Judicial Backpedalling on Trade Union Rights in the Gig Economy: Deliveroo in the United Kingdom Supreme Court

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I

The recent decision of the United Kingdom Supreme Court in *Independent Workers Union of Great Britain v Central Arbitration Committee*[1] was a significant blow for workers engaged in the gig economy, the Court denying Deliveroo food delivery riders the trade union and collective bargaining rights provided in the European Convention on Human Rights (ECHR). The blow is all the greater for the fact that the UKSC had previously made progress in addressing some of the problems of the gig economy by adopting a flexible approach to employment status, sensitive to the need to ensure that vulnerable workers were not excluded from the scope of labour law, by sham contractual terms which bore little relationship to the reality of working life.[2]

II

Before outlining the reasons for the decision in the *Independent Workers Union of Great Britain* (IWGB) case, it is necessary to say something about the factual background. The starting point is the British legislation designed to enable trade unions to secure recognition for the purposes of collective bargaining by an unwilling employer. Introduced in 1999 as an amendment to the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA 1992), the legislation permits a trade union to make an application for recognition to the Central Arbitration Committee (CAC), which is a tripartite body established also to deal with several other labour law matters. The procedure can be lengthy and complex, with various hurdles for the union to cross: the application must be admissible, the proposed bargaining unit must be appropriate, and the support thresholds must be met, either by membership level or ballot outcome.

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[1] [2023] UKSC 43.

[2] *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] ICR 1157; *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29, [2018] ICR 1511; *Uber BV v Aslam* [2021] UKSC 5, [2021] ICR 657.

A prior question, however, is that a trade union can make an application only in respect of a group of 'workers'. For this purpose, a worker is widely defined by TULRCA 1992, s 296 to mean '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, ….'.

The question for the CAC in the *IWGB* case was whether the riders were 'workers' for the purposes of the definition.

In addressing this question, it was accepted by the IWGB that while the riders were not employees under limb (a) above, they were nevertheless covered by limb (b) on the ground that they were performing services personally for Deliveroo. Shortly before the recognition application was made, however, new contracts were introduced which formally recognized the right of the riders to 'appoint another person to work on [their] behalf with Deliveroo at any time', the contract pointing out that 'a substitute working for you can log in using your phone or rider App details'. The new contract also 'informed riders that they could work for other companies including competitors and that there would be 'no requirement to wear Deliveroo branded kit while you work with us''. Riders were also free to decide when to log in, and if logged in whether to accept offers of work.

The CAC is said to have accepted Deliveroo's submission that 'the new terms were permissible even if they had been introduced by Deliveroo to defeat this claim and to prevent the riders from being classified as workers'.[3] If this was the company's motivation, it proved to be successful, the CAC holding that Deliveroo riders were not 'workers' within the statutory definition. According to the CAC the right of substitution was genuine, though the evidence appeared thin. Thus, 'a few, if that, riders use substitutes', the CAC also noting that 'while most riders did not use a substitute, a few did'. Also according to the CAC, 'in practice substitution is rare because there was no need for a rider to engage a substitute'. This is because – as explained - there was no need to log onto the App if the rider did not want to accept a job or be available for work.

The CAC decision was then challenged unsuccessfully in the Administrative Court, and subsequently in the Court of Appeal, from where the union appealed to the Supreme Court. By this stage the legal issues were focused not on domestic law but on the provisions of the ECHR, which had been considered only briefly by the CAC. By virtue of the Human Rights Act 1998, s 3, domestic legislation 'must be read and given effect in a way which is compatible with the Convention rights'. But before TULRCA 1992, s 296 can be read consistently with Convention rights, the content of Convention rights needs to be established. The Supreme Court thus had two principal issues to consider:

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[3] *Independent Workers Union of Great Britain v Central Arbitration Committee* [2023] UKSC 43, para 23.

(i) Issue 1: Do the riders fall within the scope of Article 11 of the ECHR 'such that the rights conferred by that article to join and be represented by a trade union are conferred on them'?

(ii) (ii) Issue 2: If the Riders do have rights under Article 11, do those rights include the right that the United Kingdom legislate to require Deliveroo as their employer to engage in collective bargaining with the Union ….

III

The first issue for the Court was thus to determine the scope of the ECHR, Article 11, which protects the right to freedom of association, including the right to form and join trade unions for the protection of one's interests. Applying its understanding of a decision of the Grand Chamber of the European Court of Human Rights (ECtHR) in a case involving the clergy in Romania,[4] the UKSC held that the trade union rights in Article 11 were a subset of the general right to freedom of association and as such applied only to those who were in an 'employment relationship'. A decision of the Third Section of the Court – also from Romania - suggesting a wider reach for Article 11 was disregarded,[5] despite it being clear that the need for an 'employment relationship' is an inappropriate limitation of Article 11, particularly in the context of the gig economy where vulnerable workers may - on arbitrary grounds and a failure of the law to keep pace with changing employment practices - find themselves excluded from protection.

Be that as it may, in determining whether the riders were engaged in an 'employment relationship' for the purposes of the ECHR, the main focus of the UKSC's attention was the contractual ability of the riders to appoint a substitute to carry out the work they had agreed to perform. Referring to 'analogous jurisprudence' in British law, the Court cited favourably an important passage in an earlier decision of the domestic courts warning that judges 'must be alive' to the danger that in order to defeat legal rights of workers 'armies of lawyers will simply place substitution clauses, or clauses denying any obligation to accept or provide work, in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship'.[6] Reference was also made to a more recent decision in the same vein where a substitution power - admittedly limited in nature - was discounted by the court. In the latter case, it was enough that 'the dominant feature' - not the exclusive feature - of the workers' contracts with the 'employer' was 'an obligation of personal performance'.[7]

Even if we are to be stuck with the gratuitous restriction of Article 11 to those in an 'employment relationship', there is enough in the foregoing to enable the court to apply the concept generously and expansively. To do so would be supported by ILO Recommendation

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[4] *Sindicatul Păstorul Cel Bun v Romania* [2014] IRLR 49

[5] *Manole v Romania* (Application No 46551/06) (unreported) 16 June 2015.

[6] *Consistent Group Ltd v Kalwak* [2007] IRLR 560, para 75 (Elias J).

[7] *Pimlico Plumbers Ltd v Smith* [2018] ICR 1511.

198 (the Employment Relationship Recommendation, 2006), which has been adopted by the ECtHR in interpreting Article 11.[8] The UKSC highlighted various provisions of the Recommendation, as well as one of the provisions in the Preamble. What it overlooked however were the provisions in the Preamble insisting that 'laws and regulations, and their interpretation, should be compatible with the objectives of decent work', that 'employment or labour law seeks, among other things, to address what can be an unequal bargaining position between parties to an employment relationship', and that 'situations exist where contractual arrangements can have the effect of depriving workers of the protection they are due'.

Although this too would point in the direction of a generous and expansive interpretation, the UKSC nevertheless refused to find that the Deliveroo riders were engaged in an 'employment relationship'. The Court landed principally on the ground that the riders had 'a broad power of substitution' which 'on its face' was 'totally inconsistent with the existence of an obligation to provide personal service which is essential to the existence of an employment relationship within Article 11'. Paradoxically at this point the UKSC expressly referenced ILO Recommendation 198, presumably contemplating Article 13 which sets out the indicators of an 'employment relationship' for the purposes of the Recommendation (and by extension it seems the ECHR). Sure enough, there is included there a requirement of work being carried out personally by the worker. But this is expressly said to be *one* indicator in a list of many. There is no suggestion that the absence of personal service trumps the presence of all other indicators, or that personal service is satisfied by an arrangement which 'a few, if that' use.

Despite the awareness of the UKSC in previous cases of the need to be purposive and to look at the reality of the situation of the workers involved, the *IWGB* decision was thus in contrast a triumph of old fashioned legal formalism, which pays little regard to the consequences. Not only are Deliveroo riders denied the right to bargain collectively, but as the UKSC pointed out the 'rights conferred by [Article 11] to join and to be represented by a trade union are not conferred on the riders'.[9] Whatever may be the position in relation to other Convention rights, this means that they have no Article 11 protection for being members of the IWGB; for taking part in the activities of the IWGB (such as writing a letter to a newspaper in their own time); for using the services of the IWGB (such as seeking legal advice); for participating in IWGB political campaigns (such as a lobby of Parliament to change the law on the employment relationship); or for taking part in a strike or other industrial action organized by the IWGB.

IV

Yet it was to get worse. Although there was no need to address the second issue in light of the response to the first, the UKSC spent some time considering whether the riders – assuming they were said to have had an 'employment relationship' - would have had the right

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[8] *Sindicatul Păstorul Cel Bun v Romania,* above.

[9] *Independent Workers Union of Great Britain v Central Arbitration Committee,* above, para 73.

under Article 11 to require Deliveroo as their employer to engage in collective bargaining with the IWGB. Here the Court framed the matter as being whether there was a duty on the part of the employer to engage in 'compulsory collective bargaining', in what was to be an uncompromising approach to the putative right to bargain collectively within the context of Article 11. The Court duly responded by saying that 'there is, on the current state of the Strasbourg Court's jurisprudence, no right conferred by Article 11 to compulsory collective bargaining'. It took 23 pages of text to reach this conclusion, with several high profile legal casualties in the wreckage left behind.

One casualty is the seminal decision of the ECtHR in *Demir v Turkey*.[10] There the Court held that it was necessary to reconsider its previous jurisprudence that 'the right to bargain collectively *and to enter into collective agreements* does not constitute an inherent element of Article 11' (emphasis added). Having regard to 'the developments in labour law, both international and national', it was now accepted 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'.[11] This Convention right was derived from a wide range of international material, including ILO Convention 98, acknowledged by the Strasbourg court to be 'one of the fundamental instruments concerning international labour standards'.[12] As such it provides by Article 4 that

> Measures appropriate to national conditions *shall be taken*, where necessary, *to encourage and promote* the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements'. (Emphasis added)

This is a clear and unequivocal duty of the State to promote collective bargaining. According to the UKSC, however, 'the Strasbourg Court [in *Demir*] was not prepared to hold that Article 11 rights include the right to compulsory collective bargaining'. But even if that is the case, it does not absolve the United Kingdom of responsibility arising from *Demir*. There is still the question: what steps has the government taken to promote the 'full development and utilisation of [collective bargaining] machinery' for the riders? The answer is none. On the contrary, it has actively excluded the riders from the only form of collective bargaining support for which the State currently makes provision. There is thus the consequential question: if there is no duty to require compulsory collective bargaining, what steps is the government required to take in order to met its Convention obligations, as set out in *Demir*? The answer to that also appears now to be none. *Demir* has been sidelined and confined to its 'egregious' facts:[13]

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[10] [2008] ECHR 1345, (2009) 48 EHRR 54.

[11] Ibid, paras 153 - 154.

[12] Ibid, para 147.

[13] *Independent Workers Union of Great Britain v Central Arbitration Committee,* above, para 93.

The second casualty is the decision of the First Section of the ECtHR in *Unite the Union v United Kingdom.*[14] While the decision of the First Section is both regressive and highly controversial,[15] the Court in *Unite the Union* did nevertheless acknowledge the importance of ILO Conventions, albeit noting that ILO Convention 98 'plainly leaves a great deal of discretion to the States as to which measures are 'appropriate to national conditions' or 'necessary'. Despite holding that the alleged breach of Article 11 in that case was manifestly ill-founded, the Court tempered the disappointment with various passages in its judgment which have been read to reinforce the view that the State has positive obligations and that any exclusions from collective bargaining coverage must (i) be based on 'relevant and sufficient reasons', and (ii) 'strike a fair balance between the competing interests at stake'.[16] But these observations were discounted by the UKSC in *IWGB*, as was a developing line of domestic case-law which was effectively over-turned.[17]

So while the lower courts at domestic level were unable to accept 'the stark proposition' that 'there is a right under Article 11 to seek compulsory recognition', a 'more modest proposition' was nevertheless accepted by the Court of Appeal. Thus, 'where a statutory scheme of recognition is in place, the exclusion of a trade union from access to that scheme may in certain circumstances be a breach of Article 11', the Court of Appeal adding that 'in such a case' it is 'no answer to say that the trade union has the right to seek collective bargaining on a voluntary basis'.[18] Although far from satisfactory, this is the least that can be done in a jurisdiction like Great Britain where a wholly inadequate statutory recognition procedure is the only form of compliance with the positive obligation established in *Demir*. But without any discussion or explanation by the UKSC, it seems that this subtle approach has been rejected. Nothing must stand in the way of the crude mantra: 'Article 11 does not confer the right to compulsory collective bargaining'.[19]

V

The UKSC decision in *IWGB* is a setback for workers engaged in atypical and precarious work. By insisting on the existence of an 'employment relationship' as a precondition of access to Article 11 rights, it exposes an important limitation in the scope of the ECHR,

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[14] [2017] IRLR 438.

[15] See K Arabadjieva, 'Another Disappointment in Strasbourg: UNITE the Union v United Kingdom' (2017) 46 ILJ 289.

[16] *R (Independent Workers Union of Great Britain) v Central Arbitration Committee,* para 62.

[17] *R (Boots Management Services Ltd) v Central Arbitration Committee* [2017] EWCA Civ 66, [2017] IRLR 355; *Wandsworth London Borough Council v Vining* [2017] EWCA Civ 1092, [2018] ICR 499; *R (Independent Workers Union of Great Britain) v Central Arbitration Committee* [2021] EWCA Civ 260, [2021] ICR 729; *National Union of Professional Foster Carers v Certification Officer* [2021] EWCA Civ 548, [2021] ICR 1397.

[18] *National Union of Professional Foster Carers v Certification Officer,* above, para 109.

[19] For good measure, all domestic case law to the contrary 'should not be followed'.

denying a critical protection for those who need it most. Yet there is no reason why it should be necessary for workers to have an 'employment relationship' as a precondition of engaging with trade union activity to promote their occupational interests. It is an absurd precondition: it means that there are workers with occupational interests who have **no** Article 11 protection when seeking to protect or promote them by collective action.[20] That can't be right.

The UKSC decision is also a setback for **all** workers, marking a notable retreat in terms of the substance of the rights advanced by a unanimous Grand Chamber of 15 judges in *Demir v Turkey.* The latter appears for all practical purposes to have been shredded by the UKSC, authority only for the proposition that the State should not block 'the implementation of a collective agreement that had been voluntarily entered into'. Regrettably, the UKSC seems to be of the view that employers are not required to engage in collective bargaining with a view to *entering into collective agreements* in the first place, and that as a result the State is under no obligation even to encourage them to do so.

9.12.23.

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[20] According to the Court in *Unite the Union*, above, 'Article 11 of the Convention safeguards a trade union's freedom to protect the occupational interests of its members by collective action, the conduct and development of which the Contracting States must both permit and make possible' (para 53). There is no suggestion here of a need to confine the safeguard to those with a narrowly applied 'employment relationship'. On the contrary, as Daniel Blackburn points out elsewhere in this issue, 'the whole premise of inquiring into the employment relationship in the first place is difficult to reconcile with the position expressed by the ILO Committee on Freedom of Association, which holds that 'the criterion for determining the persons covered by the right to organize is not based on the existence of an employment relationship'.