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Not Delivering – the UK 'worker' concept before the UK Supreme Court in Deliveroo

Nicola Countouris (University College London (UK)) · Tuesday, January 23rd, 2024

Not really working

On 21 November 2023, the UK Supreme Court delivered its long-awaited decision in the *Deliveroo* case. The judgment, concluded that the Deliveroo riders organised and represented by trade union IWGB were not in an 'employment relationship' for the purposes of Article 11 of the ECHR. Fatal to this claim was, in particular, the finding that 'The power conferred on Riders under the new contract to appoint a substitute is virtually unfettered' (paragraph 69 of the judgment), in other words that their power to arrange for a substitute rider to make a delivery on their behalf was incompatible with their being 'workers' of the platform. Paragraphs 71 and 72 of the decision reinforced this finding by reference to a number of other factors and indicators emerging from the

contractual relationship between Deliveroo and its riders, that equally denied the possibility of them being in an employment relationship since the Supreme Court understood them as 'free to reject offers of work, to make themselves unavailable and to undertake work for competitors' (72).

This decision puts an end to a domestic judicial 'saga' that started in November 2017, when the Central Arbitration Committee (CAC) refused to issue a declaration of recognition in favour of IWGB under Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA", often referred to as the 'statutory recognition procedure'), which would have rendered the union statutorily entitled to negotiate with the employer on pay, hours and holidays, on behalf of the riders working in the London area of Camden. CAC had refused on the basis that the riders did not fall under the 'worker' definition set out in s.296 (1)(b) TULRCA 1992 (an individual who works under a '*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*') because 'In light of [the] central finding on substitution, it cannot be said that the Riders undertake to do personally any work or services for another party' (paragraph 101 of the CAC decision). In the same decision, CAC also rejected the alternative argument that a refusal to recognise IWGB for collective bargaining based on the definition of "worker" in the domestic legislation would constitute a breach of Article 11 ECHR, affirming that 'on the specific facts of this case and the unfettered and genuine right of substitution that operates both in the written contract and in practice, the argument does not succeed' (paragraph 104 of the CAC decision). It was only the A11 argument that was allowed to proceed through the ensuing judicial review and appellate process, and this explains why the Supreme Court decision is primarily concerned with ECHR rather than domestic provisions and case law.

After a short description of some of the facts and findings of the case the present blog post argues that the Supreme Court may have actually misconstrued the personal scope of application of Article 11 ECHR and, like the other domestic jurisdictions before, misapplied the law (and the concept of 'employment relationship' deployed by the ECtHR) to the facts of this case. The UK SC approach can be usefully contrasted with the different, more relational and 'primacy of fact' based, approach adopted by the Dutch Hoge Raad in March 2023, in another dispute on the employment status of Deliveroo couriers in the Netherlands that, similarly to the ones in the UK, were also employed through contracts with broad substitution clauses.

Other aspects of the judgment, for example those pertaining to the concept of 'personal work' deployed by UK statutes, the compulsory nature of the bargaining process envisaged by Schedule 1 of TULRCA 1992, or whether Article 11 ECHR should be understood as conferring on workers a right to require the employer to bargain collectively with their union, are not considered.

The key facts of *IWGB v Deliveroo*

IWGB first started organising couriers working for Deliveroo early in 2016. In November 2016, after an unsuccessful campaign aimed at agreeing recognition on a voluntary basis with Deliveroo, IWGB sought to trigger the statutory recognition procedure provided by Part I of Schedule A1 TULRCA 1992.

In the course of the entire process, one of the objections raised by Deliveroo was that IWGB did not and could not represent any 'workers' as none of the 10,808 riders the company engaged to perform deliveries to customers, whether by motorbike or bicycle, was a worker within the meaning of s.296 of the Act, being instead 'suppliers'. After various procedural requirements were

dealt with, the application by IWGB went to a full hearing before CAC at the end of May 2017. At the hearing it became clear that the contractual terms applying to the couriers were, by and large, similar to those prevailing in the gig-economy and in the urban transport and food delivery sector. They will not be discussed in this blog and they can be found, in summary, at paras 21-30 of the Supreme Court judgment. There was however a contractual term that stood out of the more mundane crowd of clauses used by platform employers: Clause 8. A very broad – and recently introduced – 'substitution clause', that ended up playing a crucial role in supporting the platform's argument that the couriers were not workers but, instead, suppliers.

It is worth stressing that between IWGB starting to organise Deliveroo couriers in 2016 and the CAC hearing in May 2017 two important developments had taken place.

Firstly, in October 2016, the London Employment Tribunal released a judgment in *Aslam v Uber* finding that the 30,000 drivers working for Uber were indeed its 'workers' under the definition of the term contained in s. 230(3)(b) ERA 1996 a definition that is very similar but, crucially, not identical to the one contained in s.296 (1)(b) TULRCA 1992 .

Secondly, 'Shortly before the first hearing before the CAC, Deliveroo introduced new contracts' (on 11 May 2017 – para 23) and the new contracts contained a new clause, now (in)famously known as 'Clause 8', which set out the provisions concerning the right to appoint a substitute in very broad terms, saying that:

'Deliveroo recognises that … you may wish to engage others to provide the Services. Deliveroo is not prescriptive about this and you therefore have the right, without the need to obtain Deliveroo's prior approval, to arrange for another courier to provide the Services (in whole or in part) on your behalf. This can include provision of the Services by others who are employed or engaged directly by you' (Clause 8.1)

Only a cynic would think that Clause 8 was introduced for the purpose of avoiding a finding similar to the one in *Uber*. But then, as CAC pointed out at para 99 of its decision, 'Even if they did it in order to defeat this claim and in order to prevent the Riders from being classified as workers, then that too was permissible'.

We know, from the facts of the case, that only two couriers used, in practice, this clause. One, Asim Munir, gave evidence before CAC to the effect that 'he regularly engaged a substitute, taking 15-20% of the fee he received from Deliveroo and passing on the balance to his substitute' (para 29 of the SC), something that led CAC to conclude that 'he was exercising the substitution provisions for his own potential profit' (para 80 of the CAC decision). We don't know how regular this practice was nor whether, alongside this activity, he also provided his work personally and with what frequency. Secondly, in respect of another courier, there was 'one instance of substitution after the job had been accepted and before collection of the Order from the restaurant' (para 29). Worth noting that the evidence provided by this courier was challenged by the counsel for the union, Lord Hendy KC, who 'questioned the plausibility of the account' (para 81 of CAC). CAC admitted that 'It does sound a little surprising, but even if the whole situation was crafted to provide an example of a mid-job substitution*, it effectively demonstrates the capacity of a Rider to do such a thing, should they want to*' (para 81, emphasis added).

It is important to put these numbers in context. There were two couriers out of 100 operating in the proposed Camden bargaining unit making some use of Clause 8.[1] That is by all accounts a small,

a negligible, number that, on its own, should have suggested caution in making a more generalised inference about the employment status of all other workers. As confirmed by the Supreme Court 'The CAC found that "a few, if that, Riders use substitutes". Most Riders did not use a substitute as they did not need to do so.' (para 28). Nevertheless the SC proceeded to conclude, at para 69, that

'Such a broad power of substitution is, on its face, totally inconsistent with the existence of an obligation to provide personal service which is essential to the existence of an employment relationship within article 11. (See ILO Recommendation No 198, as adopted into the Strasbourg jurisprudence by *The Good Shepherd*.)'

The Article 11 ECHR 'employment relationship' question reassessed. A case of 'contractual bias' in the application of 'relational principles'?

The Supreme Court chose to approach the question of whether the couriers were covered by Article 11 by reference to the concept of 'employment relationship' arising from ILO Recommendation 198. In doing so the UK Supreme Court could rely on the 2013 Grand Chamber judgment on the employment status of members of the Romanian clergy for the purposes of establishing a union, *Sindicatul "P?storul Cel Bun" v Romania* [2014] IRLR 49 ("*The Good Shepherd*"), that had indeed deployed the concept of employment relationship as emerging from ILO Recommendation R-198 to define the scope of Article 11 ECHR.

In doing so it discarded the alternative suggestion, put forward by John Hendy KC, counsel for the union, that Article 11 could be construed by reference to the broader proposition that 'the right to bargain collectively is enjoyed by every individual with an occupational interest to protect' (para. 38 of the SC decision), finding some authority in the obiter dicta of another ECtHR decision, *Manole v Romania* (Application No 46551/06) of 2015, an ultimately unsuccessful application involving self-employed farmers whose attempts to register a trade union under Romanian law were rejected by the national authorities on the ground that self-employed workers could not form unions but only join pre-existing ones (see the SC analysis at paras 43-45). This dismissive approach by the SC has already been criticised by Prof. Keith Ewing, in a recently published blog-post.

But even conceding that the Supreme Court correctly identified and understood the applicable ECHR and ILO standards and principles, they have, it is submitted, applied them incorrectly. Or rather, they have applied them with a – perhaps unconscious – contractual bias that has prevented them from fully identifying and recognising the 'relational' dimensions of the provision and performance of work under the Deliveroo contract that should have been taken into account in order to determine the employment status of the couriers, and establish whether they were, in reality, in an employment '*relationship'* under Article 11 ECtHR.

The very first provision of ILO R198 offering some guidance on the determination of an employment relationship focuses on the 'primacy of facts' principle. Paragraph 9 of the Recommendation demands that such determination be 'guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties'. Arguably, this provision asks national authorities to perform an intellectual exercise that is, in many ways, second nature for most continental European judiciaries, but – admittedly – one that runs against the grain of the common law, freedom of contract based, tradition.[2]

This intellectual exercise requires the judicial interpreter to abstract from the terms of the contract and focus *primarily* on the *performance of the work* by the worker. It is inherently an exercise that requires the interpreter to examine with painstaking detail the way in which *each individual* worker performs its work to the benefit and for the profit of the enterprise, with little or no preoccupation for the way contractual documents depict that performance on paper. In stark contrast, English courts are apt (in fact adept) at performing a different kind of exercise, consisting in identifying working practices and behaviours that are consistent with and – in a rather circular way – capable of validating the contractual terms agreed, on paper, by the parties. The two types of enquiry are pretty much antithetical and difficult to reconcile – it's an 'either or' type of intellectual exercise.

Within the *Deliveroo* case, there are several instances suggesting that the UK judicial interpreters involved therein have been the – perhaps unconscious – victims of this contractual bias. There is arguably no clearer example of this fallacy than the CAC panel's way of dealing with the case of the 'mid-job substitution' performed by the rider who had already accepted a job but decided to pass it to another colleague. At paragraph 81 of the decision, the judge posits that 'even if the whole situation was crafted to provide an example of a mid-job substitution, it effectively demonstrates *the capacity of a Rider to do such a thing, should they want to*'. From an English contract law point of view this may be an eminently correct way to proceed, and a reflection of the aforementioned tendency to look into factual practices to validate and give credence to contractual terms. But from a 'relational' point of view this approach leads to false positives and incorrect determinations.

A judge trained in a more relational approach would make little or nothing out of the finding, correct of otherwise, that a contractual clause gives 'the capacity' to a subordinate worker to act as a self-employed person or, in the case of the courier that demanded a fee from his substitutes, in a business/employer like manner. Certainly a civil law, and we venture to say a human rights, judge would not draw the conclusion that if one or two couriers have indeed actually actioned a clause that allows them to perform their economic activity in a business-like manner, this also affects the relationship of *all the other workers* covered by the same contract but whose way of performing of their own work has refrained from making any use of that contractual clause, which is – as far as they are concerned – a dead letter, entirely eclipsed by *their*primacy of facts.

This contractual tunnel vision carries through across the various jurisdictional levels in the *Deliveroo* saga, all the way up to the Supreme Court judgment. In paragraph 70, for instance, their Lordships contend that '[CAC] found that Deliveroo did not object to the practice of substitution by a Rider for profit or to Riders working simultaneously for competitors of Deliveroo. In all the circumstances, the CAC was entitled to conclude that the contractual provisions genuinely reflected the true relationship'. It is debatable whether such a finding, made in a Dutch or French court, would cut the chase in respect of the actual workers who had actually made some use of the substitution clause.[3] But it is certain that it would not have any purchase in terms of characterising the relationship of all the other workers that never made any significant use of the substitution clause (even if they had the contractual '*capacity*' to do so, paraphrasing CAC) as a contract for services or as a business undertaking of sorts. The 'contractual provisions' may well have 'genuinely reflected the true relationship' of those two workers that used in practice Clause 8. But suggesting that this also meant that every other worker, regardless of their true relationship, was equally affected by this contractual classification would be a non-sequitur under most jurisdictions, including arguably under the jurisdiction of the ECtHR, a judicial body whose modus operandi makes it particularly sensitive to assessing claims on an individual basis.

In the 2008 publication Towards a Comparative Theory of the Contractual Construction of Personal Work Relations in Europe , Mark Freedland and I advanced the hypothesis that – in the area of labour contract regulation – it was possible to contrast between English common-law-based systems and continental European civil-law-based systems, by reference to the former being characterised by a 'regulated self-designed contracts' approach, and the latter by a 'standardised contract typology' approach. It would no doubt be an oversimplification to redefine these two approaches as, respectively, an 'à la carte' approach for the UK and a 'set menu' for the civil law traditions. But in the *Deliveroo* decisions, there is almost a sense that English judges have indulged in assuming that because a handful of diners had ordered the vegetarian options from a uniquely vast 'à la carte' menu, then surely that menu had the 'capacity' to be a vegetarian one and therefore every other diner in that establishment was also a vegetarian. Contractualist biases aside, there is a non-sequitur here. This approach is clearly not delivering in terms of the relational approach required to assess the compatibility of UK law with Article 11 of the ECHR.

A better approach, and one that the Strasbourg court will undoubtedly be asked to consider carefully, would have been to conclude that *if* the couriers that had actually used the substitution clause were to fall outside the 'employment relationship' definition of R198, then this should have been of no consequence for the classification of all the other couriers whose actual work performance pointed, in practice, towards an employment relationship as defined by R 198 and protected under Article 11. The easier solution, in domestic proceedings, would have been to expunge those two couriers from the bargaining unit calculus. But it is worth remembering that other domestic courts, such as the Dutch Supreme Court in its own *Deliveroo* judgment of March 2023, have gone beyond that and have simply ignored the substitution clauses used by the few, in favour of the reality of the employment relationship for the many.[4]

The fetish of personality at work

The word 'personal' is materially present in the legal definitions shaping the personal work of application of a number of UK labour law statues. It cannot simply be ignored by judicial interpreters and advocates (or swiped under the carpet by academic commentators) as, unlike say concepts such as 'mutuality of obligation', it is not the result of a judicial gloss on statute. It's statute. And – admittedly – it can also serve the valuable purpose of discerning between labour and entrepreneurship.

Personality at work should however not be fetishized either. The very week the UK Supreme Court released *Deliveroo*,several academics (certainly those at University College London) would have received an email from their line managers warning them that 'the flu season' has started, and that if lecturers feel unwell and cannot deliver a class, before rescheduling (an increasingly onerous task in our overcrowded universities) they should 'reach out to your teaching team … to see whether there is any possibility of cover for your lecture / seminar / tutorial within the module teaching team', an express invite to explore a substitution arrangement. In spite of the very personal nature of academic work, and lecturing in particular, it has long been customary to find substitutes (from within the teaching team, but also outside it – no Law Faculty Dean has ever objected to, say, a QC or KC delivering a 'guest lecture') to offer cover in case of illness, sudden caring obligations, but also whenever important 'policy impact' or conference opportunities materialised. And never have these substitution practices been relied upon by management to challenge the employment status of academics. These practices are of course present in many other professions, and are not an exclusive feature of academia. Obviously they appear to be far less straightforward, in the eyes of employers and the UK judiciary at least, when they are used by

working class people.

References

[1] 216 according to Deliveroo, with numbers fluctuating considerably depending on the reference period taken into account – see para 13 of the CAC decision

[2] Published work co-authored with Mark Freedland 'Towards a Comparative Theory of the Contractual Construction of Personal Work Relations in Europe' (2008) ILJ, 49-74, delves further on this distinction.

[3] In fact we know that similar substitution clauses were altogether dismissed as irrelevant by Dutch courts in litigation against Deliveroo https://industrialrelationsnews.ioe-emp.org/news/article/dutch-supreme-court-confirms-that-deliveroo-riders-are-employees

[4] ECLI:NL:HR:2023:443 available at https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:HR:2023:443

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