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Commentary

"A Worker is a Worker is a Worker": Collective Bargaining and Platform Work, the Case of Deliveroo Couriers

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Legal Implications of the Digital Transformation of Work

The focus of this commentary is the compatibility of Section 296(1)(b) of the 1992 Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A) with Article 11 of the European Convention on Human Rights (ECHR), insofar as it excludes workers who do not provide their service *personally* from being represented by a union on the negotiation of pay and terms and conditions of work.[1] The case shows how the domestic term *worker* may be equivocal and its interpretation seems at odds with various international standards, including the ILO's instruments. This confusion raises the question whether steps should be taken to "bring domestic law into alignment [with European law] in the interests of legal certainty."[2]

The Judgment

In December 2018, the UK High Court dismissed the judicial review challenge by the Independent Workers Union of Great Britain (IWGB) to a decision of

1 S.3 of Human Rights Act 1998. See Keith D. Ewing, "The Human Rights Act and Labour Law," *Industrial Law Journal* 27, no. 4 (December 1998): 275–92.

2 Alan Bogg, "Taken for a ride: Worker in the gig economy," *Law Quarterly Review*, no. 135 (April 2019): 219–26.

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the Central Arbitration Committee (CAC)[3] that Deliveroo riders did not have a contractual obligation to perform work personally because, under certain circumstances, they could be replaced by substitutes and had the option of working for rival companies. IWGB therefore could not rely on the TULR(C)A to apply for statutory recognition to be entitled to conduct collective bargaining on behalf of the riders delivering meals in London.[4] At a renewed application for permission, the only grounds of appeal had been whether Article 11—the right to form and to join a union—required an interpretation of TULR(C)A and the "personal service" element so as not to exclude the Deliveroo riders from their statutory right to collective bargaining.

In this respect, Schedule A1 of the TULR(C)A provides a compulsory framework within which independent trade unions can apply for recognition to be entitled to conduct collective bargaining in a *bargaining unit*, understood as "negotiations relating to pay, hours and holidays or other agreed matters,"[5] only in respect to "workers."[6] IWGB started the process of recognition, but a claim brought by Deliveroo before the CAC was successful in denying this right. In the meantime, in May 2017, the company issued a new contract including a substitution clause, which the CAC found to be valid and unfettered, thus defeating the classification of riders as workers.

The case affects the interpretation of the scope of application of the ECHR. The High Court's approach can be criticized on the grounds that it detaches its legal enquiry from the dimension of fundamental rights,[7] while many commentators consider collective rights as "enabling rights"[8] or even argue that labor rights could be construed as human rights.[9] The Union has announced its intention to appeal the decision.

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3 Central Arbitration Committee, *Independent Workers' Union of Great Britain v RooFoods Ltd t/a Deliveroo* (2017) 11 WLUK 313; (2018) I.R.L.R. 84.

4 Sian Moore, Sonia McKay, and Sarah Veale, *Statutory Regulation and Employment Relations: The Impact of Statutory Trade Union Recognition* (Basingstoke, UK: Palgrave Macmillan, 2013), 111–41.

5 Para. 3 of the TULR(C)A.

6 Section 296(1) of the 1992 Act.

7 Alan Bogg (@thebigbogg), Tweet, December 5, 2018, https://twitter.com/thebigbogg/status/1070293564347899904. See also Valerio De Stefano and Antonio Aloisi, "Fundamental labour rights, platform work and protection of non-standard workers," in *Labour, Business and Human Rights Law*, edited by Janice R. Bellace and Beryl ter Haar (Cheltenham, UK: Edward Elgar, 2019), xx–x.

8 Valerio De Stefano, "Non-Standard Work and Limits on Freedom of Association: A Human Rights-Based Approach," *Industrial Law Journal* 46, no. 2 (July 2017): 185–207.

9 Virginia Mantouvalou, "Are Labour Rights Human Rights?," *European Labour Law Journal*, 3, no. 2 (2012): 151–72. Judy Fudge, "The New Discourse of Labour Rights: From Social to Fundamental Rights?," *Comp. Lab. L. & Pol'y J.* 29, no. 1 (2007): 29–66.

Background and Analysis

The judgment dwells at length on the new "supplier agreement" by relying on the factual findings of the earlier CAC ruling.[10] The terms of the contract are set by Deliveroo and workers cannot negotiate them individually. Riders and drivers may "supply the services personally" or "through someone else."[11] Workers can without prior approval hire a courier to complete an order in their place. Nonetheless, the substitution clause seems hardly practicable, partly because of restrictions on the identity of the substitute.[12] Riders must disclose their credentials and are responsible both for ensuring that "substitute(s) have the requisite skills and training" and for paying them directly. This implies not only deep trust between the rider and the substitute, but also a secondary labor market for replacement.

The CAC agreed to deny the personal nature of the service because of the terms of the new contract that "Riders have a right to substitute."[13] In this respect, the "genuineness" of the substitution clause is fatal to the recognition of the personal nature of the work or service under Section 296(1)(b). According to the CAC, indeed, "even if [the company introduced the clause] in order to defeat this claim and in order to prevent the riders from being classified as 'workers', then that too was permissible."[14] The issue is not uncontested. In *Pimlico Plumbers*, the UK Supreme Court stated that a similar substitution clause, drafted in a highly problematic way, could not defeat worker status,[15] in part because the profile of the substitute was restricted under the relevant contract,[16] thus wiping out the right to substitution. Similarly, in light of the "dominant features" of the contract,[17] Deliveroo cyclists could have been classified as workers also in respect to trade union rights.

Moreover, IWGB raised the issue of whether Article 11 is engaged by the statutory barriers within the TULR(C)A. It also argued that the definition of worker in Section 296(1)(b) is "an entirely domestic concept." Especially noteworthy

10 *R.* (*on the application of the Independent Workers Union of Great Britain*) *v. Central Arbitration Committee*, para. 18 referring to the CAC Decision at para. 78.

11 Clauses 2.3, 2.4, 2.5 of the "Supplier Agreement," para. 13.

12 *R.*, para. 59.

13 Ibid., para. 19 referring to the CAC Decision at para. 100.

14 *Independent Workers' Union*, para. 99.

15 Mr. Smith qualified as a worker under s.230(3)(b) of the Employment Rights Act (ERA) 1996.

16 Employment Appeal Tribunal, *Macfarlane v Glasgow CC* [2000] 5 WLUK 461; 2001 IRLR 7.

17 Supreme Court of the United Kingdom, *Pimlico Plumbers Ltd and another v Smith* [2018] UKSC 29, para. 32.

are the various legal meanings of the term *worker*, which depend on the field of application, the legislation and the jurisdiction, whether European or domestic.[18] The High Court relies on an interpretation based on the concept of the command-and-control prerogative and "personal subordination."[19] Yet for the Strasbourg case law the issues concerning workers' status(es) have nothing to do with the scope of the right to form and join trade unions beyond the specific restrictions for a limited number of categories of work.[20]

Disrupting Collective Labor Rights

Several international legal instruments, including Article 23(4) of the United Nations Declaration of Human Rights 1948 and Article 8 of the International Covenant on Economic, Social and Cultural Rights 1966, guarantee collective labor rights to *everyone* regardless of legal status.[21] Nonetheless, the UK High Court claimed that the ECtHR case law restricts trade union rights under Article 11 to those in an employment relationship.[22] Moreover, the High Court took the view that any domestic restriction of Article 11 is justified under Article 11(2)—"for the protection of the rights and freedom of others."[23]

ILO standards on freedom of association and collective bargaining are not narrowly constructed. ILO supervisory bodies have consistently observed that these standards apply to all workers with the sole possible exception of those explicitly excluded by the text of Conventions 87 and 98.[24] Self-employed

18 Jeremias Prassl, "Who is a worker?," *Law Quarterly Review*, 133, no. 3 (July 2017): 366–72.

19 CJEU, Case C-216/15, *Betriebsrat der Ruhrlandklinik gGmbH v Ruhrlandklinik gGmbH*, 17 November 2016, para. 27. See Martin Risak and Thomas Dullinger, *The concept of 'worker' in EU law: status quo and potential for change* (Brussels: ETUI aisbl, 2018), 9.

20 The last sentence of Article 11(2) of the ECHR draws a specific exception for "members of the armed forces, of the police or of the administration of the state". The Grand Chamber of the ECtHR stated that "the restrictions imposed [by Art. 11(2)] on the three groups [...] are to be construed strictly". See ECtHR, *Demir and Baykara v Turkey*, Application no. 34503/97, 12 November 2008, para. 97; ECtHR, *Vörður Ólafsson v. Iceland,* Application No. 20161/06, 27 July 2010.

21 See also Article 28 of the Charter of the Fundamental Rights of the European Union, Article 6(2) of the European Social Charter and European Committee of Social Rights, *Irish Congress of Trade Unions* (ICTU) v. *Ireland*, Complaint No. 123/2016, 12 December 2018.

22 ECtHR, *Sindicatul "Pastorul Cel bun" v Romania,* Application no. 2330/09, 9 July 2013, para. 142.

23 ECtHR, *Unite The Union v. United Kingdom*, Application no. 65397/13, 26 May 2016.

24 ILO, "Compilation of decisions of the Committee on Freedom of Association," Normlex, Information System on International Labour Standards; ILO, *Giving globalization a human face* (Geneva: ILO, 2012).

workers are not among those excluded.[25] In addition, the European Court of Justice stated in 2014 that "false self-employed" workers, have the right to collective bargaining because such workers are "in a situation comparable to that of those workers" (para. 42) or service providers who have lost the "status of independent trader," because they do not determine independently their own conduct on the market (para. 33).[26] Accordingly, the collective agreements signed by these workers are exempted from antitrust restriction under Article 101(1) TFEU. Deliveroo riders would fit better into the category of bogus self-employed workers.

The High Court's reasoning thus appears to be naïve, particularly in calling for union membership or "voluntary arrangements" (para. 46), regardless of the CAC failure to allow for statutory union recognition.[27] Restricting recognition of rights to only employees and workers was deemed proportionate to a fair balance with the competing interest of business freedom (para. 44). However, by reason of the prominence of collective rights, restrictions should be subject to a very narrow margin of appreciation. On the contrary, in the current case, "the interference with riders' freedom of association is very far-reaching, because worker status in UK law is the gateway to the most basic freedom of association protection."[28] Riders end up being "now legally unprotected from discrimination because of their trade union membership and activities; any collective agreements may be exposed to liability under competition law,"[29] nor are they covered by dispute immunity. Once again, the imbalance of power at the workplace is far from being reduced, legally or practically, because of a misconceived idea that "carefully choreographed"[30] solutions must be tolerated as examples of *disruptive* innovation.

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25 Breen Creighton and Shae McCrystal, "Who is a worker in international law?," *Comparative Labor Law & Policy Journal* 37, no. 3 (2016): 691–725.

26 CJEU, Case C-413/13, *FNV Kunsten Informatie en Media v Staat der Nederlanden*, 4 December 2014. See also Jeff Kenner, "Uber drivers are 'workers' – The expanding scope of the 'worker' concept in the UK's gig economy," in *Precarious Work. The Challenge for Labour Law in Europe*, ed. Jeff Kenner, Izabela Florczak and Marta Otto (Cheltenham, UK: Edward Elgar Publishing Ltd., forthcoming, 2019).

27 On the issue of "voluntary arrangements" and legal vulnerability under art. 101(1) TFEU, see CJEU, Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, 21 September 1999, paras. 62 and 63.

28 Bogg, "Taken for a ride."

29 Ibid.

30 *Pimlico Plumbers*, para. 16.