Browne Jacobson

# Scope of trade union rights

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Back in 2017, the Central Arbitration Committee (CAC) declined an application by the Independent Workers Union of Great Britain (IWGB) under the compulsory recognition procedures to be recognised for collective bargaining by Roofoods Limited, trading as Deliveroo. The CAC declined the application on the grounds that Deliveroo riders were not “workers” within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992. This determination on status was made because Deliveroo riders have a right to provide a substitute and so were not personally required to provide services.

The IWGB sought judicial review in the High Court and were allowed to proceed, albeit on very limited grounds. Ultimately unsuccessful in the High Court, IWGB appealed to the Court of Appeal, asking it to consider:

- whether Deliveroo riders fall within the scope of article 11 of the European Convention on Human Rights as it relates to trade union freedom, and
- if so, whether article 11 gives IWGB the right to seek compulsory recognition.

In deciding the above two issues, the Court of Appeal had to address the status of Deliveroo riders and, in particular, the requirement for personal service.

The Court of Appeal confirmed that whether article 11 was engaged depended upon whether the riders were in “an employment relationship” with Deliveroo. The Court was keen to stress that there was a distinction between the right to organise generally, and the right to organise as a trade union – the latter, being dependant on an employment relationship (although, to be clear, this term would include both workers and employees). The issue of whether there was an employment relationship was to be determined by reference to International Labour Organisation Recommendation no. 198.

The Court of Appeal held that, 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.”

The Court of Appeal noted that the CAC had found that riders had a genuine and virtually unlimited right of substitution. The Court of Appeal held not only was this a “material factor” for the CAC to take into account, but that the CAC “was entitled to regard it as decisive.” The fact that the right of substitution was rarely exercised was irrelevant where the right was a genuine one. As a result, the Court of Appeal held that Deliveroo riders did not fall within the scope of the trade union freedom right under article 11.

So, does substitution trump all?

As set out above, the Court of Appeal referred to an unfettered right of substitution as being “decisive”. Lord Justice Underhill went on to refer to the obligation of personal service (subject to the limited qualifications acknowledged in Pimlico Plumbers v Smith) being an “an indispensable feature of the relationship of employer and worker” and “a central feature of such a relationship as ordinarily understood.”

However, in a footnote tucked at the end of the judgment, Lord Justice Underhill did add a comment: “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."

The parties in this case were allowed to add to their submissions in light of the Supreme Court's decision in Uber v Aslam; however, ultimately, the Court of Appeal found the Supreme Court's judgment to be of little assistance, not relating either to article 11 nor to the issues of personal service and substitution.

In a brief judgment at the end, Lord Justice Coulson also commented that the result may well seem "counter-intuitive" and that those in the gig economy might well be seen as those precisely in need of the right to organise as a trade union. There were very limited grounds of appeal allowed to proceed here; Coulson LJ stressed that a different decision may well be reached in future cases, where a broader range of arguments were available for consideration. As a result, the issue of the supremacy of an unfettered right of substitution is likely to rumble on.

# Contact


## Mark Hickson

Head of Business Development

onlineteaminbox@brownejacobson.com

+44 (0)370 270 6000


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