Neutral Citation Number: [2021] EWCA Civ 952

Case No: C1/2018/3104

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (Administrative Court)
Mr Justice Supperstone

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/06/2021

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE COULSON
and
LORD JUSTICE PHILLIPS

- -

Between :

THE INDEPENDENT WORKERS UNION OF GREAT BRITAIN	**Appellant**
- and -	
THE CENTRAL ARBITRATION COMMITTEE	**Respondent**
- and -	
ROOFOODS LTD t/a DELIVEROO	**Interested Party**

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- -

Lord Hendy QC, Ms Katharine Newton QC and **Ms Madeline Stanley** (instructed by **Harrison Grant Solicitors**) for the **Appellant**
Mr Christopher Jeans QC and **Mr Tom Cross** (instructed by **Lewis Silkin LLP**) for the **Interested Party**
The Respondent did not appear

Hearing dates: 2nd and 3rd February 2021
Further written submissions: 8th and 23rd March 2021

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Approved Judgment

Lord Justice Underhill:

INTRODUCTION

1. This appeal concerns collective bargaining rights in respect of Deliveroo riders. The Deliveroo service is operated by a company called Roofoods Ltd: I will refer to it simply as Deliveroo. The Independent Workers Union of Great Britain ("IWGB") applied to the Central Arbitration Committee ("the CAC"), under the compulsory recognition procedures in Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992, to be recognised by Deliveroo for collective bargaining in respect of a group of riders in its "CKT [Camden & Kentish Town] food delivery zone". By a decision dated 14 November 2017 the CAC declined to accept the application on the basis that the riders were not "workers" within the meaning of the 1992 Act because the terms under which they provide their services did not require them to do so personally but permitted the use of substitutes.

2. IWGB sought permission to challenge that decision by way of judicial review. Permission was given by Simler J on a single ground relating to the effect of article 11 of the European Convention on Human Rights. The Defendant to the claim was the CAC, but it took no part in the proceedings and it was in practice defended by Deliveroo as an Interested Party. By a judgment handed down on 5 December 2018 Supperstone J dismissed the claim.

3. This is IWGB's appeal, with the permission of Males LJ, against Supperstone J's decision. It has been represented by Lord Hendy QC, Ms Katharine Newton QC and Ms Madeline Stanley. Again, the CAC has played no part, but Deliveroo has resisted the appeal as an Interested Party, represented by Mr Christopher Jeans QC and Mr Tom Cross. The same counsel appeared below.

4. Following the hearing we gave the parties permission to file written submissions about the effect of the judgment of the Supreme Court in *Uber BV v Aslam* [2021] UKSC 5, [2021] ICR 657. That accounts for some of the delay between the conclusion of the hearing and the promulgation of this judgment.

THE BACKGROUND LAW

THE STATUTORY DEFINITION OF "WORKER"

5. It is unnecessary to give any summary of the procedure under Schedule A1 of the 1992 Act. The only point that matters for present purposes is that it is concerned only with recognition in respect of "workers". That term is defined in section 296 (1) of the Act as follows:

> "In this Act 'worker' means an individual who works, or normally works or seeks to work –
>
> (a) under a contract of employment, or
>
> (b) 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, or

> (c) in employment under or for the purposes of a government department (otherwise than as a member of the naval, military or air forces of the Crown) in so far as such employment does not fall within paragraph (a) or (b) above."

That definition is in substantially similar, though not identical, terms to that of "worker" in section 230 (3) of the Employment Rights Act 1996 and other employment protection legislation.

6. The IWGB's case in the CAC was that the riders in respect of whom it sought recognition worked for Deliveroo under contracts of the kind specified under limb (b) of section 296 (1). It will be seen that it is an essential part of the definition under limb (b) that the putative worker should agree to perform work or services "personally" for the other party. (I should note that a requirement of personal service has equally always been regarded as a necessary element in a contract of service falling under limb (a) of the definition.) *Prima facie* if the express terms of the contract permit the putative worker to provide the work or services in question through someone else, i.e. a substitute, that requirement is not satisfied. However, that is subject to two qualifications.

7. First, it is established in the case-law that the requirement of personal performance may be satisfied notwithstanding that the worker has a right to engage a substitute in some, limited, circumstances. The position is summarised at para. 84 of the judgment of Sir Terence Etherton MR in *Pimlico Plumbers Ltd v Smith* [2017] EWCA Civ 51, [2017] ICR 657, as follows[1]:

> "Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance. Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance."

8. Second, in *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] ICR 1157, the Supreme Court held that the employer was not entitled to rely on a substitution clause in order to

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[1] Lord Wilson also reviewed the issue when the case went to the Supreme Court ([2018] UKSC 29, [2018] ICR 1511) – see paras. 20-34 of his judgment; but Sir Terence's summary is consistent with his conclusions and is more useful for our purposes.

deny a claim for worker status if it did not reflect the true agreement between the parties and was in that sense a sham. The principles underlying the decision in *Autoclenz* have recently been elucidated in *Uber v Aslam*, to which I will have to return below.

ARTICLE 11

9. Article 11 of the Convention reads:

> "*Freedom of assembly and association*
>
> 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state."

10. We are in this appeal concerned with "the right to form and to join trade unions" referred to in the final part of paragraph 1. That is described in the seminal decision of the European Court of Human Rights ("the ECtHR") in *Demir v Turkey* (2009) 48 EHRR 54 as "one form or a special aspect" of the right to freedom of association conferred by article 11: see para. 109 of the judgment of the Grand Chamber. In the later decision of the Grand Chamber in the *Good Shepherd* case, which I discuss below, it is given the label "trade union freedom" (see para. 130). It was common ground before us that the article 11 right to trade union freedom is enjoyed by trade unions themselves as well as by their members.

11. The importance of *Demir* is that it established that "the right to bargain collectively with the employer has, in principle, become one of the essential elements of the 'right to form and to join trade unions for the protection of [one's] interests' set forth in Article 11 of the Convention" (see para. 154 of the judgment). That means that in some circumstances "the state may not simply be prohibited from itself interfering with [the right of collective bargaining] but may in principle have positive obligations to secure [its] effective enjoyment": see para. 38 of my judgment in *Pharmacists' Defence Association Union v Boots Management Services Ltd* [2017] EWCA Civ 66, [2017] IRLR 355 ("the *Boots* case"). The extent of those positive obligations is one of the issues in this appeal.

12. By section 3 (1) of the Human Rights Act 1998 legislation must be interpreted in a way which is compatible with Convention rights so far as it is possible to do so.

THE BACKGROUND FACTS

13. I can summarise the background facts very shortly. Those interested in a full account of the background can find it in the careful and thorough decision of the CAC, which is available online.

14. As most readers of this judgment will no doubt know, Deliveroo's business involves the delivery of prepared food and drink from restaurants and other food outlets, which it describes as its "partners", to customers' homes or other premises. In London the collection and delivery of the items is carried out almost entirely by cyclists, referred to as "riders"[2]. Deliveroo organises its services by reference to "zones". The relationship between Deliveroo and its riders is governed by standard-form written "Supplier Agreements", which are offered on a take-it-or-leave it basis without the opportunity for negotiation. In what follows I refer to the terms operating in the CKT zone. No doubt they reflect terms used by Deliveroo in other zones, but there was evidence before the CAC that different terms, at least as regards payment, apply in other zones; and it should therefore not be assumed that the conclusions reached in this judgment necessarily apply to all Deliveroo riders.

15. After initial assessment and training, riders who have entered into such an agreement download an app which enables them to indicate when they are available to be offered work in a zone for which they are registered. There is no obligation on a rider to be available at any particular times or for any particular duration. If they are available, the app will offer jobs on the basis of which rider is closest to the point of collection. The rider has three minutes in which to decide whether to accept: again, there is no obligation to do so. If they do accept, they then collect and deliver the food and are paid on a fee per delivery ("FPD") basis.

16. The version of the Supplier's Agreement with which we are concerned was referred to as "the New Contract". The New Contract was introduced only a few weeks before the hearing in the CAC: that is, at that point it became the form of contract offered to riders signing up with Deliveroo for the first time, but riders on the earlier form of were also encouraged to change over to it (see para. 51 of the decision of the CAC). It is reasonable to infer that Deliveroo's reason for making the change was to strengthen its position in the context of IWGB's claim for recognition (and possibly as regards worker status more generally), particularly as the terms of its predecessor ("the Earlier Contract"), "involved much more control and direction by Deliveroo – strict uniform requirements, a different attitude to substitutes[3] and in other significant respects" (see para. 86). However, the CAC records at para. 51 that:

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[2] Riders may also use motorbikes or scooters, but I will for economy ignore those alternatives.

[3] The relevant provision, clause 9, began:

> "While as a general rule you are expected to perform the Services personally you do have the right, without the need to obtain Deliveroo's prior approval, to arrange with another registered Deliveroo driver/cyclist for them to perform a particular delivery or deliveries on your behalf ...".

> "The parties agreed that the Panel should consider the question of worker status by reference to the New Contract and not the Earlier Contract."

At para. 86 it says:

> "What happened previously is of historic interest only, and little assistance in understanding the current situation."

17. The provisions of the New Contract with which we are mainly concerned are those permitting riders to use substitutes. The principal such provision is clause 8, which reads:

> "8.1 Deliveroo recognises that there may be circumstances in which 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; however, it may not include an individual who has previously had their Supplier Agreement terminated by Deliveroo for a serious or material breach of contract or who (while acting as a substitute, whether for you or a third party) has engaged in conduct which would have provided grounds for termination had they been a direct party to a Supplier Agreement. If your substitute uses a different vehicle type to you, you must notify Deliveroo in advance.
>
> 8.2 It is your responsibility to ensure your substitute(s) have the requisite skills and training, and to procure that they provide the warranties at clause 5 above to you for your benefit and for Deliveroo's benefit. In such event you acknowledge that this will be a private arrangement between you and that individual and you will continue to bear full responsibility for ensuring that all obligations under this Agreement are met. All acts and omissions of the substitute shall be treated as though those acts and/or omissions were your own. You shall be wholly responsible for the payment to or remuneration of any substitute at such rate and under such terms as you may agree with that substitute, subject only to the obligations set out in this Agreement, and the normal invoicing arrangements as set out in this Agreement between you and Deliveroo will continue to apply."

(The warranties referred to in clause 8.2 are rather miscellaneous, but they are, in summary, that they have the right to work in the UK; that they have no unspent criminal convictions; that they will "comply with all other legal obligations (including the Highway Code)"; and that they will ensure that Deliveroo is able to track the progress of deliveries using GPS.)

18. The right granted by clause 8 is reflected in various other provisions. In particular:

(1) The introductory section of the contract, headed "Background", reads as follows:

> "A. You are a supplier in business on your own account who wishes to arrange the provision of delivery services to Deliveroo subject to the terms and conditions below.
>
> B. You are free to supply the Services either personally or through someone else engaged by you in accordance with clause 8. For ease of reference, where involving the provision of Services or the provisions of a warranty is set out in this Agreement (and save for clause 2.1, 8, 10 or where expressly stated otherwise), 'you' is to be read as meaning either you personally, or procured by you in relation to any person engaged by you. Should you choose to provide the services through a third party in this way, you remain responsible for ensuring that the obligations set out in this Agreement are complied with."

(2) Clause 6, which requires riders to have their own insurance, adds that "any substitute appointed by you need not have their own insurance as long as they are covered under your insurance".

(3) Clause 7 acknowledges that the rider "(and not any substitute) [is] responsible for the provision of the Services if and when undertaken".

(4) Deliveroo's right to terminate the agreement with immediate effect in the event of breach (see clause 10) includes a breach by a substitute as well as by the Rider.

19. There are some other provisions of the New Contract relating to the nature of the relationship more generally to which I should refer. These are as follows:

(1) Clause 2 is headed "Supplier Services". Clauses 2.3-2.5 read:

> "2.3 You are not obliged to do any work for Deliveroo, nor is Deliveroo obliged to make any available any work to you. Throughout the term of this Agreement you are free to work for any other party including competitors of Deliveroo.
>
> 2.4 It is entirely up to you whether, when and where you log in to perform deliveries, save that it must be in an area in which Deliveroo operates and at a time when that area is open for deliveries.
>
> 2.5 While logged into the App, you can decide whether to accept or reject any order offered to you and if you do not wish to receive offers of work at any time, you can use the 'unavailable' status."

Clause 2.6 provides that when providing the Services riders "should complete [them] within a reasonable time period, using any route you determine to be safe and efficient".

(2) Clause 3 provides that riders must provide their own phone and cycle. They are required to "use appropriate road safety equipment including a helmet and clothing which meets Deliveroo's safety standards" and not to ride under the influence of drugs or alcohol. They are required to use "food transportation equipment which meets Deliveroo's safety standards", which is said to be available from Deliveroo: I assume that this is a reference to the Deliveroo-branded "equipment-pack", containing a thermal box and bags and a high-vis jacket, for which the CAC finds that riders are obliged to pay a £150 deposit when signing the Agreement (though there is no obligation actually to use the items in it) .

(3) Clause 4 sets out the payment arrangements. These include a provision that:

> "As a self-employed supplier you are responsible for accounting for and paying any tax and national insurance due in respect of sums or penalty payable to you under or in connection with this Agreement. You will inform Deliveroo of your tax reference number on request".

(4) Clause 10 gives the rider the right to terminate the agreement with immediate effect. Deliveroo can terminate on a week's notice or with immediate effect in the event of a "serious or material breach" by the rider (or, as noted above, a substitute of theirs).

20. In the letter sent to existing Riders encouraging them to sign the New Contract Deliveroo drew particular attention to the terms of the substitution clause and the right to work for a competitor. As regards the latter it emphasised that working for a competitor

> "… is fine with us: as an independent contractor you are free to work with whoever you choose and wear whatever kit you want to. There continues to be no requirement to wear Deliveroo branded kit while you work with us."

21. The extent to which riders in practice took advantage of the substitution right contained in the New Contract (and the Earlier Contract) was the subject of careful findings by the CAC, to which I now turn.

THE DECISION OF THE CAC

22. The CAC Panel comprised HH Judge Stacey, Mr Roger Roberts and Mr Michael Leahy OBE. Although its decision covers a good deal of ground, much of it is immaterial for the purpose of the issues on this appeal.

23. The Panel's discussion of the issue whether riders were workers begins at para. 88 of its decision. At paras. 88-92 it sets out the terms of section 296 (1) and identifies that it gave rise to two issues – "(1) whether there was an obligation to perform work, and (2) personal service". We are concerned only with the second.

24. As to that, the Panel set out the terms of clause 8 of the New Contract at para. 59 of its decision. At paras. 76-86 it considered the extent to which substitution occurred in practice. Paras. 76-79 read:

> "76. There is no policing by Deliveroo of a Rider's use of a substitute should s/he choose to use one. Deliveroo simply relies on the contractual terms with the Rider. In practice substitution is rare as there is no need for a Rider to engage a substitute. If the Rider does not want to accept a job or be available for work, s/he need not log on to the App, or if they are logged on, they do not need to make themselves available, and if they are logged on and mark themselves as available they are not under any obligation to accept any jobs offered. There are no adverse consequences for them.
>
> 77. We have set out above the termination provisions that enable Deliveroo to terminate the Rider's contract for any reason at all with one week's notice. Deliveroo does not terminate FPD contracts for not accepting a certain percentage of orders or for Riders not making themselves sufficiently available, although the position is different for hourly paid Riders. FPD Riders are vulnerable to having their contracts terminated on one week's notice if their, or their substitute's, delivery times over a sustained period are deemed too slow.
>
> 78. A few, if that, Riders use substitutes. In a survey of Riders with CKT Ops codes in April/May 2017 conducted by Deliveroo 14 of the 65 Riders who answered the question had either themselves used a substitute or knew of other Riders who did. A Rider might, for example, allow a friend (who is not a Rider) to use their App while they are on holiday, and since Deliveroo is not currently taking on new Riders in CKT, the friend would not otherwise be able to do so. All that is required is for either the substitute to download the App onto her or his own phone or the Rider lend their device to their substitute. Either way, the substitute would need to be privy to the Rider's Deliveroo password. The confidentiality clause in the New Agreement provides for the substitute to be told the password, but the Rider is responsible for the substitute maintaining confidence. The Rider is paid for any deliveries made by the substitute, and Deliveroo will not be aware of the identity of the substitute, or the fact that one has been used on any particular occasion. How and if the substitute is remunerated by the Rider is between the Rider and the substitute.
>
> 79. Most Riders do not use a substitute – if they do not want to do Deliveroo deliveries they do not log onto the App and do not wish to sub-contract the opportunity or be responsible for anyone else. We have set out above the provisions in the New Contract that make the Rider entirely responsible for the substitute, including insuring them and the Rider has to trust the substitute with her or his Deliveroo passwords. The vast majority of Riders see no point in engaging a substitute."

At paras. 80-81 the Panel describes a couple of particular instances of substitution about which it had heard evidence: I need not give the details, but they include the example of a Mr Munir, who regularly engaged a substitute and retained for himself 15-20% of the payment from Deliveroo. Para. 82 reads:

> "If a Rider is unable or does not want to complete a job after accepting it and does not want, or is not able, to pass it on to a substitute, they have to telephone Rider Support who will arrange for another Rider to take over the job. That Rider will not be paid if s/he or their substitute does not complete the job and it is Rider Support who re-allocate the delivery. Deliveroo was planning to change the system to enable a Rider to cancel after accepting via the App and facilitate the process."

(The phrase at the beginning of para. 78, "[a] few, *if that*", might if read in isolation suggest that the CAC did not make a positive finding that substitution occurred at all. But it is clear that that is not what the Panel meant. What it found was that substitution was "rare": see para. 76.)

25. Necessarily, all or most of the evidence relied on by the CAC will have related to the period prior to the introduction of the New Contract, but no point was taken on this before us. As noted above, substitution was also permitted under the Earlier Contract, and the changes introduced by the New Contract would not operate to reduce the frequency of substitution – if anything, the reverse.

26. The Panel considered the relevant law at paras. 93-96. I should set the passage out in full:

> "93. It was common ground between the parties that whether a person undertakes personally to perform work or services depends 'entirely on the contract between them' (*Pimlico Plumbers v Smith* [2017] IRLR 323, para 73) and that 'the essential question in each case is what were the terms of the agreement' (*Autoclenz v Belcher* [2011] ICR 1157 para 20).
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> 94. The Supreme Court judgment in *Autoclenz v Belcher* sets out the proper approach to the construction of contracts such as here, which relate to work or services as opposed to commercial contracts between parties of equal bargaining power. The task is to find the true agreement or the actual legal obligations of the parties – not to be confused with the true intentions or expectations of the parties, but what was agreed. It is for this reason that the question of whether Deliveroo's true purpose in constructing the contracts as they did was to avoid their Riders gaining worker status is not relevant, the proper question is what was actually achieved.
>
> 95. It is important to spot the difference between form and substance – the oft quoted dicta of Elias LJ [*sic*] in *Kalwak v Consistent Group Ltd* [2007] IRLR 560: 'The concern to which tribunals must be alive is that armies of lawyers will simply place substitution clauses, or clauses denying any obligations to accept or provide work in employment contracts, as a matter of form, even where such terms do not being to reflect the real relationship.'
>
> 96. It follows that all the relevant evidence has to be examined as set out by Smith LJ [sc. in *Autoclenz* in the Court of Appeal], as approved and endorsed in *Autoclenz*:

> 'To carry out [the exercise of discovering the actual legal obligations of the parties] the tribunal will have to examine all the relevant evidence. That will, of course, include the written term itself, read in the context of the whole agreement. It will also include evidence of how the parties conducted themselves in practice and what their expectations of each other were. Evidence of how the parties conducted themselves in practice may be so persuasive that the tribunal can draw an inference that that practice reflects the true obligations of the parties. But the mere fact that the parties conducted themselves in a particular way does not of itself mean that the conduct accurately reflects the legal rights and obligations. For example, there could well be a legal right to provide a substitute worker and the fact that that right was never exercised in practice does not mean that it was not a genuine right.'"

Thus the Panel directed itself squarely in accordance with *Autoclenz* and was alive to the possibility that the terms of the New Contract might not reflect the true agreement between the parties.

27. At paras. 98-101 the Panel considers the effect of its findings on the basis of the law as summarised. At paras. 98-99 it puzzles over what the real purpose of the substitution clause is (what it calls "the substitution conundrum"), but I need not set the passage out, since there is no challenge to its conclusion at paras. 100-101, which read:

> "100. The central and insuperable difficulty for the Union is that we find that the substitution right to be genuine, in the sense that Deliveroo have decided in the New Contract that Riders have a right to substitute themselves both before and after they have accepted a particular job; and we have also heard evidence, that we accepted, of it being operated in practice. Deliveroo was comfortable with it. We did not find the Deliveroo witnesses to be liars. One answer to the substitution conundrum was given by Mr Munir when he eventually explained that he was engaged in subcontracting for a 15-20% cut.
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> 101. In light of our central finding on substitution, it cannot be said that the Riders undertake to do personally any work or services for another party. It is fatal to the Union's claim. If a Rider accepts a particular delivery, their undertaking is to either do it themselves in accordance with the contractual standard, or get someone else to do it. They can even abandon the job part way having only to telephone Rider Support to let them know. A Rider will not be penalised by Deliveroo for not personally doing the delivery her or himself, provided the substitute complies with the contractual terms that apply to the Rider."

28. At para. 103 the Panel notes that its conclusion on the effect of the substitution clause makes it unnecessary to consider other features of the contractual relationships on which the parties had relied.

29. At para. 104 the Panel says this:

> "Mr Hendy made a secondary submission pursuant to Article 11 ECHR and s 3 Human Rights Act 1998. However 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. In a less clear cut case the position might have been different."

The brevity of that paragraph no doubt reflects the fact that, as Lord Hendy frankly acknowledged, the submission based on article 11 was advanced by IWGB only at a very late stage, being raised only in its written closing submissions, in four paragraphs (paras. 19-22 – out of a total of 229) supported by a short appendix. The submission (explicitly described as "secondary") was that in order to comply with article 11 it was necessary to construe the requirement of personal service in section 296 (1) so that it was fulfilled "(a) by the performance of services, for and under the direction of [the other party] and in return for which the worker receives remuneration; or (b) by the performance of those services which the putative worker in fact executes personally".

30. Accordingly, the Panel held that the riders in question were not "workers" within the meaning of section 296 (1) and that IWGB's application could not proceed.

THE JUDICIAL REVIEW PROCEEDINGS

THE GROUNDS OF CHALLENGE

31. In its judicial review claim form IWGB pleaded five grounds of challenge. I need not set out grounds (1)-(3) and (5), which challenged various different aspects of the CAC's reasoning about the effect of the substitution clause as a matter of domestic law. Ground (4) reads:

> "*The CAC erred in failing to address the Union's arguments in respect of article 11*
>
> The right to bargain collectively is an essential element of article 11 of the European Convention on Human Rights (see *Demir and Baykara v Turkey* [2009- 48 EHRR 54). The UK legislation should be construed so as to give effect to that right (*R (Boots Management Services Ltd) v CAC* [2017] IRLR 355; and *London Borough of Wandsworth v Secretary of State for Business, Innovation and Skills* [2017] EWCA Civ 1092). In the instant case that meant that the requirement of personal service should be interpreted in a way which did not exclude these workers from exercising their right.
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> At paragraph 104 of the Decision, the CAC erred in dismissing this argument without engaging with it or providing reasons in circumstances where the union had made detailed submissions on the point, which were contained at paragraphs 19-22 of its closing submissions and in Appendix 1 attached thereto."

32. Permission to apply for judicial review was initially refused on the papers. IWGB applied for an oral hearing. That took place on 15 June 2018 before Simler J. Both IWGB and the CAC were represented by counsel. Simler J gave a full judgment ([2018] EWHC 1939 (Admin), [2018] IRLR 911) in which she considered each of the five pleaded grounds.

33. Simler J held that grounds 1-3 and 5 were not arguable. I need not summarise her reasoning in full. In short, she held that the Panel's findings of fact about the genuineness of the right of substitution clause and the extent to which it was relied on in practice were unarguably open to it on the evidence and that in treating those findings as determinative of the claim as a matter of domestic law it correctly applied the principles established in *Pimlico Plumbers*. As regards what I might call "the *Autoclenz* point", she observed at para. 35 that:

> "… [I]t is clear that the CAC conducted a careful examination of the evidence from a position of being properly sceptical, recognising the problem identified by Elias J … of 'armies of lawyers' creating a substitution clause to alter the true substance of the relationship."

34. Simler J did, however, give permission on ground 4. At para. 41 of her judgment she said:

> "With some hesitation I have reached a different conclusion in relation to ground 4, which argues that the collective bargaining rights in art 11 require an interpretation of s 296 (1) and the personal performance obligation that does not exclude these riders from exercising those rights. The CAC did not engage with this argument because of its factual findings, but arguably the point required to be addressed as a matter of principle, irrespective of the strength of the facts of the particular case."

35. Strictly speaking, as pleaded the challenge raised by ground 4 is only to the failure of the CAC to address IWGB's submissions on article 11. But Simler J evidently intended to permit the substantive point to be argued, at least if and in so far as the Court was in a position to determine it, and at the hearing before Supperstone J he granted permission to amend so far as necessary for that purpose.

36. IWGB did not seek to appeal against Simler J's refusal of permission on grounds 1-3 and 5.

37. In order to understand the issues on this appeal, it is essential to appreciate the limited basis on which IWGB's challenge in the High Court was permitted to proceed. There is before us no challenge to the CAC's conclusion as a matter of domestic law.[4] As I have already noted, the decision of the Supreme Court in *Uber v Aslam* elucidated the principles underlying *Autoclenz*. I express no view as to whether if its decision had been available a viable challenge could have been mounted to the way in which the

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[4] I put it that way as a shorthand. Of course if IWGB's argument based on article 11 were to succeed it would take effect as a matter of domestic law by the operation of section 3 of the 1998 Act.

CAC, or Simler J in upholding its reasoning, understood and applied those principles. Lord Hendy acknowledged that that was a question that he could not raise in this appeal.

THE JUDGMENT OF SUPPERSTONE J

38. At para. 21 of his judgment Supperstone J records that counsel had agreed that that ground 4 gave rise to four issues, namely:

> "i) whether Article 11 (1) is engaged (*Issue 1*);
>
> ii) if so, whether any interference with the Riders' Article 11 (1) rights is justified by Article 11 (2) (*Issue 2*);
>
> iii) if the Riders' Article 11 rights have been breached, whether the CAC should have 'read-down' s. 296 (1) (*Issue 3*);
>
> iv) whether the CAC failed to address the Union's arguments in respect of Article 11 (*Issue 4*)."

39. Supperstone J considered "issue 1" at paras. 24-40 of his judgment. His conclusion was that article 11 (1) was not engaged on the facts of this case. That meant that the remaining issues did not arise, but he went on to deal with them, albeit, as he said, more shortly than he would have done had they been dispositive. On each he rejected IWGB's challenge. Since the issues are essentially issues of pure law, I will not summarise his reasoning here.

THE APPEAL

40. IWGB's grounds of appeal before us are pleaded as follows:

> "(1) The Judge was in error in holding that Article 11 of the ECHR was not engaged because the Riders did not have Article 11 rights;
>
> (2) The Judge was in error in concluding that, if Article 11 was engaged and the Riders did have Article 11 rights, the restriction on those rights (by the exclusion of those who, on a domestic construction, had substitution rights which precluded them from the definition of 'personal service' in s. 296) was justified in accordance with Article 11 (2);
>
> (3) The judge was in error in concluding that, if Article 11 was engaged and that restriction was unjustified by reference to Article 11 (2), s. 296 could not be read down in a s. 3 HRA compliant manner."

41. The formulation of those grounds reflects Supperstone J's analysis, but I do not believe that it fully reflects the relevant case-law. More particularly, I think that the terminology of "engagement" is ambiguous. For reasons which I explain at para. 91 below, in my view there are two distinct questions:

(1) Do the riders fall within the scope of the protection afforded by article 11 as it relates to trade union freedom?

(2) If so, does article 11 give IWGB the right to seek compulsory recognition in respect of them?

Both those questions arise in connection with article 11 (1) rather than article 11 (2). I take them in turn.

(1) ARE THE RIDERS WITHIN THE SCOPE OF ARTICLE 11?

GENERAL APPROACH

42. In *Sindicatul "Pastorul Cel Bun" v Romania* app. no. 330/09, [2014] IRLR 49, ("the *Good Shepherd* case") the Grand Chamber of the ECtHR had occasion to consider the correct approach to the scope of article 11 in its trade union freedom aspect. In bare outline, the facts were that a number of Romanian Orthodox priests had formed a trade union and applied for it to be granted legal personality and entered in the register of trade unions maintained under Romanian law. Although the union's application for registration was initially granted, that decision was quashed on the basis that the Orthodox clergy fell outside the scope of national labour law. The union claimed that the denial of registration constituted a breach of article 11.

43. The decision of the Court was (a) that article 11 was "applicable to the facts of the case" (see paras. 140-148 of its judgment); (b) that the refusal to register the union amounted to an interference with that right (para. 149); but (c) that that interference was justified (paras. 151-172). It is element (a) that is relevant for our purposes. As to that, the Grand Chamber's reasoning can be summarised as follows:

(1) At para. 141 it defines the question which it has to decide as being "whether [the] duties [of the clergy in question], notwithstanding any special features they may entail, *amount to an employment relationship rendering applicable the right to form a trade union within the meaning of Article 11* [my emphasis]".

(2) At para. 142 it says that in deciding whether an employment relationship existed on the facts of the particular case it "will apply the criteria laid down in the relevant international instruments". It had previously summarised the instruments in question, at paras. 56-61 of its judgment. Most of them are concerned with trade union rights, but among them was ILO Recommendation no. 198 "concerning the employment relationship" ("ILO R198"), adopted on 15 June 2006, from which the Court quotes at some length. Its summary in para. 142 is that:

> "… the determination of the existence of such a relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterised in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties".

(3) At paras. 143-148 it makes its own assessment of "the facts relating to the performance of work and the remuneration of the worker", concluding at para. 148:

> "Having regard to all the above factors, the Court considers that, notwithstanding their special circumstances, members of the clergy fulfil their mission in the context of an employment relationship falling within the scope of Article 11 of the Convention. Article 11 is *therefore* [my emphasis] applicable to the facts of the case."

44. That reasoning depends on two points which establish the correct approach to this issue:

(1) The Court treats the question whether article 11 in its trade union freedom aspect is "applicable" to the case – i.e., as I have put it, whether it falls within its scope – as depending on the existence of an employment relationship (see in particular the italicised words): to put it another way, only workers in an employment relationship enjoy the particular protections arising from by the closing words of article 11 (1).

(2) The question whether an employment relationship exists is to be answered by reference to the criteria identified in ILO R198, rather than by reference to any definition in domestic law.

45. Lord Hendy did not accept that that was the correct approach. He submitted that article 11 applies to "everyone" – see the opening words of paragraph (1) – and that accordingly no part of its protections can be restricted to any particular class of person, such as persons in an employment relationship. He described the approach taken in the *Good Shepherd* case as "an oddity" and sought to rely on the later decision of the Court in *Manole and "Romanian Farmers Direct" v Romania*, app. no. 46551/06. I do not accept that submission. My reasons are as follows.

46. I start with *Manole.* In that case a number of self-employed farmers, who were self-evidently not workers in any employment relationship, sought to register a trade union. The application was denied on the basis that under Romanian law trade unions could only be formed by employees (and civil servants). The ECtHR held that there had been no breach of article 11. It held (a) that the denial of registration was an interference with the applicants' rights under article 11 but (b) that the interference was justified.

47. Lord Hendy submitted that the first element in that decision meant that – contrary to the basis of the reasoning in the *Good Shepherd* case – the Court recognised that workers who were not in an employment relationship fell within the scope of article 11, as it relates to trade union freedom, albeit that the claim failed at the second stage. As to that, it is necessary to analyse the reasoning of the Court in a little detail.

48. At paras. 39-41 of its judgment the Court addresses a preliminary objection about the applicability of article 11 to the facts of the case. The Romanian Government contended (see para. 39) "that in its relevant well-established case-law the Court had confirmed the applicability of the part of Article 11 of the Convention relating to trade union freedom exclusively in cases in which the applicants had, in fact, been employees", referring to various authorities culminating in *the Good Shepherd* case. At para. 40 the Court records that the applicants submitted that that was too restrictive an

approach and that article 11 "including its aspect relating to trade unions freedom, concerned 'everyone', and not just persons with employee status" and that:

> "to exclude farmers from the scope of Article 11 of the Convention would be to deprive a large number of persons of the possibility of collectively defending, by means of trade unions, their professional interests".

It does not at that point resolve that dispute, saying, rather, at para. 41, that it will "join it to the merits", i.e. deal with the issue as part of its subsequent substantive consideration.

49. At paras. 57-61 the Court sets out the principles emerging from its case-law. All that it says about the scope of article 11 as regards trade union freedom is (para. 59):

> "Although the Convention does not precisely define the concept of 'trade union' beyond a general indication that it is an association formed for the purpose of defending the interests of its members, most of the cases considered by the Court have concerned employees and, more broadly, persons in an 'employment relationship' (see *Sindicatul 'Păstorul cel Bun'*, cited above, §142)."

This does not directly answer the question raised at paras. 39 and 40. The Court's reference to "most" of the cases might seem to suggest that there were some previous cases where persons who were not in an employment relationship had been found to fall within the scope of the trade union freedom right. However, we were not referred to any such decisions, and I am aware of none. (It may be that the Court used that language simply because some of the cases concern civil servants, who in many European countries are not regarded as employees.) I should say that para. 142 of the *Good Shepherd* decision, to which the Court refers, does not shed any relevant light on its thinking.

50. At paras. 62-75 the Court considers the application in the light of those principles. Para. 62 reads:

> "The Court reiterates that Article 11.2 of the Convention does not exclude any occupational group from the right of association secured under that article (see *Sindicatul 'Pastorul Cel Bun' v Romania* … para. 145). In the present case, insofar as the applicants were refused the right to be registered as a trade union-type association, the Court considers that there was an interference by the respondent State with the exercise of the rights guaranteed by Article 11 of the Convention."

Having thus found an interference, it goes on to conclude that it is justified by reference to article 11 (2). In short, its reasoning is that farmers were free to form other kinds of association to protect their interests and that accordingly there was "[no] need [for them] to establish such organisations *in the form of trade unions* [my underlining],

which are now reserved for employees and members of cooperatives[5]" (para. 73). At para. 65 it says that it was legitimate for the Romanian Government to seek to "[protect] the economic and social order by maintaining the legal difference between trade unions and other types of association".

51. Lord Hendy submitted that the Court in *Manole* must be treated as having accepted the applicants' submission recorded at para. 39 that article 11 "*including its aspect relating to trade union freedom* [my emphasis], concerned 'everyone', and not just persons with employee status"; otherwise it would have been unnecessary for it to have to decide whether the denial of the right to form a trade union was justified. I see the point, but I do not think that it is as straightforward as that. As I read it, the Court proceeded on the basis that article 11 was engaged simply because the farmers' "general" freedom of association was interfered with, and that the interference was justified because article 11 did not give them the right to associate *as a trade union*. I accept, however, that if my analysis of the *Good Shepherd* decision is correct the Court in *Manole* could have reached the same result more straightforwardly by explicitly upholding the submission of the Romanian Government (para. 40); and to that extent it could be said that there is a tension between the reasoning in the two cases.

52. If there is such a tension, I think we must follow the approach in the *Good Shepherd* case. In the first place, it is a decision of the Grand Chamber, and its reasoning is more explicit than that in *Manole*. But in any event I think that the natural understanding of the nature of a trade union is that it is an association of workers, however that term may be defined; and it is more straightforward to approach the question of who enjoys trade union freedom by confronting directly the question of who should be regarded as a worker rather than by the frankly artificial route of treating "everyone" as coming within the scope of the right and then seeking to justify any interference by reference to the stringent exclusionary criteria in article 11 (2). As Phillips LJ pointed out in argument, if Lord Hendy's submission were correct it would mean that an association of customers of a supermarket chain would have the right to form and join a trade union in order to try to negotiate better prices, subject only to article 11 (2). That does not seem to be a sensible approach. Lord Hendy's submission ignores the distinction between the general right to freedom of association protected by article 11 and trade union freedom, which is a "special aspect" of that right: see the quotation from *Demir* at para. 10 above (which is in fact repeated by the Grand Chamber in the *Good Shepherd* decision itself – see para. 130).

53. I therefore believe that the correct approach is indeed as summarised at para. 44 above. That means that it is necessary to consider the terms of ILO R198.

ILO RECOMMENDATION 198

54. ILO R198 is in four parts, with an elaborate preamble. Parts III and IV are irrelevant for our purposes.

55. The preamble refers to a large number of considerations, but a central theme is the importance of being able to establish with clarity whether a person is "a worker in an

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5 For the avoidance of doubt, I accept that the reference to trade unions being "reserved for employees and members of cooperatives" is a reference to Romanian law: the Court is not at this point considering any limitation in article 11.

employment relationship" for the purpose of employment protection measures, not least "where there has been an attempt to disguise the employment relationship, or where inadequacies or limitations exist in the legal framework, or in its interpretation or application".

56. Part I is headed "National Policy of Protection for Workers in an Employment Relationship". Paragraph 1 recommends that member states

> "should formulate and apply a national policy for reviewing at appropriate intervals and, if necessary, clarifying and adapting the scope of relevant laws and regulations, in order to guarantee effective protection for workers who perform work in the context of an employment relationship".

The remaining provisions of Part I contain various recommendations about the content of such a policy: these are not relevant for our purposes.

57. Part II is headed "Determination of the Existence of an Employment Relationship". I should set out paragraphs 9-13 in full. They read:

> "9. For the purposes of the national policy of protection for workers in an employment relationship, the determination of the existence of such a relationship should 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.
>
> 10. Members should promote clear methods for guiding workers and employers as to the determination of the existence of an employment relationship.
>
> 11. For the purpose of facilitating the determination of the existence of an employment relationship, Members should, within the framework of the national policy referred to in this Recommendation, consider the possibility of the following:
>
> (a) allowing a broad range of means for determining the existence of an employment relationship;
>
> (b) providing for a legal presumption that an employment relationship exists where one or more relevant indicators is present; and
>
> (c) determining, following prior consultations with the most representative organizations of employers and workers, that workers with certain characteristics, in general or in a particular sector, must be deemed to be either employed or self-employed.
>
> 12. For the purposes of the national policy referred to in this Recommendation, Members may consider clearly defining the

> conditions applied for determining the existence of an employment relationship, for example, subordination or dependence.
>
> 13. Members should consider the possibility of defining in their laws and regulations, or by other means, specific indicators of the existence of an employment relationship. Those 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* [emphasis supplied]; is carried out within specific working hours or at a workplace specified or agreed by the party requesting the work; is of a particular duration and has a certain continuity; requires the worker's availability; or involves the provision of tools, materials and machinery by the party requesting the work;
>
> (b) periodic payment of remuneration to the worker; the fact that such remuneration constitutes the worker's sole or principal source of income; provision of payment in kind, such as food, lodging or transport; recognition of entitlements such as weekly rest and annual holidays; payment by the party requesting the work for travel undertaken by the worker in order to carry out the work; or absence of financial risk for the worker."

Some general observations about those paragraphs may be useful at this stage.

58. First, Part II does not itself prescribe how the existence of an employment relationship should be identified in any particular case. On the contrary, it leaves it to member states to prescribe a method, while offering guidance at paragraphs 11-13 as to the kinds of approach that they might take. That leaves room for what in other contexts would be called a "margin of appreciation" as to where the relevant boundaries are drawn. Mr Jeans submitted that it followed that the correct approach in the present context was to apply the domestic definition (at least where there is one) unless it is shown to be inconsistent with the broad principles underlying ILO R198. I do not think that that is right (though a more modest version of the point may apply – see para. 80 below). It is one thing for the ILO to hold back from a (recommended) definition, but a court which has to decide whether there has been a breach of a Convention right in a given case – whether that be the ECtHR itself or a UK Court for the purposes of the 1998 Act – has to decide for itself whether the article in question is engaged, which means that it must make its own decision about any issues raised by that question. Thus, where, as here, the issue is whether the claimant or applicant is in an employment relationship, it must itself make the choices which ILO R198 leaves open, to the extent necessary for its decision. That seems to me correct in principle and also to have been the approach taken by the ECtHR in the *Good Shepherd* case itself. (For the avoidance of doubt, that is not the correct approach to the issues that may arise at the next stages of the analysis under article 11, where it is clear that member states are accorded a substantial margin of appreciation; but we are at this point concerned only with the scope of the article.)

59. Second, paragraph 12 refers, as an example of a possible "condition" to be "applied for determining the existence of an employment relationship", to "subordination or dependence". The word "condition" is a little odd in this context, but I think that it is meant to connote a broad principle which may be said to underlie or characterise an employment relationship, as opposed to the more specific "indications" in paragraph 13. I also think that it is clear from the context, notwithstanding the terminology of "example", that the ILO regards subordination (or dependence) as an essential characteristic of an employment relationship. That would hardly be a novelty. As appears from some of the authorities referred to below (including, now, *Uber v Aslam* – see paras. 71-75 in the judgment of Lord Leggatt), the concept of subordination is commonly referred to in this context in both the UK and the EU case-law, although how it is to be applied in practice is far from straightforward – whence no doubt the need to look for more specific "indicators" of the existence of such a relationship.

60. Third, the "specific indicators" suggested in paragraph 13 – (a) focusing on characteristics of the work and (b) focusing on characteristics of the reward – are clearly to be considered cumulatively. However, I consider below whether the "personal work" indicator may be decisive by itself.

61. Fourth, it is clear from the preamble that member states are expected to be vigilant for, and to reject, attempts "to disguise the employment relationship".

62. Overall, the approach taken in ILO R198 to identifying an employment relationship broadly parallels that taken in domestic law in identifying the characteristics not only of a contract of service, but also of a "worker contract". It recognises an underlying concept of "subordination"; it identifies a number of familiar indicators of the existence of such a relationship; and it enjoins a focus on the realities of the relationship and being alert to attempts to disguise it.

CASE-LAW

63. We were referred to no Strasbourg authorities dealing either with an app-based relationship such as that between Deliveroo and its riders or with the relevance of a right of substitution such as that found by the CAC in this case; nor were we referred to any domestic authorities addressing the issue in the context of article 11. We are therefore to some extent in virgin territory.

64. However, Mr Jeans submitted that important guidance could be found in the decision of the Court of Justice of the European Union ("the CJEU") in *B v Yodel Delivery Network Ltd*, case C-692/19, [2020] IRLR 550. This was a decision on a reference from an Employment Tribunal in England about the application of the Working Time Directive to a self-employed parcel delivery courier. The decision takes the form of a "reasoned order" under article 99 of the CJEU's Rules of Procedure, which applies where the Court takes the view that the reply to the question referred can be clearly deduced from existing case law or where the answer admits of no reasonable doubt.

65. The facts are helpfully summarised in the headnote to the IRLR report as follows:

> "B was a parcel delivery courier who carried on his business exclusively for Yodel, a parcel delivery undertaking. Yodel's couriers were engaged under a services agreement which stipulated that they were

> 'self-employed independent contractors'. Under that agreement, they could appoint a subcontractor or a substitute and were free to deliver parcels for third parties. Couriers were not required to accept any parcel for delivery and could fix a maximum number of parcels which they were willing to deliver. The parcels had to be delivered between 7.30 and 21.00, but the couriers could usually decide the time of delivery and the appropriate order and route. B claimed that he was a 'worker' for the purposes of the Working Time Directive 2003/88. He considered that, although he was self-employed for tax purposes and accounted for his own business expenses, he was an employee of Yodel. An employment tribunal referred questions to the CJEU on whether he was a 'worker'.
>
> The tribunal stated that the fact that the couriers had the possibility of subcontracting precluded their classification as a 'worker' under domestic law. Further, it noted that the fact that the couriers were not required to provide their services exclusively to Yodel meant that they had to be classified domestically as 'self-employed independent contractors'. It had doubts as to the compatibility of the provisions of that domestic law, as interpreted by the UK courts, with EU law."

The questions referred were very elaborately drafted, but for present purposes it is enough to say that they asked to what extent the various features of the arrangements between B and Yodel as summarised in the headnote were relevant to the question whether he was a worker within the meaning of the Directive. The Court's answer can be summarised as follows.

66. First, it confirms at para. 26 that the term "worker" has an autonomous meaning specific to EU law.

67. Second, at paras. 27-29 it identifies what that meaning is. At para. 29 it says, citing *Fenoll v Centre D'Aide par le Travail "La Jouvene"*, C-316/13, [2016] IRLR 67, that

> "… the essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration".

It also records, at para. 27, citing *Sindicatul Familia Constanţa v Directia Generala de Asistenta Sociala si Protectia Copilului Constanta* C-147/17, [2019] ICR 211, that:

> "the national court must, in order to determine to what extent a person carries on his activities under the direction of another, base that classification on objective criteria and make an overall assessment of all the circumstances of the case brought before it, having regard both to the nature of the activities concerned and the relationship of the parties involved";

and, at para. 28, that

> "since an employment relationship implies the existence of a hierarchical relationship between the worker and his employer, the issue whether such a relationship exists must, in each particular case, be assessed on the basis of all the factors and circumstances characterising the relationship between the parties".

Both propositions are based on previous decisions of the Court to which it refers. The language of a "hierarchical" relationship connotes the same concept as the language of subordination already referred to.

68. Third, at paras. 30-32 it emphasises the importance of focusing on the realities of the relationship rather than the labels attached by the parties. It says:

> "30. … [T]he Court has held that the classification of an 'independent contractor' under national law does not prevent that person being classified as an employee, within the meaning of EU law, if his independence is merely notional, thereby disguising an employment relationship (*FNV Kunsten Informatie en Media v Staat der Nederlanden*, C-413/13, para 35 and the case-law cited).
>
> 31. That is the case of a person who, although hired as an independent service provider under national law, for tax, administrative or organisational reasons, acts under the direction of his employer as regards, in particular, his freedom to choose the time, place and content of his work, does not share in the employer's commercial risks and, for the duration of that relationship, forms an integral part of that employer's undertaking, so forming an economic unit with that undertaking ([*Kunsten*], para 36 and the case-law cited).
>
> 32. On the other hand, more leeway in terms of choice of the type of work and tasks to be executed, of the manner in which that work or those tasks are to be performed, and of the time and place of work, and more freedom in the recruitment of his own staff are the features which are typically associated with the functions of an independent service provider (*Haralambidis v Casilli*, C-270/13, para 33)."

69. Finally, having identified those principles, the Court turns to the facts of the case before it, "in order to give a useful answer to the referring court". Although it is rather long, I think I should set the passage out in full:

> "35. It follows from the specific features of the file submitted to the Court that a person, such as B, appears to have a great deal of latitude in relation to his putative employer.
>
> 36. In those circumstances, it is necessary to examine the consequences of that great deal of latitude on the independence of such a person and, in particular, whether, despite the discretion, referred to by the referring court, afforded to that person, his independence is merely notional.

37. In addition, it must be ascertained whether it is possible to establish, in the circumstances specific to the case in the main proceedings, the existence of a subordinate relationship between B and Yodel.

38. In that regard, concerning, first, the discretion of a person, such as B, to appoint subcontractors or substitutes to carry out the tasks at issue, it is common ground that the exercise of that discretion is subject only to the condition that the subcontractor or substitute concerned has basic skills and qualifications equivalent to the person with whom the putative employer has concluded a services agreement, such as the person at issue in the main proceedings.

39. Thus, the putative employer can exercise only limited control over the choice of subcontractor or substitute by that person, on the basis of a purely objective criterion, and cannot give precedence to any personal choices and preferences.

40. Second, it is apparent from the file submitted to the Court that, under the services agreement at issue in the main proceedings, B has an absolute right not to accept the tasks assigned to him. In addition, he may himself set a binding limit on the number of tasks which he is prepared to perform.

41. Third, as regards the discretion of a person, such as B, to provide similar services to third parties, it appears that that discretion may be exercised for the benefit of any third party, including for the benefit of direct competitors of his putative employer, it being understood that that discretion may be exercised in parallel and simultaneously for the benefit of a number of third parties.

42. Fourth, as regards 'working' time, while it is true that a service, such as that at issue in the main proceedings, must be provided during specific time slots, the fact remains that such a requirement is inherent to the very nature of that service, since compliance with those times slots appears essential in order to ensure the proper performance of that service.

43. In the light of all those factors, first, the independence of a courier, such as that at issue in the main proceedings, does not appear to be fictitious and, second, there does not appear, a priori, to be a relationship of subordination between him and his putative employer.

44. That being so, it is for the referring court, taking account of all the relevant factors relating to B and to the economic activity which he carries on, to classify his professional status in accordance with Directive 2003/88, in the light of the criteria laid down in the case-law set out in paras 27–32 of the present order.

45. It follows from all the foregoing considerations that Directive 2003/88 must be interpreted as precluding a person engaged by his

> putative employer under a services agreement which stipulates that he is a self-employed independent contractor from being classified as a 'worker' for the purposes of that directive, where that person is afforded discretion:
>
> – to use subcontractors or substitutes to perform the service which he has undertaken to provide;
>
> – to accept or not accept the various tasks offered by his putative employer, or unilaterally set the maximum number of those tasks;
>
> – to provide his services to any third party, including direct competitors of the putative employer, and
>
> – to fix his own hours of 'work' within certain parameters and to tailor his time to suit his personal convenience rather than solely the interests of the putative employer,
>
> provided that, first, the independence of that person does not appear to be fictitious and, second, it is not possible to establish the existence of a relationship of subordination between that person and his putative employer. However, it is for the referring court, taking account of all the relevant factors relating to that person and to the economic activity he carries on, to classify that person's professional status under Directive 2003/88."

70. The structure of those paragraphs is rather convoluted and may benefit from some elucidation:

(1) The starting-point is the two questions identified in paras. 36 and 37, in summary (a) whether the apparent "latitude" given to B about how and when to do his work means that he is truly independent or whether his independence is "merely notional" (and is thus "disguising an employment relationship" – see para. 30); and (b) whether "in the circumstances specific to the case in the main proceedings", there is a subordinate relationship between B and Yodel.

(2) In order to answer those questions the Court goes through the four points at paras. 38-42 which concern the rights which B enjoys under the services agreement (in summary) – (a) to use subcontractors or substitutes; (b) to decide whether or not to accept any task (i.e. any particular parcel delivery); (c) to work for a competitor; and (d) to choose at what point in the day to make a delivery.

(3) Its conclusion, at para. 43, is that the answer to the question in para. 36 is that B's independence does <u>not</u> appear to be fictitious (which evidently means the same as "merely notional") and that the answer to the question in para. 37 is that there

does not appear ("*a priori*"[6]), to be a relationship of subordination between him and his putative employer.

(4) It followed that, on the material available to the Court, B was not a worker. It says so in terms in the main part of para. 45, which essentially repeats in summary form the effect of the preceding paragraphs. The proviso reads a little oddly since the two points which it makes are the very points that have just been answered. But that is no more than a drafting quirk – save perhaps to the extent that it recognises that as a matter of form the ultimate decision lies with the referring tribunal.

71. If *Yodel* reflects the approach that the ECtHR would take on similar facts, the decision plainly assists Deliveroo. At least the first three of the four points on which the Court based its conclusion – the right to use substitutes, the right to choose which tasks to accept, and the right to work for a competitor – apply equally in the case of its riders. As to the fourth – the right to choose at what time within the prescribed time slots to make the delivery – riders have no equivalent latitude: once the job is accepted, the food has to be collected and delivered as soon as possible. But it is not clear that that would make a decisive difference: at para. 43 of its order the CJEU discounts the constraints imposed by the time slots on the basis that they are "inherent to the very nature of [the] service", and the same could be said of the tighter time constraints in the case of a Deliveroo delivery. The Court based its conclusion on the terms of the services agreement rather than on any analysis of how often the rights in question were taken advantage of. It emphasised that the rights should not be "notional" or "fictitious", but the CAC found in the present case that the relevant rights were genuine.

72. Lord Hendy pointed out that since the decision took the form of a reasoned order the CJEU had not had the benefit of submissions from the parties, or from the Commission or member states; nor had it had an Opinion from the Advocate-General. I accept that, but despite its unusual form the decision is fully reasoned, and indeed the reason why the Court took the course that it did was that it regarded the case as straightforward.

73. Lord Hendy also reminded us that *Yodel* was a decision of the CJEU and not the EctHR and made no reference to any Convention case-law. It was concerned with the meaning of "worker" in the context of the Working Time Directive rather than with the existence of an employment relationship in the context of a fundamental right such as trade union freedom. I acknowledge that, but the fact remains that the ECtHR habitually refers to "international law" concepts where appropriate, including the case-law of the CJEU, and both the ECtHR and the CJEU take guidance from the ILO. In my view it is legitimate to treat the Luxembourg case-law as giving some indication of the approach likely to be taken to issues of worker status in Strasbourg (though the amount of space which I have had to devote to expounding the decision in *Yodel* may give a misleading impression of its centrality to my analysis).

74. Although the skeleton arguments referred to various other cases which it was suggested might have a bearing on whether the riders were in an employment relationship with Deliveroo (including several decisions of the CJEU, which, however, do no more than

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6 I am not sure that the Court is using "*a priori*" in the sense that it is used in England. The context suggests that it means something like "on the face of it" (or "*prima facie*" if one has to use Latin).

state the principles applicable to the determination of worker status in terms identical to those in *Yodel*) none of them were on facts sufficiently similar to advance the argument, and I need not address them here. I will return later to the decision of the Supreme Court in *Uber v Aslam* which was the subject of the post-hearing submissions.

THE PRESENT CASE

75. I have already noted that the way in which the CAC dealt with the case under article 11 at para. 104 of its decision is extremely summary; but I have also explained the apparent reason: see para. 29 above. I should add that the short appendix attached to IWGB's closing submissions which was said to summarise the relevant law as regards article 11 did not refer at all to the materials which were central to the submissions before us – in particular the decisions of the ECtHR in the *Good Shepherd* case and *Manole* and ILO R198. It is very unsatisfactory that the Court should be having to consider this important question without the benefit of a full consideration by the CAC as the expert tribunal; and I do not regard this as a case where we should go any further than is strictly required for the determination of the issues before us.

76. However, notwithstanding the brevity of para. 104, I think it can safely be inferred that the Panel concluded that the riders in question were not in an employment relationship with Deliveroo for the purpose of article 11: that is the only issue to which its reference to "the unfettered and genuine right of substitution that operates both in the written contract and in practice" would be material.

77. I believe that that was a conclusion to which the CAC was entitled to come. The particular feature on which it relied was its finding that riders are, genuinely, not under an obligation to provide their services personally and have a virtually unlimited right of substitution. That is on any view a material factor in the decision whether they are in an employment relationship with Deliveroo. Paragraph 13 of ILO R198 refers to the fact that the work "must be carried out personally by the worker" as an indicator of an employment relationship (see para. 57 above); and it follows at least that the absence of such an obligation must be a contra-indicator of worker status (as it was treated in *Yodel*). However, in my view the CAC was entitled to regard it as decisive. I do not think that the position taken in English law that an obligation of personal service is (subject to the limited qualifications acknowledged in *Pimlico Plumbers*) an indispensable feature of the relationship of employer and worker is a parochial peculiarity. On the contrary, it seems to me to be a central feature of such a relationship as ordinarily understood[7], and I see no reason why its importance should be any the less in the context of article 11.

78. Lord Hendy relied on the Panel's finding that riders only rarely take advantage of the right of substitution. However, I do not believe that the question of how often in practice the putative worker does the work himself or herself as opposed to having it done by someone else can be relevant as such, though it may be relevant to the question of whether the right is genuine. We are, necessarily, concerned with legal relationships,

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[7] It may be a nice question whether the reason why this is so should be characterised as being that if you do not have to provide your services personally you cannot be said to be in a "subordinate" relationship, in the necessary sense, or whether it is a free-standing point; but I need not go there. The exact scope of the concept of subordination is a ticklish question (not, I think, fully answered in *Uber v Aslam*) on which we were not addressed.

and any test other than what the parties' (genuine) rights and obligations are would be unacceptably uncertain. It cannot be the case that whether riders working on identical terms fall to be treated as workers depends on how often they choose to take advantage of their right to do the work through substitutes. I note that in *Yodel* the CJEU did not suggest that any analysis was required of how frequently B used a substitute.

79. The right to use a substitute would of course carry no weight if it "disguised" the reality of the relationship, to use the language of the preamble to ILO R198 (or were "fictitious" or "notional", in the language of *Yodel*). But that was in substance the question which the Panel asked itself at paras. 76-101 of its decision, and IWGB has no permission to challenge its conclusion.

80. I acknowledge that, if and when the ECtHR comes to consider directly the issue of the significance of the right to employ substitutes to the existence of an employment relationship, its approach might differ in detail from that adopted in the English case-law: it might, for example, be more generous in its definition of the limits to "permitted substitution". But that is no more than speculation: there is nothing in its existing case-law to indicate that it will do so, still less that any such modification would be of a kind that would produce a different outcome in this case. The correct approach of an English court in a case of this kind was expressed by Lord Bingham at para. 20 of his speech in *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323:

> "The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less."

That was echoed by Lord Mance in para. 152 of his judgment *in Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11, [2019] AC 196, where he says

> "… domestic courts should not, at least by way of interpretation of the Convention rights as they apply domestically, forge ahead, without good reason".

As the Strasbourg jurisprudence stands at present, there is no reason to believe that the approach of the domestic courts to the requirement of personal service in section 296 (1) is inconsistent with the requirements of article 11.

81. That conclusion corresponds to that reached by Supperstone J on the equivalent issue, though the details of his reasoning may not be quite the same as mine, reflecting what seems to have been a difference in exactly how the arguments were developed before him.

82. There are other features of the relationship between Deliveroo and the riders which might reinforce the conclusion that they were not in an employment relationship for the purpose of article 11. Mr Jeans submitted that several of the indicators identified in paragraph 13 (a) of ILO R198 were absent in the present case. He referred in particular to the indicators of: "specific working hours"; work "of a particular duration and … a certain continuity"; and a requirement for "the worker's availability" – in truth, riders were under no obligation to accept work at all. He also noted that the most essential physical tools of the job – phone and bike – are provided by the rider. He pointed out that the equivalent features of the relationship were relied on by the CJEU in its

conclusion in *Yodel*, which also took into account the fact that (as here) the riders were free to work for competitors. Even if I were wrong to treat the absence of a right of personal service as decisive, it may be that the CAC's decision could be supported on the alternative basis that it was decisive when taken together with these features. However, I am reluctant to decide the case on that basis, even by way of alternative, in circumstances where there was no such overall assessment by the CAC.

83. As noted above, following the conclusion of the hearing IWGB sought and was granted permission to make written submissions arising out of the decision of the Supreme Court in *Uber v Aslam*. In bare outline the issue in *Uber* was whether private-hire drivers providing services using the Uber app were "workers" within the meaning of the Employment Rights Act 1996, the Working Time Regulations 1998 and the National Minimum Wage Regulations 2015; the relevant statutory definitions are substantially similar to that in section 296 (1) of the 1992 Act. It was Uber's case, relying on the terms of the standard-form contracts which the drivers were obliged to sign, that they provided their services to, and under contracts with, the passengers, and that its own role was essentially intermediary. The Supreme Court, upholding the decisions of the ET, the EAT and this Court, rejected Uber's case. It found that the drivers provided their services to, and under contracts with, Uber; and it applied the *Autoclenz* approach in disregarding the contractual provisions to the contrary. Lord Leggatt, who gave the only judgment, gave an illuminating exposition of the theoretical underpinning of the *Autoclenz* decision.

84. In my view the reasoning in *Uber v Aslam* does not advance the arguments in this case. The starting-point must be that, as Mr Jeans emphasised, *Uber* did not involve any issue under article 11. Equally importantly, however, there was no issue about personal service: Uber did not rely on any substitution clause. I have considered whether it might nevertheless be worthwhile to try to work out how the Supreme Court's approach, particularly on the *Autoclenz* aspect, would apply to the facts of the present case, on the basis that, if I were to conclude that Lord Leggatt's reasoning meant that the CAC's findings on that issue were wrong as a matter of domestic law, that should inform my view as to whether they were acceptable in the article 11 context. But although tempted I have concluded that I should not go down that road. It is not simply that the exercise of making findings about the position in English law in order to inform a decision about the Strasbourg law is intellectually rather impure. More importantly, in the context of these proceedings it would mean allowing in by the back door a challenge to the CAC's decision which IWGB does not have permission to pursue: as I have noted, Lord Hendy rightly acknowledged that he could not rely on *Uber* to attempt to re-open the refusal of permission on the domestic law issues. It would also be an unsatisfactory exercise for two other reasons. First, the CAC made its relevant findings of fact on the basis of what I might call unvarnished *Autoclenz*, without reference to any further factual questions which might be raised as a result of Lord Leggatt's analysis. Second, the question of how that analysis would apply on the facts of the present case, as found by the CAC, does not seem to me straightforward.

CONCLUSION

85. For those reasons I would hold that the riders do not fall within the scope of the trade union freedom right under article 11.

86. I am conscious that that conclusion may at first sight seem counter-intuitive. It is easy to see that riders might benefit from organising collectively to represent their interests as against Deliveroo, and it might seem to follow that they should have the right "to join and form a trade union for the protection of [those] interests"[8]. Lord Hendy referred in passing (though we were not taken to them) to statements by the ILO that persons who are outside an employment relationship – referred to by it as "self-employed workers" – "should nevertheless enjoy the right to organise" (para. 254 of *the Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, 2006) and to similar statements by the ILO's Committee on Freedom of Association on complaints against Poland and South Korea in 2012. Examples of who the ILO had in mind as such self-employed workers are "agricultural workers" and HGV drivers[9], both of whom are no doubt in at least some senses in a subordinate or dependent relationship as regards the persons to whom they supply their services. However, although we did not have the benefit of developed submissions on this aspect, I think it is important to appreciate the distinction between the right to organise generally and the right to organise *as a trade union* (with the particular protections which that right attracts in the Strasbourg jurisprudence, particularly since *Demir*). The ECtHR has clearly decided that the latter right need not be enjoyed by the self-employed, and that it is sufficient that they enjoy other forms of freedom of association. That is particularly clear from the reasoning in *Manole* (see para. 50 above), albeit that the Court reached the result in that case by reference to paragraph (2) of article 11 rather than paragraph (1). The only question is how to define "workers in an employment relationship", and if Deliveroo riders do not satisfy that definition, applying ILO R198 as endorsed in the *Good Shepherd* decision, it follows that they enjoy only the more general right of freedom of association under article 11 (1).

(2) THE RIGHT TO SEEK COMPULSORY RECOGNITION

87. It follows from that conclusion that the second of the two questions which I identify at para. 41 above does not arise. I should, however, say that if I were wrong about whether the riders are within the scope of the trade union freedom right in article 11 it would not necessarily follow that that freedom entails the right to seek compulsory recognition. The correct approach to that issue is, in summary form, as follows.

88. As noted at para. 10 above, the decision of the Grand Chamber in *Demir* establishes that "the right to bargain collectively with the employer" is in principle an essential element of "the right to form and to join trade unions"; and it follows that in some circumstances the state may be under a positive obligation to secure the effective enjoyment of that right. In the *Boots* case I expressed the view, having regard to the subsequent decision of the ECtHR in *Unite the Union v United Kingdom* app. no. 65397/13, [2017] IRLR 438, that the effect of *Demir* could in certain circumstances be

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8 As a matter of domestic law "non-workers" such as (on this hypothesis) Deliveroo riders do in fact have the right to *join* trade unions, so long as the majority of members of the union are workers (see the *Foster Carers* case referred to in para. 88 below); and it appears that many Deliveroo riders are in fact members of IWGB. But that does not assure them the full rights protected by article 11.

9 In the UK at least many or most agricultural workers and HGV drivers would in fact be "workers", or indeed employees, but the ILO presumably had in mind other models of working under which that might not be the case.

that it was a breach of article 11 for a trade union to be excluded from access to the compulsory recognition procedure under Schedule A1 of the 1992 Act: see paras. 47 and 54 of my judgment. That proposition has since been approved by this Court both in *R (Independent Workers Union of Great Britain) v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWCA Civ 260 ("*IWGB*") – see para. 62 of the judgment of Bean LJ – and in *National Union of Professional Foster Carers v Certification Officer* [2021] EWCA Civ 548 ("the *Foster Carers* case") – see paras. 103-109 of my own judgment.

89. However, the key phrase in that proposition is "in certain circumstances". In all three of those decisions the Court, drawing on observations of the ECtHR in several cases (including in particular *Unite the Union*), emphasised the width of the margin of appreciation allowed to governments in deciding, among other things, in respect of which workers unions should be entitled to be compel recognition for the purpose of collective bargaining: see, most fully, paras. 56-62 of the judgment of Bean LJ in *IWGB.*

90. Thus the real question in this case would be whether it fell within the margin of appreciation available to the UK Government to deny access to the machinery for compulsory collective bargaining to persons who were (*ex hypothesi*) workers in an employment relationship but where the relationship had the particular features present in this case – most obviously a virtually unlimited right of substitution, no obligation to work at any particular time, and freedom to work for a competitor. I express no view about that question, not least for the reason given at para. 75 above, but I do not think that the answer is a foregone conclusion.

91. I should perhaps say something about the relationship of this issue, i.e., "issue (2)", to the issue of justification which would arise under article 11 (2) if I had concluded that article 11 was engaged. As I understand the key Strasbourg decisions (which I take to be *Demir* and *Unite the Union*), the question whether a worker or a trade union is entitled to seek compulsory recognition for the purpose of collective bargaining depends on whether the state has a positive obligation to accord that right: see paras. 38, 39-47 and 54 of my judgment in the *Boots* case. The authorities make clear, as I have said, that in deciding whether that is so in any given case a wide discretion has to be accorded to states as to how to legislate in this sensitive field. In deciding whether they have exceeded that discretion it is unsurprising that the Court may employ terminology such as "margin of appreciation" which are familiar in the context of justification. Nevertheless, the exercises are different: what we are concerned with at this stage is establishing the extent of the right accorded by paragraph (1) in the first place, rather than with the extent to which it may be justified to interfere with such a right. There may in practice be a considerable overlap between the relevant considerations but the conceptual difference between the two exercises should be respected.

OTHER ISSUES

92. Both the issues which I have so far considered go to the question of whether article 11 was engaged – that is, whether the Deliveroo riders enjoyed a right under article 11 (1) which was interfered with by their being excluded from access to the compulsory recognition machinery. Since I do not believe that they did enjoy that right the question

of whether any interference with it was justified by reference to the criteria in article 11 (2) does not arise. Although Supperstone J did address the question in the alternative, I do not propose to do so myself. I will only say that his conclusion on the justification issue lends some support to my view that that the outcome on "issue (2)" would not be a foregone conclusion: although, as I have sought to explain, the issues are conceptually different, there is a considerable overlap between them.

93. Nor do I propose to address the third issue considered by Supperstone J – that is, whether it would be possible to read down section 296 (1) if that were necessary in order to avoid non-compliance with the requirements of article 11. I should say, however, that the question does not seem to me open-and-shut: the statutory requirement of an obligation of personal service might be harder to read down, at least to the extent required, than the reference to a "contract" which was read down by the Supreme Court in *Gilham v Ministry of Justice* [2019] UKSC 44, [2019] ICR 1655 (and by this Court in the *Foster Carers* case).

DISPOSAL

94. I would accordingly dismiss this appeal.

Coulson LJ:

95. I agree that, for the reasons given by my lord, Lord Justice Underhill, this appeal must be dismissed.

96. I understand why my lord says at para. 86 that the result may seem counter-intuitive: it may be thought that those in the gig economy have a particular need of the right to organise as a trade union. So I quite accept that there may be other cases where, on different facts and with a broader range of available arguments, a different result may eventuate.

97. But the dismissal of this appeal is, in my judgment, the inevitable result of: i) the findings of fact by the CAC (and in particular the conclusion that the substitution right was genuine); ii) the very restricted scope of the subsequent permission to appeal granted by Simler J (limited to the article 11 point); iii) the reasoning and result in the *Good Shepherd* case; iv) the specific indicator of an employment relationship in ILO R198, that the work "must be carried out personally by the worker"; and v) the fact that *Uber v Aslam* was not concerned either with article 11 or personal service.

Phillips LJ:

98. I agree with both judgments.