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## TAKEN FOR A RIDE: WORKERS IN THE GIG ECONOMY

In *R. (on the application of The Independent Workers Union of Great Britain) v Central Arbitration Committee and Rooffoods Ltd t/a Deliveroo* [2018] EWHC 3342 (Admin); [2018] 12 WLUK 17, Supperstone J. considered a judicial review challenge by the Union (IWGB) to a decision of the Central Arbitration Committee (CAC) that Deliveroo Riders were not “workers”. The CAC had held that there was a valid and unfettered substitution clause in the contract, the effect of which was to negate “worker” status as defined in s.296(1)(b) Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) (*Independent Workers’ Union of Great Britain v RooFoods Ltd t/a Deliveroo* [2017] 11 WLUK 313; [2018] I.R.L.R. 84). This meant that the statutory recognition procedure in Sch.A1 of TULRCA was inapplicable to them since it is restricted to “workers”. Permission for the legal challenge was granted by Simler J. on the basis of art.11 of the ECHR and its protection of the fundamental right to collective bargaining (*Demir and Baykara v Turkey* (2009) 48 E.H.R.R. 54; [2009] I.R.L.R. 766). The IWGB argued that since Sch.A1 was the legislative specification of the fundamental right to collective bargaining, protected under art.11, its personal scope ought to be construed in favour of inclusion of the Riders. This followed from s.3 of the Human Rights Act 1998 which provides that:

“so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights”.

Supperstone J. rejected IWGB.’s argument on the principal basis that the case law of the ECtHR restricted trade union rights in art.11 to those in an “employment relationship”. These specific trade union rights did not extend to “everyone”, as is the case with the general protection of freedom of association in art.11. Since the Riders were not workers in national law, Supperstone J. concluded that they were not in an “employment relationship” either. Given his reading of the ECtHR’s case law, this treatment of their decisions appeared to be consistent with *Pinnock v Manchester City Council* [2010] UKSC 45; [2011] 2 A.C. 104 where Lord Neuberger observed (at [48]) that:

“Where there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this court not to follow that line”

Given his primary finding that there was no interference with the Riders' art.11 rights, the remaining points were quickly disposed of. Supperstone J. took the view that any restriction of the Riders' art.11 rights would be easily justified under art.11(2), and he rejected a range of proposed reformulations of the personal work criterion under s.296(1)(b) TULRCA 1992.

Supperstone J.'s judgment is erroneous in two respects. First, the judgment misapplies the "employment relationship" concept under art.11 because the Riders clearly fall within its scope. Secondly, the judgment applies a very broad margin of appreciation in its art.11 reasoning. This is mistaken. The interference with the Riders' freedom of association is very far-reaching, because worker status in UK law is the gateway to the most basic freedom of association protections. The note concludes by proposing an interpretation of the "personal work" requirement in "worker" that is consistent with "employment relationship" under art. 11.

Supperstone J. treated the Grand Chamber decision in *Sindicatul "Pastorul Cel Bun" v Romania* [2014] 58 E.H.R.R. 10; [2014] I.R.L.R. 49 as supporting Deliveroo's argument that there was no interference with the Riders' art.11 rights. According to Supperstone J. this was because there was no "employment relationship" between Deliveroo and its Riders (at [38]). The Grand Chamber in *Sindicatul "Pastorul Cel Bun"* had held that such a relationship was necessary for "the right to form a trade union within the meaning of art 11" (at [141]). The Grand Chamber referred to "the criteria laid down in the relevant international instruments" and in particular the International Labour Organisation (ILO) Employment Relationship Recommendation, 2006 (No.198) (at [142]).

There are unresolved ambiguities about the scope of freedom of association in international law, particularly the interrelationship between ILO and ECHR standards. The ILO supervisory committees have treated freedom of association as applying to *all* workers "without distinction whatsoever" (ILO Convention on Freedom of Association and Protection of the Right to Organise Convention, 1948 (No.87)), and this would include the self-employed (B. Creighton and S. McCrystal (2016) 37 Comp. Lab. L. & Pol'y J. 691 at 701). By contrast, the ILO Recommendation relied upon by the Grand Chamber is focused more narrowly on contexts of "disguised employment" (see (2016) 37 Comp. Lab. L. & Pol'y J. 691 at 716)

In applying art.11, therefore, it is better to treat the narrower ILO concept of "employment relationship" as applicable to the Riders' contractual situation, rather than the wider argument that the right to collective bargaining applies to "everyone", including independent entrepreneurs. That wider argument would represent a much more fundamental challenge to the legal structure of collective labour law in the UK, which is centred on the "worker". It is a

more modest step to secure an alignment of “worker” with the concept of “employment relationship”.

The application of the criteria in the Recommendation to the Riders’ situation leads ineluctably to the conclusion that they are in an “employment relationship”. At first blush, the concern of the Recommendation with “disguised employment” might appear to limit its relevance to *Deliveroo*. The CAC had already decided that the substitution clauses were genuine and not a sham. Nevertheless, the Recommendation in its Preamble also recognises that there might be “difficulties of establishing whether an employment relationship exists...where inadequacies or limitations exist in the legal framework, or in its interpretation or application”. A legal rule that treats the mere existence of a valid contractual term (such as a substitution clause) as a conclusive negation of worker status is defective in precisely this respect. It is tantamount to permitting contracting-out of employment protection. To counter this “inadequacy or limitation”, it is necessary to develop the law on personal work in a purposive way.

Under Part II, the determination of an “employment relationship” should be:

“guided primarily by the facts relating to the performance of work ... notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties” (para.9).

It also recommends “allowing a broad range of means for determining the existence of an employment relationship”; and where there is a “relevant indicator” present in the factual arrangements there should be a “legal presumption that an employment relationship exists” (para.11). These relevant indicators:

“might include: (a) the fact that the work: is carried out according to the instructions and under the control of another party; involves the integration of the worker in the organization of the enterprise; is performed solely or mainly for the benefit of another person; must be carried out personally by the worker ... involves the provision of tools, materials and machinery by the party requesting the work” (para.13).

In *Deliveroo* the existence of an apparently unfettered substitution clause was treated as fatal to worker status. This is incompatible with para.13. Its effect was to characterise the Riders as self-employed despite the existence of other indicative factors, such as the provision of extensive training to new recruits (*Independent Workers’ Union of Great Britain v RooFoods*

*Ltd t/a Deliveroo* [2018] I.R.L.R. 84 at [46]-[47]), pointing the other way. As the CAC Panel stated, once the finding of a valid substitution clause had been made:

“it is therefore unnecessary to dissect the other features of the contractual relationship between Deliveroo and its Riders: they are insufficient to compensate in the Union’s favour in light of the substitution finding.” (at [103]).

Nor was there any “legal presumption that an employment relationship exists” as required by the Recommendation. The arrangements were construed neutrally rather than in a pro-inclusionary way favouring worker status. Properly understood, the Riders were in an “employment relationship” for the purposes of art.11.

The second problem concerns Supperstone J.’s conclusion that the justification for any interference with art.11 (1) was easily met:

“Any interference with Art.11(1) is of a limited nature. The personal service obligation does not prevent Riders from belonging to the Union if they choose to do so, or prevent the making of voluntary arrangements. All that it precludes is the compulsory mechanism provided by Schedule A1 of the 1992 Act” (at [46]).

The assumed existence of alternative means for the Riders to organise for the protection of their interests provided support for a wide margin of appreciation. This assumption permeates Supperstone J.’s entire judgment.

Supperstone J.’s generous approach to margin of appreciation implies an equivalence with decisions such as *Pharmacists’ Defence Association Union v Boots Management Services* [2017] EWCA Civ 66; [2017] 2 WLUK 283 and *Unite the Union v UK* (2016) 63 E.H.R.R. SE7; [2017] I.R.L.R. 438. In these cases, the courts emphasised that legislators enjoyed a wide latitude to concretise the right to collective bargaining in legislation. It was necessary for courts to proceed cautiously before disrupting the complex social and economic adjustments that underlie such legislation. This is a pre-eminently political domain in which courts should tread lightly. In *Boots*, the workers had the opportunity to seek statutory derecognition of the recognised non-independent staff association, enabling the independent union to seek recognition under Sch.A1 in the event of a successful derecognition ballot. In *Unite*, the abolition of the Agricultural Wages Board did not violate art.11. This finding was supported by the fact that the agricultural workers still enjoyed formal access to Sch.A1 (though they faced serious practical obstacles in that regard because most employers fell below the Sch.A1 threshold that an employer must employ at least 21 workers) and could pursue collective

bargaining through voluntary means, including strike action (see [2017] I.R.L.R. 438 at [65]). In other words, the legal regime provided opportunities for these workers to organise and seek collective bargaining, despite the existence of specific impediments in each case.

By contrast, Supperstone J.'s conclusion that the Riders are not workers has extreme implications for their freedom of association. The logic of Supperstone J.'s analysis is that the Riders are now legally unprotected from discrimination because of their trade union membership and activities; any collective agreements may be exposed to liability under competition law; and trade unions organising strike action of self-employed Riders cannot benefit from the trade dispute immunity under s.219 TULRCA 1992. Far from being an interference "of a limited nature", the denial of worker status represents a complete negation of their freedom of association.

According to Supperstone J. the Riders are not prevented "from belonging to the Union if they choose to do so." That is a surprising assertion because the structure of legal protection for freedom of association under the 1992 Act is focused on "workers". "Workers" are protected from being subject to a "detriment" (s.146) and financial inducements by their employer (s.145A) where the sole or main purpose is to prevent or deter them from being trade union members, using union services, or taking part in the activities of a union at an appropriate time. "Workers" are also protected in certain circumstances from "offers" where the employer's "sole or main purpose" is that the worker's terms will no longer be determined by collective agreement (s.145B). Refusal of employment (s.137) and dismissal (s.152) in relation to trade union membership, use of union services, and taking part in the activities of a union at an appropriate time, is restricted to "employees". The Riders may also be legally unprotected from blacklisting. Under the Employment Relations Act 1999 (Blacklists) Regulations 2010 a "prohibited list" must be:

"compiled with a view to being used by employers or employment agencies for the purposes of discrimination in relation to recruitment or *in relation to the treatment of workers*" (reg.3(2)(b), emphasis added).

After *Deliveroo*, anti-union discrimination can be perpetrated against self-employed Riders with legal impunity.

In these circumstances:

"their freedom to belong to a trade union, for the protection of their interests, becomes illusory. It is the role of the State to ensure that trade union members are not prevented or

restrained from using their union to represent them in attempts to regulate their relations with employers.” (*Wilson v UK* (2002) 35 E.H.R.R. 20; [2002] I.R.L.R. 568 at [46]).

Without these minimal legal protections, the very foundations of the right to collective bargaining are removed. It is “a very far-reaching interference with freedom of association” (*Unite the Union v UK* [2017] I.R.L.R. 438 at [60]) which should, like the interference in *Demir*, be subject to a very narrow margin of appreciation.

Supperstone J. also stated that the exclusion of worker status did not prevent the Riders from “the making of voluntary arrangements”. This betrays a basic failure to understand the anti-competitive nature of collective agreements. Under EU law, collective agreements between organisations representing employees and employers are exempted from art.101 (1) TFEU where those agreements are directed at improving conditions of work and employment (*Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* (C-67/96) EU:C:1999:430; [1999] E.C.R I-05751 (Grand Chamber)). By contrast, where agreements relate to the work conditions of the self-employed, a representative organisation is exposed to liability under competition law because it is functioning as an association of “undertakings”. In *FNV Kunsten Informatie en Media v Staat der Nederlanden* (C-413/13) EU:C:2014:2411; [2015] All E.R. (EC) 387) the ECJ held that the exclusion from art.101 (1) TFEU could be extended where the individuals were “false self-employed” (at [31]). That court enumerated various criteria for determining whether the individuals were in a disguised employment relationship, such as the degree of control and subordination. Where independence is “merely notional” (at [35]), this will lead to a characterisation of “worker” in EU law. The Riders in *Deliveroo* are likely to be “false self-employed” in EU law (though that cannot be said definitively). If they are workers in EU law, thereby insulating their collective agreements from competition law restrictions, it would be better for the courts to bring the domestic law on worker into alignment in the interests of legal certainty.

Finally, the organisation of strike action undertaken by Riders may expose trade unions to liabilities in tort. Where organisers of strike action commit certain listed economic torts, it is possible to claim a “trade dispute defence” under TULRCA 1992. The scope of this defence is limited to “a dispute between workers and their employer” (s.244 TULRCA 1992). If Riders are not workers, any dispute with Deliveroo is incapable of being a “trade dispute”. Admittedly, in the context of casualised contracting where there is no obligation to undertake work, the scope for the tort of inducing breach of contract is diminished. Of course, it is not fanciful to anticipate that the employer’s presentation of its contractual arrangements will be sensitive to

the legal context. There was no conclusive finding on “mutuality of obligation” in *Deliveroo*, and it may be that the “true agreement” in a strike injunction case is that there are continuing contractual obligations, leading to potential liability for the tort of inducing breach of contract. There are also ambiguities around the torts of conspiracy to injure and the parameters of “unlawful means” sufficient to leave trade unions exposed to injunctions and uncertain common law liabilities. (See, e.g., ‘Union drops support for DPD courier walkout after legal threat’ <https://www.theguardian.com/business/2018/nov/22/gmb-union-drops-support-for-dpd-courier-walkout-after-legal-threat>).

Section 296(1)(b) provides that X is a worker where he is employed:

“under any other contract whereby he undertakes to do or perform personally *any* work or services for another party to the contract who is not a professional client of his” (emphasis added).

In interpreting this provision in accordance with art.11, three points should be borne in mind. First, the ILO Recommendation supports the Employment Appeal Tribunal’s approach in *Uber* that the tribunal should examine “all the circumstances” in determining the “true agreement” (*Uber B. v Aslam* [2017] 11 WLUK 238; [2018] R.T.R. 14 at [105]). Secondly, where any of those indicative elements point towards the existence of an employment relationship, the “purposive” approach in *Autoclenz Ltd v Belcher* [2011] UKSC 41; [2011] 4 All E.R. 745 should be applied. “Purposive” must be interpreted in accordance with the ILO Recommendation. Where it is *possible* to characterize X as a worker on a reasonable construction of the working arrangements, X should be characterized as such (see further A. Bogg (2018) 81 M.L. R. 509). In effect, this equates “purposive” with a “legal presumption” of employment relationship, as required by the Recommendation. Thirdly, where a fundamental human right is at stake, such as the right to collective bargaining, the purposive approach should be applied strongly in favour of inclusion (see V.D. Stefano and A. Aloisi, *Bocconi Legal Studies Research Paper No. 3125866*, 28 February 2018).

Treating a valid substitution clause as a ‘term inconsistent’ with employment status is, in the words of the Recommendation, an example of an “inadequacy or limitation” in the legal framework. It is incumbent on a court to interpret and apply the legal tests as favourably as possible to the worker. Even on a conventional view of substitution clauses, the evidence did not support the conclusion that there was a wholly unfettered substitution clause in *Deliveroo*. The contract stipulated restrictions on the identity of the substitute: the Rider could not just send anyone. (*Independent Workers’ Union of Great Britain v RooFoods Ltd t/a Deliveroo*



[2018] I.R.L.R. 84 at [59]). This positions the *Deliveroo* substitution clause closer to those in *Macfarlane v Glasgow CC* [2000] 5 WLUK 461; [2001] I.R.L.R. 7 and *Pimlico Plumbers v Smith* [2018] UKSC 29; [2018] 4 All E.R. 641, where the substitution clauses were held not to negate personal work, in part because the identity of the substitute was restricted under each contract.

In conclusion, how should courts interpret the personal work requirement under s.296(1)(b)? The radical strategy would be to excise “personally” from the statutory definition. The effect of this would be to relegate personal work to a relevant factor in deciding whether the other party to the contract is a “professional client” (or customer). Substitution clauses would no longer function as “terms inconsistent” with worker status. A less radical strategy would be simply to interpret the current words in a more purposive way. Let it be recalled that the worker must undertake to “perform personally *any* work or services”. It is not decisive that a Rider might opt at their discretion to send substitutes frequently or even once an assignment had been commenced. The relevant question is: would it have been within the reasonable contemplation of the contracting parties that the appointed Rider would *never* do *any* delivery personally during the working relationship with Deliveroo? The answer, of course, is no. If that is so, the Rider should be treated as meeting the personal service requirement under section 296(1)(b) for they have plainly undertaken to do at least *some* work personally. Either approach would bring the law on freedom of association back into alignment with art.11 ECHR. In so doing it would rectify a serious injustice against the precarious “self-employed” in the Gig economy.

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