

FESTSKRIFT TILL
ANN NUMHAUSER-HENNING

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SAMUEL ENGBLOM

ATYPICAL WORK IN THE DIGITAL AGE – OUTLINE OF A TRADE UNION STRATEGY FOR THE GIG ECONOMY

1 Introduction

The regulation of fixed-term work was the subject of Ann Numhauser-Henning's 1984 PhD thesis *Tidsbegränsad anställning – en studie av anställningsformsregleringen och dess funktioner*.¹ Throughout her career, she has returned to the topic of atypical and flexible work, showing an interest not just in the regulation as such but also in its function and effects on the labour market. Already in her dissertation she pointed at an apparent contradiction in the practical effects of 'regulations governing categories of employment' that she argued 'impede as well as promote employment in insecure employment categories.'²

In the third of a century which has passed since those lines were written, many additional categories of atypical work have been regulated, de-regulated or re-regulated in one form or another – fixed-term work, part-time work, temporary agency work, telework –often with the stated aim if not to 'impede and promote' then at least to protect (employees) and promote (atypical forms of work). This is for example clearly visible in the EU framework directives on fixed-term work and part-time work, as well as in the directive on temporary agency work.

The fact that regulation of new forms of work can be as much a part of their promotion as their reining in has important practical implications for policy makers, not least on the trade union side where the author of this contribution has been active for more than a decade. Faced with new ways of organising work, trade unions must make strategic decisions regarding both the public policy regulation it should promote and their own role. Today, these issues are raised in relation to atypical forms of work that are a result of digitalization.

Technological development has been and will continue to be one of the most

¹ Ann Henning (1984) *Tidsbegränsad anställning – en studie av anställningsformsregleringen och dess funktioner*.

² *Ibid* p. 554.

important drivers of change in the labour market. Technological development contributes to the rise and decline of individual companies and entire industries. New technology also allows for new ways to organize work. Staffing practices have been greatly affected by companies' improved abilities to analyse such things as fluctuations in demand and the flow of customers, as well as by tools that facilitate managing large pools of potential workers who can be called in, or who can voluntarily sign up, on short notice. The result is many short hirings, zero-hour contracts etc. In recent years, web-based platforms such as Uber, Task Rabbit and Amazon's Mechanical Turk – designed to facilitate matching and contracting of consumers or companies with people willing to perform work – have received a lot of attention, not least due to the many legal issues that they raise. Other companies are offering persons who have found a client but who do not have their own company to function as their employer-on-paper, sending invoices to customers but otherwise exercising few of the functions expected from a real employer. Further, modern technology facilitates the coordination of tasks performed by several people, also persons outside of the firm's physical or legal boundaries. Thus the traditional firm, important both for the regulation of work and the activities of trade unions, is disintegrating.

In this contribution, all these developments will be assembled under the popular but rather vague term 'gig economy', referring roughly to a way of organising work where people have short temporary jobs, often but not always for different employers, clients or customers. Another important characteristic of the gig economy is the prevalence of intermediators between the person performing the work and the final customer or client. These intermediators come in many forms, from large temporary work agencies to platforms to Facebook groups where a user can pay a neighbour to take garden waste to a recycling station.

The gig economy is not without advantages, also to people who perform work. Labour markets are complicated matching markets where many times it is not all that easy for supply and demand to meet. Platforms facilitate the clearing of these markets and improve availability of certain services that could release a latent demand. In theory this could in turn mean more job opportunities.

Making it easier to find customers could also allow individuals selling their labour to spend more time doing paid work and less time looking for jobs or marketing their skills. For self-employed workers, gig economy intermediaries can also help them with some of the administration, e.g. taxes and book-

keeping, thus further increasing the number of billable hours they work. For some employees, the gig economy could increase their bargaining power vis-à-vis their employer if the appearance of a platform can make their threat of quitting to start their own business more credible.

When trade unionists and labour law scholars discuss the gig economy, the focus tends to be on the risks and disadvantages. In this system, very short-term contracts proliferate, with little or no job security and unstable incomes. Many platforms and other gig economy schemes are characterized by legal ambiguities or outright circumvention of labour law, collective bargaining and taxes. Another effect is that more people might come to combine part-time work as an employee with part-time work as self-employed, depending on how their customers or intermediaries prefer to contract out work. As will be developed below, these ‘combiners’ are sometimes difficult to fit into current social safety nets.

The gig economy is often described as a way to facilitate the entry into the labour market of otherwise marginalized groups. It could have that effect, but at the same time it can work to the disadvantage of less skilled workers, as it paves the way for e.g. university students to work a few hours per week doing tasks for which they are over-qualified and thus crowds out less-skilled workers in greater need of these jobs.

The aim of this contribution is to outline a three-pillar trade union strategy for dealing with atypical work in the digital age. How can the pitfalls of the gig economy be avoided, the negative consequences be mitigated and the advantages captured by trade unions and their members? What must trade unions do to remain relevant?

2 First pillar: apply existing concepts to prevent abuse circumvention

The corporations behind the gig economy platforms and their large circle of supporters (not least among politicians), but also many of the more tempered observers of these developments tend to emphasize the novelty of gig economy arrangements and how they defy and disrupt existing legal categories. While not being dismissive about the innovative quality of some of the gig economy intermediaries, trade unions must not uncritically accept these claims, lest they open new avenues for the abuse of atypical forms of work and the circumvention of mandatory regulation.

It is correct that the concept of employee – the legal notion widely used to define the personal scope of labour law – is a product of the late nineteenth

and early twentieth century, modelled on the industrial worker of the time. But throughout the past century, the concept has proven its ability time and again to adapt to changes in the organization of work and to a workforce with higher levels of skills and autonomy. Today, few would argue that teachers, consultants or middle managers cannot be employees. This was not done through grand reforms but through the open-minded application of existing concepts to new situations.

From this, an important conclusion with implications for trade union strategy can be drawn. The risk is not that technology or new ways of organising work develop too quickly, but that the concept of employee or other legal concepts that define the personal scope of labour law and other social legislation do not develop organically along with them.

In this context, trade unions must therefore focus not on what makes the gig economy novel and special, but on the traits that the work arrangements have in common with more traditional forms of employment. Attempts to grant exemptions or *sui generis* status must be rejected.

How the legal arguments need to be constructed will differ between jurisdictions. Even if the multi-factor tests used by courts in many countries to decide who is or is not an employee tend to include more or less the same criteria, they are construed differently and the weight given to different criteria varies. Considering the temporary nature of the contractual relationships that make up the gig economy, however, it will be important to make courts accept that the short duration of a gig should not in itself disqualify its performer from being considered an employee.

The triangular nature of many gig economy intermediaries should induce close study of the regulation of temporary work agencies. *Directive 2008/104/EC on temporary agency work* defines 'temporary-work agency' as any natural or legal person who 'concludes contracts of employment or employment relationships with temporary agency workers in order to assign them to user undertakings to work there temporarily under their supervision and direction'. Concluding contracts with workers in order to assign them to user undertakings is a good description of what many gig economy intermediaries do.

In occupational safety and health, the scope of the regulation commonly extends beyond the employees of the employer, making user companies responsible for the safety of e.g. independent contractors, temporary agency workers and others who share their premises or work alongside their employees. Anti-discrimination law also comes with a wider scope and the possibility to hold others than direct employers responsible. Trade unions

should closely analyse how these broader scopes can influence the gig economy.

To conclude the first pillar: The primary regulatory strategy of trade unions should not be to have gig economy arrangements outlawed or to subject them to specific regulation. Instead the first choice should be to try and apply existing legal concepts, disentangling the web of relationships to find, where possible, an employer or someone who is responsible under occupational safety and health rules or anti-discrimination law. This is not to say that new regulations are not needed, but at least for the time being, trade unions should focus on the possibilities, not the deficiencies, of existing regulation in relation to the gig economy.

3 Second pillar: adapt social security, active labour market policies, and education systems

For the individual, the practical consequences of a working life made up of many short-term contracts go beyond the lack of job security. For someone who tries to make ends meet in the gig economy, access to social security such as unemployment insurance in between gigs and sickness benefits if he or she falls ill can make a big difference. Just like labour law, these systems were constructed with full-time, indefinite-term contract employees in mind.

Gig economy workers can encounter problems when it comes to qualifying for work-related benefits, e.g. because the number of days or hours worked do not meet qualification thresholds. Eligibility can also be problematic, as it is far from easy to define when a gig economy worker should be considered as unemployed. In systems where benefits are calculated in relation to previous or predicted income, workers with incomes that vary greatly from week to week and month to month have always required special rules. In all these areas, combiners – people who in the same day, week or month work both as an employee and as self-employed – pose a particular challenge.

As a starting point, trade unions should work for the improved inclusion of gig economy workers in social security systems. Apart from the economy safety it grants the workers themselves, this can also be a way to maintain reservation wage levels and prevent a race to the bottom among gig economy workers. There is, nonetheless, a potential dilemma that must be taken into account. Improving access to e.g. unemployment benefits for workers registered with gig economy intermediaries can have the side-effect that it allows these companies to maintain an on-demand workforce while off-loading the economic risk to the individual and the state.

The gig economy should also prompt trade unions to call for reforms of active labour market policies and education systems. One of the things on which there is a relative consensus concerning the future of work is the need for skills. The ongoing polarization of the labour market in industrialized countries – with jobs requiring moderate levels of skills decreasing in relation to jobs requiring few skills and jobs requiring greater skill levels – accentuates this. For gig economy workers in less skilled jobs, improving skills will be necessary to be able to move up the ladder to more skilled jobs in the future, but also to be able to compete for jobs with medium-skilled workers who move down to less-skilled jobs. For more highly skilled gig economy workers, maintaining and developing skills will be necessary to stay attractive in the labour market.

It is unlikely, however, that the employers and intermediaries of the gig economy will want to make any more substantial investments in developing the skills of their temporary employees or the persons who use their services to find work. Traditional active labour market policies, which focus on people who are full-time unemployed for a sustained period, will not do the trick either.

What is required is very flexible training systems where gig economy workers can participate in for example short, part-time, online courses that are possible to combine with active participation in the gig economy. In addition, significant numbers of the workforce, including some gig economy workers, are university educated. This means that institutions of higher education will have to get involved as well, increasing the number and flexibility of courses that allow graduates to update their skills or change occupation later in life.

4 Third pillar: organize and empower individuals

The past 30 years have seen a decline in trade union membership across western countries. The OECD average trade union density declined from over 30 per cent in 1984 to less than 20 per cent today.³ Much has been written about the causes of this decline, but as trade unionists – before we point our fingers elsewhere – we must acknowledge that our own response to changes in the labour market and in society has been insufficient. Nevertheless, the very fact that our response has been insufficient also means that it lies within

³ OECD Employment and Labour Market Statistics Database, available at http://www.oecd-ilibrary.org/employment/data/oecd-employment-and-labour-market-statistics_ifs-data-en.

our powers to reverse the trend. Increasing unionization among part-time workers, fixed-term workers, temporary agency workers, the self-employed and combiners is therefore crucial to reviving the trade union movement. The gig economy is the new frontier in this effort.

It is easy to find reasons for gig economy workers not to join a trade union. Their work may be of a very casual nature, never intended to be the beginning of a career, or done on the side of another main activity, for example studies. Combined with doubts over what a trade union could actually do for them, it is not strange that many do not find joining worth the fee. Trade union organizational models are often workplace- or occupation-based, arguably ill-suited for the gig economy reality where one's workplace, employer, or occupation and even whether the worker is an employee or self-employed may change several times a week, or even in the course of a day. The structure of the gig economy can also make it difficult to get a trade union recognized by the employer, engage in collective bargaining, or exercise information and consultation rights. As regards self-employed workers, in many jurisdictions there are legal obstacles to their organization in trade unions.

What trade unions must adopt is a combined strategy of organising and empowering gig economy workers. The basics of organising are rather straightforward: a union must ask people whether they want to join and this union must make sure that it has an offer attractive enough for them to say yes. In relation to the gig economy, where workers seldom meet in larger numbers in a specific location, trade unions must develop new tools to reach potential members, and many are already doing so. Trade unions must be where members and potential members are. The online communities – such as groups on Facebook or WhatsApp – that often surround the gig economy intermediaries should be a natural hunting ground. This requires, however, tuning the message to fit both the forum and the audience. Lambasting the oppressive nature of the gig economy and proclaiming intentions to shut down the company or intermediary that provides people with their livelihood or an extra income is probably not a very clever strategy. The current rhetoric of too many trade unions runs the risk of alienating the very people that should be organized.

Instead, trade unions must show that membership provides tangible benefits, also to workers who do not foresee problems arising with their employer or gig economy intermediary, or who know that making claims will be difficult. This brings us to the second part: empowerment.

Empowerment of gig economy workers can be both collective and individual.

Already the online communities mentioned above can strengthen gig economy workers vis-à-vis their employer or intermediary by increasing access to information. Trade unions could add to this, for example through developing tools that improve gig economy workers' possibilities to compare different intermediaries with each other. The question should even be asked whether trade unions should cooperate with and maybe even certify gig economy intermediaries. Further, there is a need for actions which, short of collective bargaining, allow workers to coordinate their demand for remuneration and avoid setting too-low prices on work. As an example, the Swedish Union of Journalists provides an online tool that allows self-employed members to calculate what they should charge in order to be remunerated at the level of the relevant collective agreement and to afford the necessary insurances and supplementary pension payments.

Individual empowerment can be accomplished through providing gig economy members with advice on how to navigate the gig landscape in the best way and, if desired, point out the most promising routes to more stable employment. Providing tangibles such as insurances for those not covered by policies taken out by an employer is another way to strengthen gig economy members. Considering the need mentioned above to maintain and upgrade skills, trade unions could play an important role through procuring courses from suppliers and providing these to their members at lower cost.

In all these areas, trade unions for journalists, actors and musicians – to whom the gig economy is no novelty – can provide valuable insights and inspiration.

5 Conclusions

The digital economy is too important to be left to either the tech geeks or the doomsday prophets who proclaim the end of work or at least the end of stable employment relationships. Trade unions must bury any Luddite instincts and instead engage with the gig economy and the workers who are active there. Being against new technology is rarely successful.

That does require actions, however, that are well thought through and whose consequences, which may be both to 'impede and promote', have been analysed beforehand. In this respect, busy trade union policy makers ought to seek advice more often of legal scholars working in the same spirit as Ann Numhauser-Henning has done throughout her long career.

