



NEWS, LATEST, CURRENT TOPICS

PRESUMPTION OF EMPLOYMENT CONTRACT ON DIGITAL PLATFORMS

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With the entry into force of Law no. 13/2023, of the 3rd of April, on the 1st of May of 2023, Article 12-A was introduced into the Portuguese Employment Code, under the heading "Presumption of employment contract in the context of a digital platform".

A digital platform is a legal person that provides or makes available services at a distance, by electronic means, such as a website or an app, at the request of users and which involves, as a necessary and essential component, the organisation of work provided by individuals in exchange for payment, regardless of whether that work is provided online or in a specific location, under the terms and conditions of its own business model and brand.

This article establishes, among other things, a presumption of the existence of an employment contract when, in the relationship with the **activity provider**, it is the **digital platform** that:

- (i). Fixes the remuneration for work carried out on the platform or establishes maximum and minimum limits for it;
- (ii). Exercises the power of direction and determines specific rules, in particular as regards to the way in which the activity provider is presented, its behaviour towards the service user or the provision of the activity;
- (iii). Controls and supervises the provision of the activity, including in real time, or verifies the quality of the activity provided, in particular through electronic means or algorithmic management;

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(iv). Restricts the activity provider's autonomy when it comes to the organisation of work, especially with regard to the choice of working hours or periods of absence, the possibility of accepting or refusing tasks, the use of subcontractors or substitutes, through the application of sanctions, the choice of clients or the possibility of providing activity to third parties via the platform;

(v). Exercises labour powers over the activity provider, such as disciplinary powers, including exclusion from future activities on the platform by deactivating the account; or

(vi). The equipment and work tools used belong to the digital platform or are operated by it through a rental contract.

This presumption can be rebutted in general terms, namely if the digital platform proves that the activity provider works with real autonomy, without being subject to the control, management and disciplinary power of the entity who hires them.

Less than a year after the aforementioned rules came into force, several Portuguese courts of first instance have already been called upon to apply the new legislation and rule on the existence or non-existence of an employment contract between activity providers and digital platforms.

This is the case of the Labour Courts of Lisbon, Castelo Branco and Portimão, the first and second of which recognised the existence of employment contracts between couriers (who provide the activity) and Uber Eats (a digital platform) and the third, in the opposite direction, rejected the existence of employment contracts between couriers and Glovo.

In the case of the Lisbon Labour Court decision, despite the fact that Uber did not lodge a defence (with the legal consequences of confessing all the facts articulated by the plaintiff) - because, allegedly and as

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has been reported in the media, it had not been duly summoned to the action - the Court considered that the evidence of labour were fulfilled in the case, namely:

(i). That Uber Eats integrates the concept of a digital platform;

(ii). That the courier provides his activity to Uber Eats, having registered and created an account on the platform, through which he began to carry out the activity of courier, delivering meals and other products, according to orders/tasks distributed to him through the platform, which he accesses through the application installed on his mobile phone;

(iii). That the courier provides his activity to Uber Eats for a fee (the delivery fee proposed in the app when the courier accepts a delivery proposal);

(iv). That even though the courier can define in the app the minimum amount per kilometre that he accepts to deliver each order, this payment is regular (it obeys its own rule, an amount for each order/delivery made) and periodic (weekly, via bank transfer), and Uber Eats unilaterally sets the amount to be paid to him for the deliveries he makes;

(v). That it is Uber Eats that exercises the power of direction and determines specific rules, particularly as regards the way the courier presents himself, his behaviour towards the service user or the provision of the activity, requiring that the activity be carried out using a thermal backpack with minimum requirements as regards size, state of repair and cleanliness (and even suggesting a place to buy it); determines the procedures that the courier must follow when collecting/delivering the products, namely how to use the application, giving instructions on when to enter the information about the collection/delivery they are carrying out;



(vi). That it is Uber Eats that controls and supervises the provision of the activity, including in real time, or checks the quality of the activity provided, in particular through electronic means or algorithmic management: the courier and the establishment preparing the order enter data into the application so that each pick-up, transport and delivery can be monitored; users are invited to give feedback on how the courier has carried out his activity, as well as being able to report problems with delivery orders in the event of violations of the terms and conditions; in addition, from the moment the courier logs into the application, the platform learns his location through a geolocalisation system, which is indispensable for carrying out the activity and assigning customer orders;

(vii). That Uber Eats restricts the courier's autonomy regarding the organisation of work, especially regarding the use of subcontractors or substitutes, by not allowing them to share the credentials associated with the account and by determining that the courier cannot allow third parties to use their account and must keep their login details confidential;

(viii). That Uber Eats exercises powers of exclusion from future activities on the platform by deactivating the account: the platform may temporarily restrict access to the app or even deactivate the account permanently in the event of a suspected breach of the obligations assumed by the courier.

On the other hand, the judgement ruled out the possibility of rebutting the presumption. This is because, although the courier (i) is responsible for ensuring payment for the mobile data he uses, with the telecoms operator he has chosen; (ii) is not obliged to wear distinctive brand clothing or present himself in accordance with any criteria; (iii) does not receive any value for the waiting time and (iv) the hours he works, within the Uber Eats operating period, depend on his will, there being no constraints on the days and periods of time in which he carries out his activity; what is certain is that on-demand work via apps is a field of special relevance for atypical forms of working/non-working time such as availability, online, with irregular hours or zero hour contracts, which occur in the interests of Uber Eats, since the performance of the activity has to take place within its operating period and payment is made with a view to serving its interests, since the hours with the greatest flow are better paid.

As for the recent decision by the Castelo Branco Labour Court, in the context of an action in which Uber Eats presented its defence, it was proved, according to the news, that Uber Eats set minimum and maximum



limits on the amount paid to the couriers, determined specific rules for the provision of the activity and restricted the couriers' working hours and, as a result, the relationship between the couriers and Uber Eats was classified as one of subordinate labour.

It should be noted that the legal actions in question only recognised the existence of the employment contracts and did not rule on the legal regime applicable to such contracts.

Finally, with regard to the decision of the Portimão Labour Court, contrary to the previous ones, and according to what has been reported, it was considered that there were indications contrary to the presumption of employment, including: the absence of exclusivity, with couriers being able to provide services to various platforms that compete directly with Glovo; the possibility for couriers to set their own hours and place of work; the possibility for couriers to appoint other people to replace them in their work; and the possibility for couriers to refuse any proposed service without any consequences.

These are therefore absolutely new rulings in Portuguese jurisprudence, triggered by last year's legislative change, and which could impose changes in the way digital platforms relate to activity providers and users. It should be noted, however, that these are decisions that have not yet become final and, as such, will be analysed by the competent higher courts on appeal.