide immediate results to the extent that it relates to measures advocating for minimum decent on-demand work.

8.4 RECOMMENDATIONS

It must be noted that advocating for decent on-demand work is a shared burden, but South Africa, as a democratic country, cannot act carelessly with vulnerable on-

2210 It is important to remember that in an employment context and if the legal reform takes place on a national scale the multistakeholder engagement process extends to Nedlac and the social partners such as the government, trade unions and employer organisations. See para. 1.8.8.
2211 See para. 6.8.3.
2212 See para. 6.9.

demand workers' livelihoods. Notwithstanding the comprehensive classification of labour framework, which includes common law requirements, judicial tests, statutory definitions, and the presumption of employment provision in the *LRA* and the *BCEA*, it has yet to be determined how on-demand work fits into the traditional employment relationship. In the meantime, thousands of on-demand workers are left in the 'twilight zone' of legal protection. The following recommendations are divided into two categories, namely long-term approach and those that require a short-term solution.

8.4.1 Advocating for decent on-demand work in South Africa: A long-term approach

8.4.1.1 Conceptualising the modern-day gig economy

There is a pressing need for South Africa, together with national stakeholders, to conceptualise the modern-day gig economy and on-demand work to develop an informed understanding of the concepts. It is recommended that South Africa should play a leading role on the African continent insofar as the modern-day gig economy is concerned. The first step would be to actively recognise the changes in the world of work that include the ability to monitor the size and projected growth of the gig economy, engage with platform companies and on-demand workers, and above all establish suitable regulatory measures to advocate for decent on-demand work.

8.4.1.2 The ILO decent work indicators

The ILO has made significant progress with research on measuring decent work, conceptualising the gig economy, and identifying decent work deficits experienced in the on-demand sector. The ILO's role to measure decent work using decent work indicators is also the foundation on which different scholars have established gig economy standards and principles. It is submitted that South Africa is on the right trajectory insofar as advocating for decent work, in general, is concerned. However, it

is recommended that South Africa should consider decent work deficit in the on-demand sector. It is also recommended that South Africa prioritise its interventions by establishing minimum decent work standards for the on-demand sector in respect of minimum pay, hours of work, and multi-stakeholder engagement. Failure to do so will result in growing inequality. A policy measure that is proposed by platform companies must have a clear definition of on-demand work. It is therefore recommended that platform companies work with government and other stakeholders, such as Nedlac, trade unions and employers' organisations, to harmonise their understanding of the on-demand sector and the terminology associated with this type of work.

8.4.1.3 Extending the common law and statutory law for the decent classification of on-demand workers

The common law notion of employment must be developed in such a way that it advocates for decent work for all, regardless of one's employment classification. South Africa must expand its traditional employment relationship and categories of non-standard work to extend it to new forms of work, such as on-demand work. A greater understanding is needed of the common law factors for the dominant impression test, drawing on the experience of the research conducted by the ILO and the EU, and the judicial interpretation of the multi-factor test in Australia. It is recommended that a 'worker' category could be established to broaden the scope of certain minimum labour protections afforded by the *BCEA* and the *NMWA*, such as decent pay and decent working hours, to the on-demand sector.

8.4.1.4 Investigating the possibility of a sectoral determination

The on-demand sector in South Africa requires a framework that advocates for decent on-demand work. A sectoral determination that advocates for decent working conditions, stakeholder engagement and the classification of on-demand workers is advisable. It is recommended that such a sectoral determination should include the

following aspects: First, it must provide a legal definition of on-demand work that considers the different types of platform work. It is important that the aforesaid definition is broad enough to include the various categories of on-demand work. To avoid misclassification practices, it is also recommended that national legislation be amended for stricter adherence and monitoring of regulations.

8.4.2 Advocating for decent on-demand work in South Africa: A short-term approach

8.4.2.1 Renewed commitment from stakeholders

On-demand work is growing, and its business model is constantly adapting to the current needs of its clients and the on-demand workers. It is recommended that platform companies commit themselves to sharing reliable statistics on the on-demand sector in specific regions. This will in turn assist the government in monitoring the on-demand sector.

Platform companies must ensure that the terms of their service agreements correspond with the actual work that is performed. More importantly, the terms of the service agreement must be clear and explained in plain language so that is understood by on-demand workers using their application. This includes key information relating to the on-demand workers' classification, earning capacity, and the calculation of hours worked. It is recommended that platform companies intensify their information sharing practices to inform on-demand workers of their terms and conditions in a clear and understandable way.

8.4.2.2 A proposed multi-stakeholder engagement process

The current bargaining power between a platform company and an on-demand worker is skewed and favours the platform company. Consequently, on-demand workers need a forum for multi-stakeholder engagement to negotiate and interact with the platform company on an equal footing. It is recommended that platform companies establish a clear policy that advocates for a multi-party engagement process where on-demand workers or their representatives can negotiate changes to their service agreements and fee structures. A workable policy on multi-stakeholder engagement can strike a balance between the on-demand workers' expectations and the platform companies' demands, similar to a collective bargaining process provided for by the LRA. It is furthermore recommended that a solution from a platform company's side is more beneficial, seeing that its implementation would enable faster realisation of minimum decent work rights.

The regulation of the broader gig economy and on-demand work is not an exclusive role of the government, considering that all stakeholders have to take responsibility in the process. Based on this reasoning, a multi-stakeholder engagement process can strengthen the ongoing relationship between the on-demand worker and the platform company by providing them with a forum to negotiate their terms of service and to raise issues that they are experiencing. Although attempts to address and resolve the issues experienced by on-demand workers are commendable, it is submitted that trade unions can play a vital role in a multi-stakeholder engagement process in South Africa. This aspect is particularly important, given the increased efforts to regulate e-hailing services under the transport industry.

It has also been found that a legal response from the legislator or decisions from the judiciary could take a considerable amount of time. It is thus recommended that a phased multi-party stakeholder negotiation approach be considered. In terms of this method the platform company, the on-demand workers, and a trade union adopt an approach to constructively negotiate and agree on a statement of principles and future

commitments for the on-demand industry in South Africa. A template of such a document is recommended in Annexure A. Keeping in mind the limitation of this study, the agreement's standards focus on decent classification practices, decent working hours, decent pay, and decent multi-stakeholder engagement.

8.4.2.3 Decent working hours

Introducing an hours of work policy prescribing maximum hours of work and work shift measures could align platform companies' terms of service with national legislation that advocate for decent working hours, which in the case of South Africa will be the *BCEA*. It is recommended that the policy approach make provision for shift scheduling via mobile applications. In addition, platform companies must increase their capacity to guarantee a minimum number of tasks within a geographical area. This must include mandatory breaks after a set number of hours active on the mobile application. Based on the minimum working hours prescribed by the *BCEA*, the following is recommended:

- 'Working hours' must include actual time spent on the application. This includes active time seeking and performing tasks.
- The platform company must not permit an on-demand worker to work for more than 12 hours during a 24-hours cycle.
- An on-demand driver must take a mandatory break of 12 hours after being active on the platform application for 12 hours.

8.4.2.4 Decent pay

Platform companies must ensure that the fee structure is aligned with that of the *NMWA*, which is R23.19 for each ordinary hour worked. It is recommended that a platform company consider its approach without drastically increasing its cost structure. This policy approach must also advocate for a payment structure that maintains a decent standard of living that is socially and economically viable in South Africa. It would be ideal for such a policy approach to prescribe a set minimum rate of pay per hour if the platform company is unable to assign tasks to on-demand workers

during their shift period. This flat rate must, however, be benchmarked according to the demand during specific hours of the day and the number of on-demand workers active during that time. The aforesaid can also form part of a financial incentive for long-term on-demand workers. For example, the platform company can increase the minimum rate of pay for on-demand workers who have achieved an overall good rating over a specific period of time.

8.5 FUTURE RESEARCH AREAS

The on-demand sector is expanding, and so are its consequences on the legal framework, the economy, and on communities in South Africa. From a broader perspective, the extent of the gig economy and the forms of platform work are unnerving, and aspects in this study necessitate further research. An overview of these aspects is provided below.

Firstly, the growth and decent work deficits in the crowdwork sector require research. Up-to-date information on the exact size of crowdwork in South Africa is unknown. The same applies to a legal consideration of the ILO decent work indicators in this sector. It may be useful to repeat the objectives of this study and apply them to crowdwork. For example, the issues that on-demand workers experience could also apply to crowdwork if one considers their classification practices, decent work conditions, and the difficulties they face to participate in multi-stakeholder engagement opportunities, given the absence of a physical workplace.

Secondly, the interplay between labour law and other fields of law such as consumer law and competition law must be researched further. In doing so, the research focus can be shifted to the commercial aspects related to the service agreements that platform businesses establish. To this extent an alternative structure for setting minimum standards and improved multi-stakeholder engagement can be explored further.

Thirdly, a deeper examination of the decent work indicators for on-demand work can be researched as a separate research concept. This includes an appraisal of work/life balance in the on-demand sector, anti-discrimination practices and algorithmic discrimination in the on-demand sector, occupational health and safety measures for on-demand work, and lastly, extending the coverage of social protection measures for the on-demand sector.

Fourthly, the practicalities of a multi-stakeholder engagement process and the extent to which it can assist in bringing about standards for a formalised on-demand sector requires additional research. It may be advantageous to examine the phases of a constructive multi-stakeholder engagement process, the use of negotiation as a preferred method and the enforceability of the agreed terms.

Finally, further research may have to be done to understand how South Africa's approach to regulate the gig economy and on-demand work compares with other African countries. An examination of the best practice in other African jurisdictions could advance our own understanding of how on-demand work is experienced in practice in an African context.

8.6 CLOSING COMMENTS

Between several economic, social, and political issues, the labour market in South Africa is experiencing major disruptions. In addition, the use of mobile technology and online platforms is changing the very nature of how we communicate, how we perform work, and how we conduct our day-to-day tasks. On-demand work can provide a platform to access work opportunities. However, as seen in this study, it also brings with it various legal challenges when clashing with traditional forms of work. One of these legal issues is the classification of the on-demand workforce.

On-demand workers continue to be classified as independent contractors. As such they are excluded from most labour protections, which leaves them vulnerable and susceptible to exploitation. While the misclassification issue is much broader that the on-demand sector, it is predominantly pressing in the current modern-day gig economy. It is therefore understandable that labour law is often criticised as not fit for purpose to protect vulnerable workers, including new forms of work that do not fit the mould of traditional formal employment.

The ILO advocates for a human-centred future of work for all. In the South African context this would necessitate a balancing of various socio-economic ailments such as poverty, inequality, and unemployment against the technological advancements that require a rapid uptake of new skills, and that challenge the boundaries of traditional work. On-demand work, for all purposes, is merely one aspect of a much bigger legal conundrum. For some, on-demand work is something that we see and interact with every day. In essence, it has become a regular part of our everyday life.

The overall finding of this thesis is that the challenges faced by on-demand workers in their very nature and intensity differ greatly from traditional employees. South Africa is only starting to investigate the impact of the gig economy and, more specifically, platform facilitated work. I argue that the common law contract of employment can be developed to include on-demand work. This is particularly relevant if considering the judicial approaches adopted in Ireland and Australia. That being said, it is predicted that the South African courts will take a more constitutional approach to consider if on-demand workers are indeed ‘employees’. However, it has been found that merely extending existing labour provisions to the emerging on-demand sector poses several problems, given the unique characteristics of on-demand work. If acceptable solutions cannot be found within the existing labour framework, it becomes necessary to consider alternatives outside the scope of labour law. The best binding and non-binding practices in Ireland and Australia that advocate for decent on-demand work demonstrate that the binary classification of labour remains the gateway to achieving full decent work. Furthermore, extending legal entitlements to working hours and pay that are initially developed to fit traditional permanent employment is not feasible.

In conclusion, it is argued that an approach to extend minimum decent work rights to on-demand workers must reflect their actual needs. In determining the minimum threshold for decent work, this study used the contractual agreement between the parties as a starting point to advocate for decent on-demand work. It was also submitted that providing a set of principles that advocate for decent pay, decent working hours, and decent multi-stakeholder engagement could be seen as a step forward in achieving full decent work in the on-demand sector. However, in the absence of a clear regulatory framework for on-demand work, it is up to the platform company and on-demand workers or their representatives to find realistic solutions. The approach they choose should be seen as the first step to bring about regulatory change in the industry. As Schwab stated, "… *shape a future that works for all by putting people first, empowering them and constantly reminding ourselves that all of these technologies are first and foremost tools made by people for people*."[2213]

2213 Schwab 2016:72.

Annexure A: Draft statement of principles in respect of minimum decent work principles in the on-demand sector

The following draft statement of principles is based on the Platform Code and the agreement between Australia's TWU, Uber and Doordash, respectively.[2214] Its principles are furthermore derived from the research done by the Fairwork organisation,[2215] the WEF,[2216] and the legal writings of Du Toit[2217] and Heeks.[2218]

STATEMENT OF PRINCIPLES AND FUTURE COMMITMENTS IN THE SOUTH AFRICAN ON-DEMAND SECTOR

Background

Changes in technology in the transport industry have brought about new innovative modes of transport and delivery. (*Insert trade union name*) and (*insert platform company name*) recognise that on-demand work is developing at a rate faster than expected and can create opportunities to counter unemployment. However, although platform companies continue to be an impetus for creating economic opportunity, (*insert trade union name*) and (*insert platform company name*) commit to measures aimed at advocating for decent on-demand work in South Africa.

(*Insert trade union name*) and (*insert platform company name*) acknowledge that on-demand workers are not classified as 'employees' of (*insert platform company name*) and as such are left with few enforceable standards relating to working conditions in relation to pay and working hours, and multi-stakeholder engagement opportunities. Subsequently, (*insert trade union name*) and (*insert platform company name*) support the aspiration that reform is required to establish a set of principles that provide clarity

2214 See paras. 5.6.1 and 5.6.2.
2215 See para. 2.6.4.
2216 See para. 3.6.3.
2217 See para.6.8.3
2218 See para.3.6.2.

and legal certainty for on-demand workers in the transportation industry that are not 'employees'.

The (*insert trade union name*) and (*insert platform company name*) actively advocate for regulatory certainty for platform companies and the provision of minimum decent conditions of work for on-demand workers who are not 'employees' of (*insert platform company name*), while preserving the flexibility inherent to on-demand work.

The principles set out below aim to identify key principles that serve as a basis for decent on-demand work. All stakeholders, including (*insert trade union name*), (*insert platform company name*), government, and on-demand workers themselves, have a role to play in advocating for decent on-demand work. Continued multi-stakeholder engagement is required to successfully entrench these principles across the gig economy.

Principles for decent on-demand work

(*Insert trade union name*) and (*insert platform company name*) affirm the following principles and commit to use their best efforts to apply them within the remit of their responsibilities, available resources, and within the application of any applicable legislation.

(*Insert trade union name*) and (*insert platform company name*) commit to advocating for the following principles:

- Appropriate classification of on-demand workers under the South African law and provision of suitable regulations for these forms of work and services.
- Terms and conditions of service must be transparent, clearly stated in plain language, and provided to on-demand workers in an accessible form.
- Minimum standards for decent pay must be established considering the nature of on-demand work.
- On-demand workers should have full transparency regarding what they will earn before choosing to accept a task.

- Minimum pay must be calculated in accordance with the national minimum wage. On-demand workers should therefore earn at least a minimum wage proportional to the time spent actively working on the application.
- Conditions regarding minimum hours of work must be considered by all stakeholders.
- On-demand workers should be able to decide to accept or decline certain fixed hours of work during certain times.
- The right of on-demand workers to join and be represented by a relevant registered organisation is respected.
- Platform companies should provide processes, channels, or forums as appropriate for on-demand workers to express their collective voice.
- Appropriate enforcement mechanisms should be established to ensure that these standards and objectives are met within a reasonable timeframe.

Future commitment

The (*insert trade union name*) and (*insert platform company name*) commit to:

- Having further discussions to find solutions that satisfy all the stakeholders.
- Having good faith discussions with the aim of implementing the agreed principles.
- Having good faith discussions aimed at cooperating with all stakeholders to establish a set of sector specific standards for on-demand work.

Signed:

Dated:

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