



Work by digital platforms in Germany: an analysis on the labour market and the decision 9 AZR 102/20 of the Federal Labour Court (*Bundesarbeitsgericht*)¹

Trabalho por plataformas digitais na Alemanha: uma análise sobre o mercado de trabalho e a decisão judicial 9 AZR 102/20 da Corte Federal Trabalhista (Bundesarbeitsgericht)

Trabajo en plataformas digitales en Alemania: un análisis sobre el mercado de trabajo y la decisión judicial 9 AZR 102/20 del Tribunal Federal Laboral (Bundesarbeitsgericht)

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ABSTRACT

The paper aims to analyse the characteristics of the labour relations by digital platforms in Germany, focusing on two dimensions: the understanding of these relations in the context of changes and inequalities of the labour market in that country, as well as its interpretation in German normative framework and in *Bundesarbeitsgericht's* 9 AZR 102/20 decision. Regarding the methods of analysis, the study combines bibliographic and empirical research. The development of the article is divided into three items: (i) a sociological analysis on the insertion and diffusion of this labour relation in the German labour market; (ii) the German legal system and the *Bundesarbeitsgericht's* decision under analysis; (iii) possible theoretical-empirical precautions for future comparative research on the topic between Germany and Brazil. In the final considerations, the main challenges observed throughout the study are taken up again, based on the assumption that legal normativity should not be understood in isolation from social relations.

KEYWORDS: Work by digital platforms. Germany. Labour market. *Bundesarbeitsgericht's* 9 AZR 102/20 decision.

RESUMO

O objetivo do artigo consiste em analisar os contornos do trabalho em plataformas digitais na Alemanha, com foco em duas dimensões: a compreensão dessa relação de trabalho no contexto das alterações e desigualdades do mercado de trabalho naquele país, bem como sua

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interpretação no bojo do arcabouço normativo alemão e da decisão 9 AZR 102/20 do *Bundesarbeitsgericht*. Como métodos de análise, o estudo conjuga pesquisa bibliográfica e empírica. O desenvolvimento do artigo se divide em três itens, que tratam, respectivamente: (i) de uma análise sociológica sobre a inserção e difusão dessa relação de trabalho no mercado de trabalho alemão; (ii) do sistema juslaboral alemão e da decisão do *Bundesarbeitsgericht* sob análise; (iii) de possíveis precauções teórico-empíricas para futuras pesquisas comparativas sobre o tema entre Alemanha e Brasil. Nas considerações finais, são retomados os principais desafios observados ao longo do estudo, partindo do pressuposto de que a normatividade jurídica não deve ser entendida de forma apartada das relações sociais.

PALAVRAS-CHAVE: Trabalho por plataformas digitais. Alemanha. Mercado de trabalho. Decisão 9 AZR 102/20 do *Bundesarbeitsgericht*.

RESUMEN

El objetivo del artículo es analizar los contornos del trabajo en las plataformas digitales en Alemania, centrándose en dos dimensiones: la comprensión de esta relación laboral en el contexto de los cambios y desigualdades en el mercado de trabajo de ese país, así como su interpretación dentro del marco normativo alemán y la decisión 9 AZR 102/20 del *Bundesarbeitsgericht*. Como métodos de análisis, el estudio combina la investigación bibliográfica y la empírica. El desarrollo del artículo se divide en tres puntos, que tratan respectivamente de: (i) un análisis sociológico sobre la inserción y difusión de esta relación laboral en el mercado de trabajo alemán; (ii) el sistema iuslaboral alemán y la decisión del *Bundesarbeitsgericht* bajo análisis; (iii) posibles precauciones teórico-empíricas para futuras investigaciones comparativas sobre el tema entre Alemania y Brasil. En las consideraciones finales, se retoman los principales retos observados a lo largo del estudio, partiendo del supuesto de que la normatividad jurídica no debe entenderse al margen de las relaciones sociales.

PALABRAS CLAVE: Trabajo en plataformas digitales. Alemania. Mercado de trabajo. Decisión 9 AZR 102/20 del *Bundesarbeitsgericht*.

INITIAL CONSIDERATIONS: METHODOLOGY AND PRESENTATION OF THE MAIN ASPECTS OF THE ANALYSIS

In a scenario of deepening contradictions in the capital-labour conflict around the world, marked by the worsening of a broad social crisis with the spread of the Covid-19 pandemic, the debate about the so-called “new” labour relations gains



special vigour.² Among these relationships, work through digital platforms stands out, given the increased demand for this type of service in view of the need to reduce physical displacement. At the same time, the perception of inequalities and social disparities (between, on the one hand, the deterioration of working conditions and the increase in social risks to which workers are subjected, and on the other, the increase in the platforms' profits) becomes more acute, leading to the effervescence of protesting social movements.³

In any case, caution is needed to understand the exact contours of what has been taken conventionally as a *new* phenomenon. The discourse that the pandemic would have been the cause of the current social crisis (a crisis that is, at the same time, political, juridical, economic, sanitary, ideological and environmental - among other spheres of sociability) does not stand up to a more detailed analysis of social reality. The pandemic did not create social inequalities, nor did it create the mismatches between legal normativity and materiality - in fact, it intensified and pushed to the limit the already existing social contradictions. As for labour relations (specific topic of this article), the negative indices of the labour markets cannot be explained merely by the advent of the health crisis. On the contrary, the spread of precarious forms of employment and the deterioration of working conditions, fundamental processes of capitalism worldwide, preceded the pandemic.

In this context, and understanding the relevance of sociological and legal dynamics to define the contours of the capital-labour conflict in a given social reality, the methodological focus of this article turns to an analysis of the labour relation that is the object of the decision 9 AZR 102/20 of the Federal Labour Court in Germany (*Bundesarbeitsgericht*). This decision, which dates back to December 2020, allows us to address the issue of reconfigurations around the employment relationship - especially, in this case, the so-called crowdworkers and the microtask platforms. The fact that the platform draws specifications, credits experiences, links

² For a critical analysis of narratives about “newness” in labour relations as a strategy to legitimise capitalist discourse, see FILGUEIRAS, Vitor. “É tudo novo”, *de novo*. São Paulo: Boitempo, 2021.

³ For example, the strikes of delivery workers by digital platforms, which take on international dimensions. See, among others, CANT, Callum. *Riding for Deliveroo: Resistance in the new economy*. Cambridge: Polity, 2019.



the possibility of access to higher remunerations to the acceptance of a set of previous jobs, as well as determines and controls working conditions, led the Court to decide on the existence of the legal-labour relationship.

These labour relations are part of what has been understood as platform capitalism⁴, a polysemic term which, in a broader sense in the labour field, signals the (re)configurations of labour dynamics based on the “mediation” of computerised processes. But rather than being mere intermediating agents, digital platforms control and direct work. For Kalil⁵, labour relations in platform capitalism would fall into two basic types: “crowdwork and work on demand through apps”. This paper dwells on the first type (which is a on-demand work too) - and, more specifically, on so-called microtask platforms. Such a model, as in the case of the trial under review, is characterised by a highly standardised process, as well as by the performance of a high number of activities in a short time and by involving a large number of workers.

Moreover, it is necessary to observe that technology should not be analysed in an essentialised and ahistorical way, as if it were a merely external and predetermined element with respect to social phenomena. It would be no different with regard to labour relations. Technique and technology are not neutral categories detached from the historical trajectory of each social reality. As Carelli and Oliveira note, one must be careful not to fall into two risks: one is to idealize technology and understand it as a kind of salvation, and the other is to ignore its social effects.⁶

In order to avoid mechanistic understandings of regulatory frameworks and social realities, the article combines sociological and legal analyses. The purpose of the interdisciplinary research is, therefore, to provide subsidies to delineate the labour relation involved in the case in question, in its complexities and contradictions. In other words, the employment relationship that is the object of the

⁴ Far from being self-evident, the term is capable of raising theoretical controversies. Due to the complexity of the subject and the methodological limits of this article, I will not be able to deepen this discussion here.

⁵ KALIL, Renan. *Capitalismo de plataforma e Direito do Trabalho: Crowdwork e trabalho sob demanda por meio de aplicativos*. 2019. **Thesis (PhD in Law)** - Universidade de São Paulo, São Paulo, 2019, p. 8, free translation.

⁶ CARELLI, Rodrigo; OLIVEIRA, Murilo. **As plataformas digitais e o Direito do Trabalho: Como entender a tecnologia e proteger as relações de trabalho no século XXI**. São Paulo: Dialética, 2021.



decision is investigated and detailed from its socio-legal implications - above all, by contextualizing its role in the German labour market and by explaining the debate around the legal-labour bond.

The first item of this article is based on data and literature mainly related to the sociology of work. It aims to situate the German labour market, as well as the social context that enabled the emergence and spread of the employment relationship in question. In this part, in particular, quantitative secondary empirical data concerning the German labour market, made available in the studies referenced throughout the writing, are analysed. This analysis helps to denaturalize the social relationship involved and to understand it in its materiality.

In turn, the second item of development begins with a contextualization of the German labour law system. Thus, it goes through the characterisation of its main forms of regulation of labour relations, as well as the outlines of the organization of labour courts in Germany. Next, the item aims to present the decision 102/20 in more detail, based on the official report of the *Bundesarbeitsgericht*, on the judgment and on the debates on the subject raised in specialised literature, in order to outline the central factual and legal aspects and foundations of the decision.

Finally, the third and last item of the development outlines possible approximations and tensions between the German and Brazilian contexts. This exposition aims to contribute to possible future research about a comparative analysis, presenting mediations and theoretical-empirical precautions that help to avoid automatic replications (and potentially maladjusted) of sociological and legal data concerning different social realities. Finally, the conclusion of the article is intended to discuss possible challenges arising from the analysis undertaken.

The justification for the choice of a foreign decision on the subject of labour relations through digital platforms is related to the observation that, when we are faced with other contexts, we are provided with subsidies for the expansion of the material and conceptual basis of the reasoning. It must be stressed, however, that this does not imply any pretension of automatic or mechanical transposition between different social and legal dynamics. Moreover, if we take into account the context of accelerated flows of information, labour power and capital between different



parts of the world, we will reach the conclusion that it is not possible to fully understand the contours of the capital-labour conflict (as well as its legal regulation) without looking at the expansive dynamics of capitalist accumulation at a supranational level. We know, at least since Rosa Luxemburg's fundamental book *The Accumulation of Capital*, that this process of accumulation demands a movement beyond national borders, with its consequent production and reproduction of geographical inequalities.⁷

Thinking about labour relations in a materially situated way, in their historical-social imbrications with the process of capitalist accumulation, helps us to avoid reducing a certain dimension of the phenomenon to a merely external or formal aspect with respect to social reality. That is, the context of labor relations should not be understood apart from the amalgam of the axiological horizons that sustain capitalist sociability. Otherwise, we run the risk of naturalising social processes, without thinking about the possibilities that these processes are historically (and collectively) modifiable.⁸

1. The materiality of digital platform work in Germany

To understand the contours of the *Bundesarbeitsgericht's* 9 AZR 102/20 decision requires us to situate the employment relationship under analysis in its materiality and historicity. In this sense, this item proposes to investigate the context in which work on microtask platforms is inserted and spread in Germany, with special attention to the social contours of the German labour market and its relationship with the working conditions of the so-called crowdworkers.

The term *mikrojobs* platform refers to the English *microjobs*. This work relationship is aligned, worldwide, with the processes of permanent reorganisation of labour dynamics, which gain strength, above all, in periods of capitalist productive restructuring. This reality is reproduced on an international scale, although it

⁷ In the same vein, see HARVEY, David. *The new imperialism*. Oxford: Oxford University Press, 2005.

⁸ See, among others, FISHER, Mark. *Capitalist realism: Is there no alternative?* New Alresford: Zero Books, 2009.



assumes specific characteristics depending on the position each country occupies in the global value production chain. In other words, “while platforms represent a global organizational model, they are embedded in different models of capitalism”.⁹

Given the disputes around the legal categorisation of this employment relationship in various countries (and also in view of the organisational diversity of platforms, as well as their forms of operationalisation), it is noticeable, as a rule, a difficulty in publicising, obtaining and cataloging official empirical data on the work of crowdworkers. Germany is no exception. To try to minimize this difficulty (without eliminating it, however), we take as a basis for the analysis to be developed below, the data collected and published in two studies: (i) the article *Crowdworking Platforms in Germany: Business Insights from a Study & Implications for Society*¹⁰, which was presented at the VHB-Jahrestagung 2020 in Frankfurt; (ii) the article *Varieties of platform work: Platforms and social inequality in Germany and the United States*.¹¹

In the first study mentioned above, the authors, after pointing out the insufficiency and the little representativeness of the data available so far, proposed to collect information from thirty-two platforms with headquarters or at least physical place of operation in Germany. By means of an electronic questionnaire, answers were obtained from twenty-one of them. In addition to this statistical data, twelve in-depth interviews were also conducted between August 2018 and October 2019 with representatives of the platforms and with workers who provide services to them, as well as discussions with union leaders and sociologists.¹²

⁹ KRZYWDZINSKI, Martin; GERBER, Christine. **Varieties of platform work: Platforms and social inequality in Germany and the United States**. Berlin: Weizenbaum Institute for the Networked Society: The German Internet Institute, 2020, p. 4.

¹⁰ MRASS, V.; PETERS, C.; LEIMEISTER, J. M. *Crowdworking Platforms in Germany: Business Insights from a Study & Implications for Society*. In: JAHRESTAGUNG DES VERBANDS DER HOCHSCHULLEHRER FÜR BETRIEBSWIRTSCHAFT (VHB). 82., 2020, Frankfurt. **Jahrestagung des Verbands der Hochschullehrer für Betriebswirtschaft (VHB)**. Frankfurt am Main, Germany, 2020.

¹¹ KRZYWDZINSKI, Martin; GERBER, Christine. **Varieties of platform work: Platforms and social inequality in Germany and the United States**. Berlin: Weizenbaum Institute for the Networked Society: The German Internet Institute, 2020, p. 4.

¹² MRASS, V.; PETERS, C.; LEIMEISTER, J. M. *Crowdworking Platforms in Germany: Business Insights from a Study & Implications for Society*. In: JAHRESTAGUNG DES VERBANDS DER HOCHSCHULLEHRER FÜR BETRIEBSWIRTSCHAFT (VHB). 82., 2020, Frankfurt. **Jahrestagung des Verbands der Hochschullehrer für Betriebswirtschaft (VHB)**. Frankfurt am Main, Germany, 2020.



Among the negative aspects highlighted by workers, the low pay and the remote control exercised by some platforms stand out. The supposed “flexibility”, on the other hand, tends to be pointed out by them as a positive factor, as it allows circumventing the difficulties of full access to the labour market.¹³ Note that what is individually presented as a favourable aspect should be read, in fact, as the result of a social maladjustment in the absorption of this labour force in a stable manner by the labour market. In turn, the representatives of the platforms tend to point out as positive factors the reduction of costs (since the workforce is paid below the average of a worker hired as an employee, besides the non-payment of social security contributions), as well as the acceleration of the work process due to hiring on demand.¹⁴

The main data obtained in the referred research were these¹⁵: (i) on average, the platforms had 6.86 years of operation (with 2011 being the year in which the highest number of company formation was observed); (ii) the average number of crowdworkers registered on these platforms (external employees) from Germany was 93,909 workers (with high variability in this number, depending on the platform, which ranges from 1,000 to 500,000 crowdworkers); (iii) as for internal employees on the platforms, they had, on average, only 23.21 people (counting full-time hires); (iv) among the most common services are content production, design, microtasks (which is the case at issue in the *Bundesarbeitsgericht*'s 9 AZR 102/20 decision), testing (of users and software) and customer service; (v) most platforms (fifteen of

¹³ MRASS, V.; PETERS, C.; LEIMEISTER, J. M. Crowdfunding Platforms in Germany: Business Insights from a Study & Implications for Society. In: JAHRESTAGUNG DES VERBANDS DER HOCHSCHULLEHRER FÜR BETRIEBSWIRTSCHAFT (VHB). 82., 2020, Frankfurt. **Jahrestagung des Verbands der Hochschullehrer für Betriebswirtschaft (VHB)**. Frankfurt am Main, Germany, 2020, p. 16 and following.

¹⁴ MRASS, V.; PETERS, C.; LEIMEISTER, J. M. Crowdfunding Platforms in Germany: Business Insights from a Study & Implications for Society. In: JAHRESTAGUNG DES VERBANDS DER HOCHSCHULLEHRER FÜR BETRIEBSWIRTSCHAFT (VHB). 82., 2020, Frankfurt. **Jahrestagung des Verbands der Hochschullehrer für Betriebswirtschaft (VHB)**. Frankfurt am Main, Germany, 2020, p. 17.

¹⁵ MRASS, V.; PETERS, C.; LEIMEISTER, J. M. Crowdfunding Platforms in Germany: Business Insights from a Study & Implications for Society. In: JAHRESTAGUNG DES VERBANDS DER HOCHSCHULLEHRER FÜR BETRIEBSWIRTSCHAFT (VHB). 82., 2020, Frankfurt. **Jahrestagung des Verbands der Hochschullehrer für Betriebswirtschaft (VHB)**. Frankfurt am Main, Germany, 2020, p 6 and following.



them) operate, legally, as a limited liability company; (vi) from 2015 to 2016, sixteen (out of twenty-one) platforms reported growth in revenue.

Although this is an uncertain figure (due to the lack of a general registry, and the fact that workers can register on several platforms at the same time), it was estimated that in January 2017 there would be an average of 1,162,059 registered crowdworkers in Germany. Of these, an estimated average of 25.24% would be active.¹⁶ In order to conceptually characterise a crowdwork platform, the authors point out four requirements: offering an open call to potential service providers, the selection of platforms by these workers, the existence of a digital platform as an intermediary, and the formal possibility that providers decide to perform certain activity or not.¹⁷ They note that the main complications of this type of work are verified, socially, in the long term: compromising the future by not collecting social security contributions and difficulty in state control of labour information for the collection of taxes.¹⁸

As for the second study mentioned above (by Krzywdzinski and Gerber), the authors focus on aspects related to inequalities of work in platforms, with emphasis on the workload, remuneration and subjective perception by workers. Based on a case study involving fifteen selected platforms (in Germany and the United States), and also on a remote survey with workers, they conclude that there is a direct relationship between the characteristics of the labour market and the social security model, on the one hand, and the conditions of work on platforms, on the other. These empirical data were the result of the project *Between digital bohemia and precarity: Work and performance in the crowd*, developed between 2016 and 2019.

¹⁶ MRASS, V.; PETERS, C.; LEIMEISTER, J. M. Crowdworking Platforms in Germany: Business Insights from a Study & Implications for Society. In: JAHRESTAGUNG DES VERBANDS DER HOCHSCHULLEHRER FÜR BETRIEBSWIRTSCHAFT (VHB). 82., 2020, Frankfurt. **Jahrestagung des Verbands der Hochschullehrer für Betriebswirtschaft (VHB)**. Frankfurt am Main, Germany, 2020, p. 10.

¹⁷ MRASS, V.; PETERS, C.; LEIMEISTER, J. M. Crowdworking Platforms in Germany: Business Insights from a Study & Implications for Society. In: JAHRESTAGUNG DES VERBANDS DER HOCHSCHULLEHRER FÜR BETRIEBSWIRTSCHAFT (VHB). 82., 2020, Frankfurt. **Jahrestagung des Verbands der Hochschullehrer für Betriebswirtschaft (VHB)**. Frankfurt am Main, Germany, 2020, p. 14.

¹⁸ MRASS, V.; PETERS, C.; LEIMEISTER, J. M. Crowdworking Platforms in Germany: Business Insights from a Study & Implications for Society. In: JAHRESTAGUNG DES VERBANDS DER HOCHSCHULLEHRER FÜR BETRIEBSWIRTSCHAFT (VHB). 82., 2020, Frankfurt. **Jahrestagung des Verbands der Hochschullehrer für Betriebswirtschaft (VHB)**. Frankfurt am Main, Germany, 2020, p. 17.



On the profile of the so-called crowdworkers in Germany, Krzywdzinski and Gerber¹⁹ note that most of these workers are male, comparatively younger than the other self-employed, and with a higher degree of education than the average population. On the relationship between the spread of platform work and institutional conditions in Germany in recent years, the authors point out that:

[...] precarious forms of employment have increased in Germany due to the deregulation of the labor market (e.g. with regard to the possibilities of using temporary work), the decline in collective bargaining coverage and the outsourcing of workers by companies. As a result, the low-wage sector has expanded and the number of self-employed workers has also increased (Grabka/Schröder 2019; ILO 2017)²⁰

One relevant aspect, extracted from the data obtained in the project, is that the microtask platforms represented 88% of the sample, while the macrotask platforms made up only the other 12%. In addition, by combining data on the time spent on this activity, on the percentage that the income from this activity represented in relation to the person's total income, as well as on whether or not the person was formally employed in another activity, the authors concluded that, in Germany, work on crowdwork platforms tends to be performed in a secondary and complementary way to other occupations. This scenario differs from other countries, such as the United States, where work on these platforms represents the main occupation of the workers who provide services to them. As for the share that income from platform work occupies in the total income of crowdworkers in Germany, the data collected by the survey showed that, for the vast majority of workers (over 70%), this income represents up to 25% of their total income.²¹

¹⁹ KRZYWDZINSKI, Martin; GERBER, Christine. **Varieties of platform work: Platforms and social inequality in Germany and the United States**. Berlin: Weizenbaum Institute for the Networked Society: The German Internet Institute, 2020, p. 7.

²⁰ KRZYWDZINSKI, Martin; GERBER, Christine. **Varieties of platform work: Platforms and social inequality in Germany and the United States**. Berlin: Weizenbaum Institute for the Networked Society: The German Internet Institute, 2020, p. 10.

²¹ On the data presented in this paragraph, see KRZYWDZINSKI, Martin; GERBER, Christine. **Varieties of platform work: Platforms and social inequality in Germany and the United States**. Berlin: Weizenbaum Institute for the Networked Society: The German Internet Institute, 2020, p. 14 and 18.



One of the possible hypotheses for this scenario, presented in the study, refers to the spread of so-called “minijobs” and part-time jobs in recent years in Germany. These jobs are usually accompanied by low monthly wages, which makes these workers need to seek work through platforms as a mechanism to supplement their income. This leads us to realize that there is a direct relationship (and reciprocal affectation) between the contours of work on platforms and changes in the labour market. In other words, it is not appropriate to interpret the complementary character of the activity in workers’ income as a positive indicator, but rather as a sign that the labour market has not been able to absorb, with an adequate remuneration pattern, the social labour force. That is, there is a trend towards longer total working days and work intensification in contemporary capitalism.²²

By the way, Brady and Biegert²³ note that one should not make an isolated analysis of the growth of the occupation rate in Germany from the late 1980s, since it was neither a uniform process (18 to 24-year-olds, for example, experienced a fall in this rate), nor an egalitarian one. This means that inequalities in income and wages, especially from the end of the 1990s, increased, as well as the spread of precarious jobs. As evidence of this deepening of the precariousness process, the authors point to the increase in low-paid work and temporary contracts.

They also note that, between 1984 and 2013, the time period of the study, there was a significant increase in the so-called “minijobs”, defined as “a subset of low-paid jobs that do not require the employer to pay social security taxes or provide employment protection”.²⁴ Therefore, it is in this scenario, arising from the deregulation process of the German labour market²⁵, that the employment relationship subject of the *Bundesarbeitsgericht*’s decision is inserted.

²² In this sense, see BASSO, Pietro. *Modern times, ancient hours: Working lives in the twenty-first century*. London: Verso, 2003.

²³ BRADY, David; BIEGERT, Thomas. The Rise of Precarious Employment in Germany. *SOEP Papers on Multidisciplinary Panel Data Research*, n. 936, 40 p., 2017, p. 6 and following.

²⁴ BRADY, David; BIEGERT, Thomas. The Rise of Precarious Employment in Germany. *SOEP Papers on Multidisciplinary Panel Data Research*, n. 936, 40 p., 2017, p. 10.

²⁵ “[...] the German government has instituted a series of labor market reforms [...] (for an extensive overview of the reforms 1991-2005, see Ebbinghaus and Eichhorst 2006). While the reforms may have perhaps encouraged increased employment, the reforms also contributed to the rise of inequality and precarious employment.” (BRADY, David; BIEGERT, Thomas. The Rise of Precarious Employment in Germany. *SOEP Papers on Multidisciplinary Panel Data Research*, n. 936, 40 p., 2017, p. 25).



Finally, it is important to refer to the study by Markus Grabka and Carsten Schröder, published in 2019, regarding the profile of the German labour market. This helps us to get a broader dimension of these inequalities. The research points out that analysis of the 2017 SOEP (Socio-Economic Panel) data reports that there were around nine million low-paid employment contracts in the country that year, which accounted for about a quarter of all contracts.²⁶ The authors point out that in the social groups most likely to have a precarious contract are young people, women and East German workers. Although the *Bundesarbeitsgericht's* decision did not directly address these data and the contours of inequality in the German labour market, focusing on the elements of the employment relationship and its legal characterisation, this contribution makes it possible to understand the social context that affects (and is affected by) the decision.

2. Background of the German labour law system and presentation of decision 9 AZR 102/20 of the Federal Labour Court (*Bundesarbeitsgericht*)

Before proceeding to the presentation of the decision under review, it is appropriate to briefly contextualise the German labour law system. This contextualisation allows us to understand, even if not exhaustively, the main features of the legal regulation of employment relationships in that country - and, consequently, the impact of the *Bundesarbeitsgericht's* 9 AZR 102/20 decision on the German legal system and labour dynamics. Otherwise, the decision cannot be fully understood and situated in its legal-social specificity.

The first point to be made on the German labour law system refers to the legal normative that served as a central legal foundation for the decision in question. It is §611a of the BGB (*Bürgerliches Gesetzbuch*, German Civil Code), an article that was

²⁶ GRABKA, Markus; SCHRÖDER, Carsten. The low-wage sector in Germany is larger than previously assumed. *DIW Weekly Report*, n. 14, p. 117-124, 2019, p. 118 and following. Available on: <https://ideas.repec.org/a/diw/diwdwr/dwr9-14-1.html>. Access on: 20 Aug. 2021.



introduced in the German legal system only in April 2017.²⁷ This article disciplines the employment contract as a specific contract, which has its own characteristics, such as the existence of an external determination about the instructions to be followed by the employee, as well as the presence of personal dependence.²⁸

An important aspect, which appears at the end of §611a, concerns the recognition that this employment contract is executed once the factual characteristics mentioned in the normative text are present, even if the denomination given to the contractual instrument states that it is another type of contract. In other words, reality prevails over forms. By the way, this was one of the central arguments used by the Court in reaching the decision set out below.

One of the central disputes as to the interpretation of a relationship as employment or autonomous, therefore, refers to the issue of dependency. Krzywdzinski and Gerber²⁹ observe that, in Germany, the main criterion for characterizing the so-called *dependent employment*³⁰ concerns the existence of a “direct obligation to follow instructions (*Weisungsgebundenheit*), which enables the employer to determine working hours and work content”. They also point out that this characteristic tends to be interpreted relatively strictly in that country.³¹

²⁷ The article was included by the law amending provisions of the Temporary Employment Law (*Arbeitnehmerüberlassungsgesetzes*) and other laws, dated February 2017, and in force since April of that year.

²⁸ In summary (and in free translation from German), §611a BGB provides that an employment contract is formed when the employee is obliged to render services to another in a binding manner (with instructions regarding the content, place, time and manner of performance of the task), as well as with external determinations and under personal dependence. In order to be considered essentially free, the worker must have the autonomy to set his working hours and organize his activity. Finally, the article states that the configuration or not of an employment contract must be analysed according to the circumstances, without being bound to the designation formally mentioned in the contract.

²⁹ KRZYWDZINSKI, Martin; GERBER, Christine. **Varieties of platform work: Platforms and social inequality in Germany and the United States**. Berlin: Weizenbaum Institute for the Networked Society: The German Internet Institute, 2020, p. 24.

³⁰ On the issue of dependency at work on digital platforms, see CUTOLO, Donato; KENNEY, Martin. **Dependent Entrepreneurs in the Platform Economy: Playing in the Gardens of Gods**. Berkeley: University of California in Berkeley, 2019.

³¹ On §611a of the BGB and its interpretation, see also MÜLLER-GLÖGE, Rudi; PREIS, Ulrich; SCHMIDT, Ingrid (ed.). **Erfurter Kommentar zum Arbeitsrecht**. Munich: C.H. Beck, 2020.



As Bernd Waas³² explains, the Federal Court in labour matters in Germany had decades ago outlined a criterion known as *Typusbegriff*, to define what could be considered as an employment relationship. In this method, “terms” are understood as “types”. The qualification of employee, therefore, would be a type to be investigated in the concrete case, without it being possible to draw up, abstractly and previously, a sort of exhaustive list of requirements that would characterise a relationship as employment.

Moreover, section 84(1) of the *Handelsgesetzbuch*, the code that deals with commercial relations in Germany, has traditionally functioned as one of the guidelines to investigate the presence or absence of labour subordination, by outlining indicatives to define the degree of freedom or not that someone could have, in the concrete relationship, to define the work, the schedules and other aspects of the activity.³³ Another complementary dimension, built by the jurisprudence of the Court, concerns a so-called “test” of “integration” (*Eingliederung*), to analyse to what extent someone would be inserted into the structure of the company and would consequently be directed by another.³⁴

In this sense, the 2017 legislator, when introducing §611a, “has strongly oriented itself on existing case law, not only with regard to the requirements developed by the courts, but also with regard to the relevance of the typological method [...] and the principle of primacy of facts”.³⁵ The author also points out that another previous bill had been presented, which sought to define, in a more incisive way, the indicators of an employment relationship - but which was quickly rejected,

³² WAAS, Bernd. The legal definition of the employment contract in section 611a of the Civil Code in Germany: An important step or does everything remain the same? *Italian Labour Law e-Journal*, v. 12, n. 1, p. 25-34, 2019, p. 26 and following.

³³ WAAS, Bernd. The legal definition of the employment contract in section 611a of the Civil Code in Germany: An important step or does everything remain the same? *Italian Labour Law e-Journal*, v. 12, n. 1, p. 25-34, 2019, p. 27.

³⁴ WAAS, Bernd. The legal definition of the employment contract in section 611a of the Civil Code in Germany: An important step or does everything remain the same? *Italian Labour Law e-Journal*, v. 12, n. 1, p. 25-34, 2019, p. 28.

³⁵ WAAS, Bernd. The legal definition of the employment contract in section 611a of the Civil Code in Germany: An important step or does everything remain the same? *Italian Labour Law e-Journal*, v. 12, n. 1, p. 25-34, 2019, p. 31.



due to opposing social forces.³⁶ Waas notes, finally, that the wording of the new §611a has been criticised by part of the labour law literature for having limited itself to transposing jurisprudential elements into legislation, missing the opportunity for a more effective regulation of the employment relationship. For another part of this literature, however, the explicit mention of external determination (or by third parties) may work as an important element to interpret employment relationships different from the classic forms of subordination, such as the one that occurs through digital platforms.³⁷

Back to the analysis of the labour regulatory system in Germany, it is worth noting that, in addition to the fact that §611a is a recent innovation of the BGB (inserted, therefore, in the code that deals with private contractual relations in general), the German labour law framework does not have a condensation of labour norms in a single normative diploma - nor in a diploma that can be considered as the main one. In fact, each aspect of the employment relationship (working hours, holiday, collective bargaining, essential elements of the employment contract, among others) is regulated by a specific normative instrument.

For instance, working hours are regulated by the *Arbeitszeitgesetz*, originally dated June 1994. In turn, the holiday system is governed by the *Bundesurlaubsgesetz*, enacted in January 1963. The *Kündigungsschutzgesetz* (Law on Protection against Dismissal) of August 1951 also provides for guarantees against dismissal that is considered socially unjustified. The main normative basis for collective bargaining is the *Tarifvertragsgesetz*, enacted in April 1949. The elements that must be included in the employment contract, on the other hand, are regulated by the *Gesetz über den Nachweis der für ein Arbeitsverhältnis geltenden wesentlichen Bedingungen*, enacted in July 1995, which can be understood as the

³⁶ WAAS, Bernd. The legal definition of the employment contract in section 611a of the Civil Code in Germany: An important step or does everything remain the same? *Italian Labour Law e-Journal*, v. 12, n. 1, p. 25-34, 2019, p. 32.

³⁷ WAAS, Bernd. The legal definition of the employment contract in section 611a of the Civil Code in Germany: An important step or does everything remain the same? *Italian Labour Law e-Journal*, v. 12, n. 1, p. 25-34, 2019, p. 32-33.



law that provides for the proof of the essential conditions to be applied to an employment relationship.

Due to the transformations in the world of work³⁸, this legislation, mostly conceived in the post-World War II context, is faced with challenges that relate, above all, to the need to account for a social reality marked by the complexification of forms of alienation of the workforce. In this sense, Wolfgang Däubler points out three challenges to labour law in Germany: (i) the effects of globalisation, focusing on the fact that markets for goods and investments tend to become increasingly open; (ii) inequality in society in general and even among workers themselves; (iii) the deepening digitalisation of work, which blurs the boundaries between private life and work.³⁹

After this point of contextualisation of the regulatory framework, and before moving on to the presentation of the decision itself, it is also important to specify, albeit in general terms, the way in which the German labour judiciary operates. To this end, reference is made to the *Arbeitsgerichtsgesetz* of September 1953, which governs the organisation of labour courts in Germany. Articles 14 to 32 of the law deal with the *Arbeitsgerichte*, which relate to the first degree of jurisdiction. In turn, Articles 33 to 39 of that law are devoted to the second degree of jurisdiction, consisting of the courts called *Landesarbeitsgerichte*. Subsequently, articles 40 to 45 provide for the *Bundesarbeitsgericht*, which can be translated as the Federal Labour Court (in a simple comparison, it would be similar to the Brazilian Superior Labour Court).

The *Bundesarbeitsgericht* is of closer interest to us, since the decision that is the subject of the present research was rendered within this court. Based in Erfurt, the court has subdivisions called “Senates”. Each *Senat* consists of three judges (one of whom is the president) plus two lay members who each represent workers and

³⁸ These can be seen, above all, in the spread of precarious forms of contracting, added to and interconnected with the spread of service provision through digital platforms.

³⁹ DÄUBLER, Wolfgang. Challenges to Labour Law. *RDRST*, Brasília, v. 3, n. 2, p. 36-56, jul./dec. 2017, p. 37.



employers.⁴⁰ This Court has the task, above all, of providing unity and consistency to labour decisions in the country, as well as interpreting cases that the legislation does not fully regulate.⁴¹ The precedent in question, set out below, concerns a decision of the ninth *Senat*.

Having explained these points, let us now turn to the analysis of decision 9 AZR 102/20 of the *Bundesarbeitsgericht*. In the official press release No. 43/20, entitled *Arbeitnehmereigenschaft von „Crowdworkern“*⁴², the main aspects of the decision concerning the case and the fundamentals used by the judges are presented. Furthermore, the explanation developed here is also based on the arguments published in the judgment of the Ninth *Senat*.

This is a case that reached the Court by way of an appeal against a previous decision handed down by the Munich Labour Court (*Landesarbeitsgerichte*), which did not recognise the employment relationship claimed. At the Federal Court, the worker was able to have his appeal partially upheld, in particular the recognition of the employment relationship with the so-called *mikrojob* platform for which he had provided services (in this case, the *Roamler* platform). Based on the press release and the judgment, the following paragraphs are dedicated, therefore, to the account of the case.

When filing the lawsuit, the worker requested recognition of the existence of an employment contract of indefinite duration with respect to the platform. In June 2019, during the proceedings, the defendant terminated the contract with the

⁴⁰ The presence of lay members in the German judiciary is historically striking not only in labour courts, but also in other areas (such as criminal courts). In the words of a magistrate in a report of the 10th Meeting of European Labour Court Judges: “The involvement of lay judges in all three instances plays a decisive role for the respect and confidence which labour court jurisdiction has gained among employers and employees since its existence. [...] The presence of lay judges makes labour jurisdiction more understandable and more ‘familiar’ to working people. In general I think it is a democratic factor too. It is a point of control for the public of what labour jurisdiction does.” ILO. **Tenth Meeting of European Labour Court Judges Stockholm**, September 2, 2002. Lay Judges Questionnaire. Germany: General Reporter Judge Peter Clark Employment Appeal Tribunal, London, Great Britain; National Reporter Judge Friedrich Hauck, Federal Labour Court. P. 5. Available on: http://www.oit.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/meetingdocument/wcms_160093.pdf. Access: 21 Aug. 2021.

⁴¹ BUNDESARBEITSGERICHT. *Zuständigkeit der Gerichte für Arbeitsachen*. 2020. Available on: <http://www.bundesarbeitsgericht.de/allgemeines/allgemeines.html>. Access: 07 Mar. 2021.

⁴² “Employee status of ‘crowdworkers’”, in a free translation from German.



plaintiff on a precautionary basis, for which reason the plaintiff amended his claim to include labour indemnities and the incidence of protection against dismissal. Before the case reached the *Bundesarbeitsgericht*, the previous decisions of the other courts had been to completely deny the worker's claim. On the other hand, the Ninth Senat of the *Bundesarbeitsgericht* partially granted the plaintiff's appeal. As already stated, the judges considered that the plaintiff made his labour force personally available for the digital microtasks platform. By means of a generic hiring (that is, from his digital account registered in the platform), the attributions consisted, mainly, in controlling the presentation of products in sales locations and gas stations, photographing them and answering questions about them.

Once the worker accepted a certain assignment, through the online platform, he or she had to perform it in a certain place and time (within two hours). The platform also specified how the service was to be provided. One of the main issues is that, even though the worker has a supposed freedom in accepting or not the assignment, it is the amount of work completed that allows the worker to accumulate experience points on the platform and thus have the prospect of higher remuneration per hour of service in the future.⁴³

The legal basis for the Court's recognition of the employment relationship between the worker and the digital platform was based on the understanding that the factual requirements of the employment relationship were present, regardless of the formalities of the hiring. As a central normative base, it was used article §611a of the BGB (German Civil Code), according to which an employment contract is formed when the service is performed under the external determinations and control of the employer (if the provider is not free to set his schedule, for example), and

⁴³ BUNDESARBEITSGERICHT. **Pressemitteilung Nr. 43/20.** Arbeitnehmereigenschaft von Crowdworkern. 2020. Available on: <http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=pm&nr=24710>. Access: 07 Mar. 2021. BUNDESARBEITSGERICHT. **Urteil vom 1.12.2020, 9 AZR 102/20** ECLI:DE:BAG:2020:011220.U.9AZR102.20.0: Arbeitnehmerstatus eines Crowdworkers. 2020. Available on: http://juris.bundesarbeitsgericht.de/zweitesformat/bag/2021/2021-04-19/9_AZR_102-20.pdf. Access: 25 May. 2021.



with personal dependence.⁴⁴ If these circumstances are present, and regardless of the name given to the contractual instrument, an employment contract is formed. The magistrates of the *Bundesarbeitsgericht* concluded that this was the case in question, since the plaintiff could not control the times, places, how the tasks were performed or their results.⁴⁵

The Ninth *Senat* pointed out that the way the platform operates was designed so that workers (considered as “users” of the platform) adhere to packages of small tasks, continuously and personally, in order to accumulate points that allow them to advance levels in the algorithmic rating system. Reaching a higher level in this system is the only way for workers to be able, in the future, to perform several tasks simultaneously - and thus be able to group them in the same path and increase their hourly pay. This was precisely the case of the plaintiff, who carried out almost three thousand orders for the defendant in an eleven-month period.⁴⁶ That is, the alleged choice or freedom to accept the tasks or not has a merely apparent character.

In summary, the court found that the platform determined the conditions under which the work was to be performed, including the time and place for the task to be accomplished. It also considered the central aspect of the relationship of personal dependence between worker and platform. In addition, there is the fact that all the steps of the activity were indicated and controlled by the defendant, whose points system would configure one more factor to undermine the autonomy in

⁴⁴ See KURT, Simge. *Schutz und Verantwortung in der digitalen und globalen Arbeitswelt: Die Stellung des Menschen im Arbeitsschutzsystem auf dem Weg zur (Un)Abhängigkeit 4.0*. Baden-Baden: Nomos, 2020.

⁴⁵ BUNDESARBEITSGERICHT. *Pressemitteilung Nr. 43/20*. Arbeitnehmereigenschaft von Crowdworkern. 2020. Available on: <http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=pm&nr=24710>. Access: 07 Mar. 2021. BUNDESARBEITSGERICHT. *Urteil vom 1.12.2020, 9 AZR 102/20*. ECLI:DE:BAG:2020:011220.U.9AZR102.20.0: Arbeitnehmerstatus eines Crowdworkers. 2020. Available on: http://juris.bundesarbeitsgericht.de/zweitesformat/bag/2021/2021-04-19/9_AZR_102-20.pdf. Access: 25 May. 2021.

⁴⁶ See BUNDESARBEITSGERICHT. *Pressemitteilung Nr. 43/20*. Arbeitnehmereigenschaft von Crowdworkern. 2020. Available on: <http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=pm&nr=24710>. Access: 07 Mar. 2021. BUNDESARBEITSGERICHT. *Urteil vom 1.12.2020, 9 AZR 102/20*. ECLI:DE:BAG:2020:011220.U.9AZR102.20.0: Arbeitnehmerstatus eines Crowdworkers. 2020. Available on: http://juris.bundesarbeitsgericht.de/zweitesformat/bag/2021/2021-04-19/9_AZR_102-20.pdf. Access: 25 May. 2021.



the provision of services. It was not, therefore, a mere factual indication of how to perform the task, as would occur in a private non-employment relationship. The *Senat* also considered that the work was performed personally, since the worker's account was not transferable.⁴⁷

The case is paradigmatic because, since there is no provision for collective labour actions in Germany, this is the only publicly known case so far on the subject. Krzywdzinski and Gerber⁴⁸ note that the plaintiff worker has received support from the unions, but because of the fragmentation of platform work and the consequent hindrance of collective articulation, as well as the novelty involved in this employment relationship, the major German unions - such as “ver.di and IG Metall - have been cautious in their approaches so far and are counting on dialogue with the platforms”.

Among the main trade union mobilisations in the context of the legal and regulatory disputes around digital platform work, the dialogue between IG Metall and the *Bundesarbeitsministerium* (which can be translated as Federal Ministry of Labour) stands out. In addition to the dialogue with the Ministry regarding legislative proposals to regulate platform work, as well as the establishment of a Code of Conduct with nine platforms, IG Metall provided support to the plaintiff in the key case brought before the *Bundesarbeitsgericht*.⁴⁹ Although trade union mobilisation on platform work has been ongoing since at least 2015⁵⁰, the context of the pandemic makes the inequalities and demands of this employment relationship more explicit.

⁴⁷ BUNDESARBEITSGERICHT. Urteil vom 1.12.2020, 9 AZR 102/20 ECLI:DE:BAG:2020:011220.U.9AZR102.20.0: Arbeitnehmerstatus eines Crowdworkers. 2020. Available on: http://juris.bundesarbeitsgericht.de/zweitesformat/bag/2021/2021-04-19/9_AZR_102-20.pdf. Access: 25 May. 2021.

⁴⁸ KRZYWDZINSKI, Martin; GERBER, Christine. *Varieties of platform work: Platforms and social inequality in Germany and the United States*. Berlin: Weizenbaum Institute for the Networked Society: The German Internet Institute, 2020, p. 26.

⁴⁹ IG METALL. *Arbeit auf digitalen Plattformen: IG Metall begrüßt Vorschläge des Bundesarbeitsministeriums*. 2020. Available on: <https://www.igmetall.de/presse/pressemitteilungen/arbeit-auf-digitalen-plattformen-ig-metall-begruesst--vors>. Access: 27 Aug. 2021.

⁵⁰ IG METALL. *Arbeit auf digitalen Plattformen: IG Metall begrüßt Vorschläge des Bundesarbeitsministeriums*. 2020. Available on: <https://www.igmetall.de/presse/pressemitteilungen/arbeit-auf-digitalen-plattformen-ig-metall-begruesst--vors>. Access: 27 Aug. 2021.



3. Possible precautions for future comparative analyses between Germany and Brazil

Although the specific objective of this paper was not to carry out a comparative analysis between Germany and Brazil, it is valid to conclude it with some reflections on the topic, as a way to point out possible investigative paths and methodological precautions for future research that discusses these approximations. The reflections proposed here will take into account the two axes observed in the article: (i) the materiality of this employment relationship and its imbrications with the transformations in the labour market; (ii) the legal framework and the judicial dispute regarding the categorisation of the relationship between deliverers and platforms.

Regarding the first point, an analysis that intends to trace possible approximations between work on crowdwork platforms in Brazil and Germany must inevitably take into account the diversity of the formation and reconfigurations of the labour market in both countries, as well as the social contours of the working classes. Otherwise, we run the risk of mechanically transposing the merely external and apparent aspects of this labour relation, without considering the material specificities and contradictions they assume in each social reality.⁵¹

For example, a comparison that simply poses empirical data, without understanding them in their historical and social complexity, could conclude that there is a pure dichotomy between the configuration of this labour relation in both countries. In fact, it could even take the German social reality according to an idealised perspective, as if it were detached from the process of precariousness of labour relations. That is, the German data that points to a higher level of education

⁵¹ For an analysis on working conditions via digital platforms in Brazil, see: ABÍLIO, Ludmila et al. Condições de trabalho de entregadores via plataforma digital durante a Covid-19. *Revista Jurídica Trabalho e Desenvolvimento Humano*, Campinas, v. 3, p. 1-21, 2020, and SANTOS, Eneida; CARELLI, Rodrigo. As plataformas digitais de transporte e o lugar do negro no mercado de trabalho: o racismo nas configurações institucionais do trabalho no Brasil do século XXI. *Revista Jurídica Trabalho e Desenvolvimento Humano*, Campinas, v. 5, p. 1-37, 2022.



of crowdworkers, as well as the complementary character of platform work in the total income of these workers, could be inadvertently interpreted as a reflection of a labour market without inequalities.

Geographical inequalities and the role played by each country in the production and global circulation of value, of course, denote a scenario of overexploitation of the workforce in the context of the so-called dependent capitalism.⁵² But this does not imply the conclusion that there would be spaces of absence of disparities and contradictions in the so-called centre of capitalism, and for a very simple reason: the growing extraction of value, through the transfiguration of the workforce into merchandise, is the basic mechanism of accumulation of the capitalist mode of production anywhere in the world.

This is not to say that the capital-labour conflict in Germany has been stalled, but rather that it has become more acute (above all due to the spread of especially precarious forms of contracting, which push people to seek work on the platforms as a means of supplementing their income). In Klaus Dörre's words, who also points to a process of "de-collectivization of labour relations" in a large part of Europe⁵³:

Even in societies with a thriving economy, insecure labour relations have become "a normal form of organisation" (Castel: 2011, 136) of social life. Germany's society of precarious full-time workers is no exception here. In income and assets as well as in housing, health, education and social distinction, Germany has become one of the most unequal societies in Europe and the OECD countries (Kaelble, 2017: 176; Alvaredo et alii, 2018: 155-161).⁵⁴

After this point, let us look at the second axis of analysis proposed, concerning the legal-labour framework of both countries. A first precaution for possible approximations between distinct legal systems concerns precisely the understanding that law is not restricted to its most immediately visible formalisations. In other

⁵² MARINI, Ruy Mauro. *Dialética da dependência*. Petrópolis: Vozes, 2000.

⁵³ DÖRRE, Klaus. Capitalismo de risco. Landnahme, crise bifurcada, pandemia: chance para uma revolução sustentável? (*Risiko Kapitalismus*. Landnahme, Zangenkrise, Nachhaltigkeits-revolution). *Sociedade e Estado*, v. 35, n. 3, p. VII a LII, sep./dec. 2020, p. XXVII, free translation.

⁵⁴ DÖRRE, Klaus. Capitalismo de risco. Landnahme, crise bifurcada, pandemia: chance para uma revolução sustentável? (*Risiko Kapitalismus*. Landnahme, Zangenkrise, Nachhaltigkeits-revolution). *Sociedade e Estado*, v. 35, n. 3, p. VII a LII, sep./dec. 2020, p. XXVI, free translation.



words, it is not possible to understand a legal system in its complexity simply by reading normative instruments and judicial decisions.

The way in which these rules and decisions interweave with social life, and how they construct their meanings from this interweaving (including their legal sense), also includes what is understood as law. In addition to this, it is also necessary to note that the very expression legal system itself denotes the need to understand the dynamics of interaction between the elements that make up this system. That is, it is not a question of a static apprehension, or even of a simple apposition of these elements.

Regarding the legal-labour framework, it is noticeable that the social-historical formation of the German labour legislation has different characteristics from the Brazilian one. The process of compilation of Brazilian labour laws, whose central framework was outlined in Vargas' government, aimed to discipline the workforce, as well as the formation and consolidation of a then incipient industrialisation pattern.⁵⁵ In turn, most of the current German labour legislation, extremely fragmentary, arose in the post-World War II context, as part of the attempt to rebuild Germany.

Specifically on the issue of the factual-legal elements that characterise an employment relationship, as seen above, although there is a certain similarity between §611a of the BGB and the Brazilian labour law provision, it is necessary to consider important nuances. The first one is that this recently enacted German discipline is inserted in the normative diploma that deals with private contractual relations as a whole (i.e., in the German Civil Code). It should also be taken into account that the legal interpretation of these elements varies from country to country. In Germany, as observed in the previous item, the requirement of personal dependence takes center stage when analysing the (in)existence of a legal-employment relationship in a certain case.

Finally, it is also valid to trace some mediation regarding the judicial organisation and the contours of labour litigation in both countries. Although the

⁵⁵ OLIVEIRA, Francisco de. *Crítica à razão dualista: O ornitorrinco*. São Paulo: Boitempo, 2003.



structure of German labour courts and procedures are somewhat similar to ours, there are important distinctions. One of the most significant concerns the absence of collective labour actions in Germany - which, by the way, contributed to make the case under analysis (and the decision of the 9th *Senat*) a paradigm in the subject, as pointed out by Krzywdzinski & Gerber.⁵⁶

In short, proceeding to a comparative analysis between different social realities and legal systems requires observing, first of all, the contours that a relationship, norm or decision assumes or may assume in the context of certain social dynamics. These precautions are also relevant when reflecting on the possible contributions of a foreign legal decision, or even data from a certain labour market, to the debate on the legal-social categorisation of work on platforms in Brazil. That is, it is necessary to reflect on what underlies a certain legal response and on its relations with the materiality of each society.

CONCLUSION

Without claiming any conclusive or exhaustive tone, these final notes are intended to condense some of the main challenges observed throughout the analysis. The first of these refers to the notion that it is not possible to understand the law as a self-evident phenomenon or alien to social influences. This is especially noticeable when it comes to labour relations, since they involve materially dynamic social processes which are not entirely subsumed by previous normative frameworks.

In this sense, the diffusion of work through digital platforms worldwide should not be considered a point out of the curve or a qualitatively unprecedented event at the social and historical level. In fact, what we observe is a complexification in the forms of alienation of the workforce, without altering, therefore, the core of the functioning of the capitalist mode of production. To deal with this complexification, nor are the basic categorical constructions of labour law overcome. Not surprisingly,

⁵⁶ KRZYWDZINSKI, Martin; GERBER, Christine. **Varieties of platform work: Platforms and social inequality in Germany and the United States.** Berlim: Weizenbaum Institute for the Networked Society: The German Internet Institute, 2020, p. 25.



terms such as dependency, subordination, control, personality, among others, are in permanent dispute (inside and outside the courts).

For this reason, it was possible to observe that the spread of platform work, despite having historical and social specificities in each country, constitutes a transnational phenomenon related to the productive alterations and restructuring of capitalism. This process leads to the deepening of inequalities and contradictions that are at the basis of this mode of production, whose effects fall, above all, on the working class. Whether in Germany or in Brazil, the expansion of this particularly precarious form of contracting is related to a context of the labour market's incapacity to fully absorb the social workforce. This is what the empirical data shown in the article reveal. The fact that, in Germany, work on digital platforms is generally considered a source of income supplementation does not mean an attenuation of inequalities in that labour market. On the contrary, it demonstrates the effects of the diffusion of part-time and low-paid jobs.

This question leads us to a second challenge: how to understand the judicial decisions concerning the legal-labour bond between platforms and workers without falling into the ever-pressing risk of legal idealism? In other words, how can we enter this debate without reducing it to conclusions that the recognition of the employment bond would, by itself, resolve all the fundamental inequalities of this relationship? In other words, the possibilities of legal regulation must not be conceived as an aprioristic datum in the face of social relations, but rather, as the direct result of the struggles, conflicts and contradictions of these relations. Only in this way is it possible to understand material inequalities and the conditions for their real overcoming.

In order to try to deal with this challenge and escape a possible essentialisation of the *Bundesarbeitsgericht's* 9 AZR 102/20 decision, this article proposes an interdisciplinary analysis aimed at understanding the labour relation that is the object of the decision in its social concreteness. In this line, it was observed the context that allowed the spread of this form of hiring, as well as its implications with the reconfigurations of the German labour market. In addition, it is necessary to reinforce, once again, that law itself is not limited to formal categorisations, but



should be understood in a reciprocal affective relationship with social dynamics and with the way of theoretically reflecting on them.

To that end, the characteristics of the German labour legal system were also observed, both as to the sparse nature of the legislation and the organisation of the labour courts. From the exposition of the decision of the German Federal Labour Court in question, the factual and legal elements that led the court to decide were extracted: the fact that the worker performed the services under the control and determinations of the platform, as well as the existence of continuity, personality and dependence. These characteristics have some similarities in relation to what Brazilian labour legislation and jurisprudence tends to point out as characterising elements of an employment relationship. That is, in both legal systems, the existence of an employment relationship is analysed according to the concrete and real facts of that activity, notwithstanding the formal names that the contracting may receive.

Finally, it is worth mentioning a third challenge, along the lines of the precautions suggested in the last item in the development of the article: it is necessary to bear in mind the historical and social specificities of each labour market and each legal framework, when attempting any comparative analysis between two countries. This does not mean to affirm that there are no points of convergence and possible similar social bases, but on the contrary, it only signals that similarity can only be found when materiality is kept in mind.

Although the main objective of this paper was not a strict comparison between the German and Brazilian scenarios, it was observed that the paths of the labour legal framework and labour market development have their own historical and social trajectories. Whether in terms of the formats of lawsuits, the historical construction of labour legislation, or the social characteristics of inequalities in the labour market, each context must be analysed in a materially situated way. This does not mean that comparative studies cannot be carried out, but just the opposite: that these studies should not seek a mechanical transposition between formal aspects of the legal system, as if it were detached from the contradictions proper to each social reality.



In short, one must first of all look at concrete inequalities and the contours of the capital-labour conflict in a certain social dynamic. Only then is it possible to investigate the complexity of the process of alienation of the workforce in contemporary times, with special attention, for the purposes outlined here, to labour relations mediated by digital platforms. And this does not lead, in any way, to the assumption of some kind of inaugural point in the flow of history. In fact, the so-called past has much more to say about the present than one might think.

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