

Contesting 'bogus self-employment' via legal mobilisation: The case of foster care workers

Capital & Class
2020, Vol. 44(4) 531–539

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DOI: 10.1177/0309816820906355
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Eleanor Kirk

University of Glasgow, UK

Abstract

The rise of the 'gig' economy has placed a spotlight on employment status, leading to challenges over the nature of working relationships and attendant rights from increasingly diverse groups. The predominant image of the struggle against 'bogus self-employment' features the mostly young, male riders and drivers engaged in platform work. This article examines the distinctive campaign of foster carers to be recognised as workers, focusing upon the emergence of the campaign and the imaginative solidarities forged with seemingly disparate groups of precarious workers. Drawing from interviews and observation, this article explores the tactics used in contesting 'bogus' self-employment, the achievements and challenges faced. The concept of legal mobilisation is used as lens, capturing the blend of strategic litigation, organising and legal enactment. This article concludes by considering how this solidaristic project might be further broadened to provide fully inclusive protections for all those who work for a wage.

Keywords

bogus self-employment, employment status, legal mobilisation, organising, precarious workers

Introduction

Following a number of high-profile legal challenges, the dominant image of struggles against 'bogus self-employment' (BSE) in the media is that of the Independent Workers' Union of Great Britain (IWGB) and the mostly young and male 'gig economy' riders, drivers, and couriers working for platforms such as Uber and Deliveroo from these legal

Corresponding author:

Eleanor Kirk, School of Law, University of Glasgow, Stair Building, 5-9 The Square, Glasgow G12 8QQ, UK.

Email: eleanor.kirk@glasgow.ac.uk

cases. Less attention has been focused upon the campaign of foster care workers (FCWs) to be recognised as workers, despite now comprising around half of the IWGB membership. Key activists in the campaign recognised the commonality of their plight with ‘gig economy’ workers waging legal battles and were inspired to contact the IWGB, as a visible spearhead engaged in a number of projects of strategic litigation. The case of FCWs highlights an emerging ‘organic solidarity’ (Hyman 1998) across a wide range of groups subject to dubious employment arrangements and is notable for several reasons. First, while the majority of those contesting BSE legally are accepted to be undertaking forms of economic activity, recognised as ‘work’, FCWs carers are battling to change the narrative around what it is they do, opening up wider debates about care work, care quality, gendered relations and what is defined in law as ‘work’. Second, and following, as FCWs’ allowances are paid from local authorities, the challenge is directly to the state for misclassifying them, relying upon carers’ portrayal as surrogate parents who volunteer for love rather than waged workers entitled to a minimum wage and basic protections. Third, FCWs are rapidly organising, with estimations of 50% plus membership in certain bargaining units in which they hope to press for recognition (should they be successful in gaining recognition in law as workers). They are also gaining momentum politically with an All-Party Parliamentary Group considering the need for a FCWs’ Bill, which has been drafted and put to consultation for the IWGB membership. So, this article considers FCWs’ campaign and how it emerged. First, the background concerning FCWs is presented. Second, the research project from which data are drawn is presented. Third, key findings are discussed, focusing upon the emergence of the campaign, based upon an organic solidarity that blossomed between seemingly disparate groups of ‘precarious workers’, specific tactics in contesting BSE, the achievements of the workers and challenges they have faced. This article concludes with a consideration of how this solidaristic project might be further broadened to provide fully inclusive protections for all those who work for a wage. Within all of this, the concept of legal mobilisation (Colling 2009) as blending organising, strategic litigation and legal enactment is used as a lens.

Background

Over the past decade, grassroots unions have become an ever-increasing part of the landscape of industrial relations and workers’ struggles (Wegmann 2019). The IWGB has rapidly gained a reputation as small but influential union, especially for group of workers usually out with the fold of formal union organisation, and utilising strategic litigation, often on the basis of *pro bono* representation or crowd funding to support legal costs and lawyers’ fees. Recently, *The Economist* (2019) spoke of how ‘long hostile to the legal system, British . . . unions have changed’ with the IWGB seen as exemplary of a shift ‘from the barricades to the bar’. This rightly highlights that the IWGB has been at the forefront of important legal battles. However, critical to successful legal mobilisation is the ‘ability to blend legal action and collective bargaining’ (Colling 2009: 11). So, *The Economist* neglected to consider how the IWGB’s willingness to deploy strategic litigation is supported by a commitment to grassroots organising and oversimplified the complexity of unions’ relationship with labour law. Historically, unions have attempted to enact law and engage litigation when expedient but have also been cautious about becoming focused

upon individualistic employment rights (Colling 2009). Contemporary debates about union organising have distinguished a ‘servicing’ model, in which a passive membership are serviced by paid-officials, particularly in terms of undertaking individual casework and litigation, as well as other benefits, from an ‘organising’ model in which the union facilitates a more active membership to act by, and for themselves (see Guillaume 2018, who related this to litigation strategies). In addition to being keen litigators, the IWGB is also committed to strong sectoral branch identities and limiting bureaucracy, factors which seem to be of importance given its broad coalition of unusual bedfellows. Perhaps, the most distinctive, and surprising of these groups, is the FCWs, in their campaign to be recognised as workers and to obtain associated legal protections.

What is noteworthy about litigation over employment status is its immediate relevance as employment status is a passport to employment rights, determining the jurisdiction of courts and tribunals to consider claims of particular breaches. It is also a matter for the Central Arbitration Committee (CAC) to consider when determining the admissibility of applications for statutory recognition for the purposes of collective bargaining. While Employment Tribunal (ET) rulings only apply to the individuals involved in specific cases, there is a greater likelihood that their status classifications can be used to try to establish precedent and momentum. Disputes over status can go to the heart of business models, as was vividly demonstrated in Uber’s (2016) ET hearing, where the judgement memorably stated, ‘The notion that Uber in London is a mosaic of 30,000 small businesses linked by a common “platform” is to our minds faintly ridiculous. In each case, the “business” consists of a man with a car seeking to make a living by driving it’ (Aslam et al. 2016: 28). This case was then likely to be a key factor in explaining barristers’ willingness to take *pro bono* cases and for people to pledge money to crowd funding campaigns supporting cases.

Strategic litigation can facilitate ‘legal mobilisation’ (Colling 2009), inspiring or radiating a sense of grievance from single instances and galvanising others to join a cause, rather than merely seeking resolution from a narrow, individual and privatised dispute perspective. The case of FCWs exemplifies how employment status is being used as a point of leverage to challenge the historical undervaluing of care work and question the boundaries of what is deemed to be ‘productive labour’ in contrast to the way invisible labour in the home has been separated from ‘marketised work’. As Zatz’s (2015) examination of prison labour illustrated, the socially constructed designation of work as market or non-market has ‘concrete consequences for people’s life chances’ and should be treated ‘as a site of conflict, subject to institutionalization’ (Bandelj 2015: 15, also see Dukes 2019). FCWs’ status as ‘self-employed’ for tax purposes is being problematised by IWGB activists to challenge their treatment as unjust and unjustifiable. This is indicative of how the so-called ‘gig economy’ has placed a spotlight on employment rights, and activists hope is making lay-people more aware of them and their limits.

Contesting BSE: a dispute perspective on problematic precarity

Data used for this case study of FCWs are drawn from a small-scale research project exploring the incidence and experience of BSE and attempts to contest it, whether individually or collectively, through litigation, organising and campaigning (Kirk 2020).

What is colloquially known as BSE refers to a situation in which a person has been wrongly classified as self-employed when legal tests find them to be a worker or an employee with attendant employment rights and tax status (Heyes & Haystings 2017; Thörnquist 2015). The motive usually imputed to perpetrators of BSE is the avoidance of tax and liabilities and benefits associated with worker/employee status. To be bogusly self-employed means that individuals encounter the risks of self-employment (e.g. insecure earnings and work) and lack the protections of worker/employee status, without the boons (e.g. 'being your own boss', high earning potential). In addition, their access to justice may be more difficult than for workers and employees because of the ambiguity of their status in the first place and the additional hurdle of satisfying a tribunal or court of their legitimate status before bringing a claim of an attendant rights breach. It is also an issue in terms of lost tax revenue, national insurance and pension accrual (Citizens Advice 2015). It is this scenario which Fleming (2016) referred to in suggesting that 'self-employment used to be the dream. Now it's a nightmare'. Self-employment has risen in Britain fairly dramatically over the last five decades (Office for National Statistics (ONS) 2018). Estimates of the proportion that is 'bogus' range from 10% generally (Citizens Advice 2015) to 30%–40% in some sectors such as construction (Heyes and Haystings 2017). Given high-profile examples of misclassification being contested in court, there is reason to believe that instances of BSE accompany the growth of self-employment generally. However, our knowledge of the phenomenon is understandably patchy, given that organisations and individuals engaged in it may attempt to camouflage the practice or alternatively may be unknowing victims of misclassification.

Data collection between 2018 and 2019 involved a number of methods: 20 semi-structured interviews with advice agents, union officials and activists who assist people dealing with employment issues and workers themselves who have experienced problems. Organisations involved included the Scottish Trades Union Congress (STUC), Citizens Advice Scotland (CAS), West Dunbartonshire and Inverness Citizens Advice Bureaux (CAB), GMB (General, Municipal, Boilermakers) and IWGB unions, and individual workers contacted through them. Interviews were supplemented by non-participant observation of union branch meetings and participant observation of protests, as well as the documentary analysis of key legal rulings and campaign materials (e.g. tribunal judgements, union campaign materials, Parliamentary Group minutes, and social media discussions).

The case of FCWs – similarities and differences in contesting BSE

By its nature, BSE can involve deception, so those misclassified may not question their status. However, attention on the 'gig' economy has placed a spotlight on employment rights generally, and employment status in particular. People from diverse settings are increasingly contesting this precarity and associated poor conditions. A FCWs' branch was launched in late 2016, when the IWGB was still mostly comprised couriers and cleaners but was approached by an FCW. Analogous to other IWGB sectors, FCWs relate their employment status situation to legal tests, such as being highly controlled, having to undertake work personally and not being able to work for another 'customer'.

FCWs feel they 'tick all the worker status boxes' but are being denied their attendant rights: 'They class us as self-employed and we couldn't be less self-employed if you tried' (FCWs' branch chair, England, Wales and Northern Ireland). BSE means to them, as others, bearing the risks of self-employment with none of its benefits.

As other precarious workers, FCWs' lack of status leaves them vulnerable to arbitrary deregistration, akin to dismissal or 'de-activation' in the world of apps, with associated loss of work and income. By its nature, children who have been removed from their birth parents can find it difficult to settle into new living arrangements. Complaints and allegations by children are, therefore, common. However, because allegations are heard by their local authorities, that is, their employers, rather than an independent body, with no right to independent representation, FCWs feel that, 'our whole world is governed by this slightly looking over our shoulder side' (FCWs' branch chair, England, Wales and Northern Ireland). This branch chair shared her experience of being placed under investigation without pay:

They can take the job away [and] your livelihood away . . . We went through five months of hell, I thought I was going to lose my house. They take their time because they haven't got to the pay you, but you can't immediately go out and get another job . . . we were suddenly plunged into having no income.

FCWs are afraid to raise their own concerns about placements in case this is held against them. For this reason, whistle-blowing protection, attached to worker status, is an important demand in their campaign.

Many FCWs also struggle to live on allowances, meaning pay is effectively below the minimum or living wage. Some

leave the role because they can literally not afford to continue or have to get another paid job to be able to pay bills, and then give up because they feel they are failing the children in placement or physically can't continue. (Parliamentary group minutes)

Activists estimate that 15% of FCWs only receive allowances and nothing as compensation for their time and labour, while others earn around £1.70 an hour for a 40-hour working week. Activists talk of securing a wage that is not less than the minimum wage for a 40-hour working week, even though they are providing care work potentially 24 hours a day, 7 days a week. They see payment for 40 hours as a 'realistic starting point' and still 'good value for money for the state' (FCWs branch chair, Scotland). This up to 168 hour week (7 days × 24 hours) is one distinctive aspect of FCWs situation. The uniqueness of their campaign is further explored in the following.

The distinctive campaign of FCWs

While many of FCWs grievances readily relate to those of other IWGB members, more unusually, FCW activists see themselves as misclassified by the state, with local authorities as employers who 'rely on that "parent" tag' to undervalue them and to resist the notion that what they do is 'work', 'to control us, to keep us cheap' (Online branch

discussions). This parent tag is virtually synonymous with 'mother', as activists estimate that approximately 85% of main carers are women. The foster care system has historically been premised upon a (male) breadwinner model, with a (female) partner staying at home to look after children. As such, the undervaluing of foster care is gendered. Activists in Devon County used the striking image of Margaret Atwood's (1985) handmaid, from the dystopian novel-come-television-production, *The Handmaid's Tale*, to highlight how used, abused and silenced they feel. Echoing Atwood's key themes of the subjugation of women in a patriarchal society, a woman is seen, dressed in a red hooded cloak, with her face covered as she flashed cards stating their lack of rights. However, the trend towards dual-earning households is threatening the ability of people to foster at the rates provided by local authorities. FCWs feel they are engaged in the social reproduction of society, but this work is accorded little status or reward.

FCWs face the objection that treating them as 'workers' turns what should be a loving relationship into an economic one. However, carers involved in this study felt that their legal status has little impact on their relationship with their children, though it does matter that they have basic rights and protections so that they can provide stable homes. The children generally do not want 'to call us mum and dad' (FCWs' Branch chair, England, Wales and Northern Ireland). Others added that unpaid work was not expected of other front-line professionals such as nurses. They see themselves as part of social services more or less directly and find divisions between the work they do and that of other professionals and workers therein to be arbitrary.

Challenging misclassification and organising precarious workers

Misclassification may result from deliberate attempts to camouflage the reality of working relationships, creating hurdles to the recognition of rights breaches and enforcement of law. An employment rights adviser explained it was difficult enough to reach non-union workers but 'there are people who [wrongly] believe they are genuinely self-employed who I would never get you never get access to'. A Citizens Advice Bureau manager also perceived there to be a great deal of inaction:

Most people just accept what's presented to them. It's better than the alternative quite often . . . Why would I rock the boat? . . . If I do then I'm out of work and the debt problem I've just about found a solution to goes out the window.

Such hurdles may be considerable when the work people carry out is not recognised as marketised labour. Ambiguous employment status complicates the assertion of employment rights via organising or litigating, and by nature, is accompanied by hostility towards unions by perpetrators, even in the public sector, where unions are recognised for other groups. Activists found it hypocritical that local authorities are heavily unionised 'but they don't want us to unionise' (FCW branch meeting, Scotland), noting how social workers could display UNISON posters around council offices and bring officials to workplace hearings, but an IWGB presence had not been welcomed because FCWs are not deemed to be entitled to union accompaniment nor recognition.

2016 was identified as a turning point. In this year, Uber was taken to an ET and the death of the DPD courier who missed hospital appointments as he was unable to take sick leave brought about outrage. An IWGB branch coordinator spoke of how the FCWs' campaign 'really came out of this new kind of consciousness about categories of employment'. A foster carer approached the union:

She was listening to a report [on BBC radio] about Deliveroo drivers joining IWGB and you know everything about bogus self-employment [so] she's like 'that is us, that is us all over!' . . . before foster carers had never thought about themselves and their employment category or status at all. It's just been generally accepted. . . she approached the union saying we need to organise foster care workers basically and then there was a big inaugural meeting in parliament . . . it all went from there really. (FWC branch chair, England, Wales and Northern Ireland)

The FCWs' claim goes to the heart of what 'counts' as 'work' (see Waring 1988). In this larger struggle, employment status has become a leverage point. One IWGB activist, found to be an employee by an ET, implored to others, 'we need a start, and that's workers' rights'.

Facing prolonged legal cases and several rounds of fees, crowdfunding was used to support workers' challenges in addition to *pro bono* work by legal professionals. In this, the IWGB sees itself as 'recalibrating' organising methods, as a 'necessary extension of the kind of workers that we organise' (IWGB FCW branch coordinator). In adapting themselves towards groups without a history of organising, they find 'there is this whole education problem in essentially raising awareness of what a . . . union is . . . what role it plays in society' (IWGB national coordinator). Even though some activists had previous union experience, this was dropped because of BSE. It was not until difficulties arose in relation that some looked again towards unionism. Additional organising challenges include reaching isolated workers and undertaking labour mostly in their homes as this keeps workers apart physically most of the time. Employer hostility, combined with fear of victimisation, especially deregistration, also dampened organising efforts.

Although still nascent, the IWGB branch for FCWs was able to turn pre-existing networks towards unionisation. Activists have promoted victories in litigation to bolster the confidence of existing and potential members, inspiring action by crystallising and radiating a sense of injustice among FCWs, as part of 'legal mobilisation' (Colling 2009) is being used to build up 'mutual insurance' (i.e. membership), with the aim of instituting the method of collective bargaining (Webb & Webb 1897). Strategic cases may or may not be ultimately successful and are likely to be continually appealed, in drawn out legal processes. There is further uncertainty around securing either voluntary recognition agreements or satisfying the CAC that FCWs are workers in law. For these reasons, the campaign also involves the strategy of 'legal enactment', with a proposed FCWs' Rights Bill as another route to changing their status and improving basic conditions.

Notwithstanding this, FCWs are yet to build towards any campaigns for recognition for the purposes of collective bargaining. As the Deliveroo case highlighted in 2017, the CAC will accept applications unless the applicant's members are deemed to be 'workers' in law. Given this, there is a sense that legal challenges are 'the only thing open to us at the minute' (FCWs branch vice chair, Scotland). In particular, the IWGB is keen to use

'Limb b' worker status in law as reflecting the self-identity of FCWs as well as drivers and couriers. This relates to guarantees such as the minimum wage and holiday pay, but not protection from unfair dismissal afforded by 'employee' status. Although this sits at odds with the push from the Institute of Employment Rights, TUC and Labour Party that all those that work for a wage should enjoy the full employment rights from day one of work, some activists feel that without major legislative reform

Limb b, independent contractor, . . . is a better fit to what we do . . . [often because] if we were employees, how would we advocate for the child? We'd have to agree with the views of the organisations that we work for. (FCWs' branch chair, Scotland)

Irrespective of such differences, there remains a common belief that a lack of enforcement of employment rights is a key issue given weak regulation and penalties.

Conclusion

FCWs display a growing awareness about employment rights and status following media coverage of the BSE in the 'gig' economy and associated acts of strategic litigation sponsored by the IWGB and sympathetic activist-lawyers. In this, the FCWs' campaign is a striking example of legal mobilisation, involving innovative strategic litigation and ambitious legal enactment combined with traditional grassroots organising. It shows that legal mobilisation can be put to good use, without encouraging membership passivity. It remains to be seen whether IWGB will successfully institute the method of collective bargaining for FCWs. All this brings to the surface broader issues of political economy and what we value in and as a society. FCWs' fight necessarily contests what counts as marketised work and how highly it is priced, especially as adult social care is paid work, and thus which workers are eligible for and entitled to collective representation.

Acknowledgements

This article would not have been possible to write without the insight and knowledge of the research participants. Thanks are also due to Lydia Hughes, Sebastian Flais, Kendra Briken, Ruth Dukes and Gregor Gall for comments on earlier drafts.

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Author biography

Eleanor Kirk is a research associate at the University of Glasgow School of Law. Recently, she has been working to conceptualise how labour law operates in society, from the more obvious ways in which workers and employers engage in formal legal proceedings towards the more expansive ways in which ideas of justice and injustice are formulated and underpin action, or indeed inaction.