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IWGB v RooFoods: status, rights, and substitution

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Introduction

The employment status of those working in the 'gig-economy' is one of the most pressing questions facing employment lawyers at present. The trend in many recent decisions has been to find that people undertaking gig-work have 'worker' status, and are therefore entitled to individual rights such as holiday pay, and the protection of working time regulations.[1] This note examines *IWGB v RooFoods* ('*Deliveroo*'), which bucks this general pattern, both in its outcome and because it concerns access to *collective* labour rights in the gig-economy. After briefly setting out the relevant decisions of the CAC and High Court, we advance three critiques of their reasoning. First, that it is not safe to assume, as the CAC did, that the tests for 'worker' status are the same under the Employment Rights Act 1996 ('ERA') and the Trade Union and Labour Relations (Consolidation) Act 1992 ('TULRCA'). Second, that the High Court was too hasty in dismissing the arguments that Article 11 of the European Convention of Human Rights ('ECHR') should influence the personal scope of the statutory recognition procedure. Finally, we question the approach to substitution clauses adopted by the CAC as being out of step with the accepted principles on worker status, and suggest that a more lenient approach to the compatibility of worker status and substitution clauses be adopted.

The Decisions of the CAC and the High Court

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[1] *Aslam, Farrar and Others v Uber*, 2202550/2015 (ET)*; Dewhurst v Citysprint UK Ltd*, 2202512/2016 (ET)*; Leyland v Hermes*, 1800575/2017 (ET).

The matter originally before the CAC related to an attempt by the IWGB to be recognised for the purpose of collective bargaining with Deliveroo, on behalf of Deliveroo Riders ('Riders') in Camden, London.[2] The question that became central to the decision was whether the Riders were 'workers' for the purposes of s.296 TULRCA. The recognition procedure in Schedule A1 of TULRCA applies only to unions seeking to represent 'workers', so if the Riders were not considered to be 'workers' the IWGB would be unable to access the recognition framework. The CAC concluded the Riders were *not* workers, and therefore, the IWGB's attempt at recognition had to fail. The 'central and insuperable difficulty for the Union' was that 'Riders have a right to substitute themselves both before and after they have accepted a particular job', so there was no obligation for them to do or personally perform any work or services as required by s.296.[3] In arriving at this conclusion, the CAC drew a parallel between s.296 TULRCA 'worker' status and s.230(3)(b) Employment Rights Act (ERA) 1996 'worker' status, finding that the 'extensive body of case law' on the s.230 worker concept was applicable to the TULRCA definition.[4] The CAC also dismissed the relevance of the right to freedom of association, contained in Article 11 of the ECHR, to their interpretation of s.296 TULRCA.

Judicial review was sought over the CAC's decision, with permission granted only in respect of the Article 11 issues. The IWGB's claim was that the Human Rights Act 1998 (HRA), in conjunction with the Article 11 right to freedom of association, demanded the 'personal service' requirement for 'worker' status under s.296 TULRCA be construed broadly to include the Riders, and that the CAC had erred in not considering this argument or dismissing it without providing adequate reasons. In deciding the case, the High Court identified and considered four subsidiary issues that made up the challenge:

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);

[2] *Independent Workers' Union of Great Britain v Deliveroo T/A Deliveroo*, TUR1/985 (2016) (CAC), [3].
[3] Ibid.
[4] Ibid., [91].

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).[5]

The court rejected the unions' arguments on each of these issues. They found that Article 11 was not engaged by the Riders' exclusion from s.296, as they were not persuaded that the right to bargain collectively contained in Article 11 extended beyond the confines of an employment relationship,[6] which was lacking in the instant case. Additionally, the court thought that if there *were* any interference with freedom of association this was justified as necessary in a democratic society for the protection of the freedom of business, and the freedom of contract.[7] They also concluded that even had there been a violation of Article 11, it would nevertheless have been impermissible for them to use the interpretive powers contained in s.3 of the HRA to read the s.296 worker status as including the Riders. In the court's view, interpreting the statute to include the Riders would be incompatible with the 'underlying thrust' of s.296,[8] and therefore 'cross the constitutional boundary section 3 seeks to demarcate and preserve'.[9]

A Unified Worker Status?

In deciding whether the Riders were 'workers' for the purposes of the trade union recognition procedure, the CAC thought that the same general principles were applicable to the s.296 TULRCA worker concept as the worker status contained in s.230(3)(b) ERA 1996, although the textual differences between the two provisions must be 'borne in mind'.[10] We do not take a firm position on the correctness of this approach here, but do want to caution against assuming the existence of a unified worker concept under domestic legislation too quickly.

[5] *R (The Independent Workers' Union of Great Britain) v Central Arbitration Committee* [2018] EWHC 3342 (Admin), [21].
[6] Ibid., [36].
[7] Ibid., [41]-[55].
[8] Ibid., [56]-[68].
[9] *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [33].
[10] *Deliveroo* (CAC) (n 2), [90]-[91].

Section 296 TULRCA defines 'worker' as:

> … an individual who work, or normally works or seeks to work— … 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[11]

It is immediately apparent that this language shares key features with the s.230(3)(b) ERA 1996 definition of 'worker':

> … an individual has entered into or works under … any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual[12]

In *Deliveroo*, the parties were unable to locate any authority explaining the relationship between these two statuses, but the CAC proceeded on the basis that, as the statuses were functionally similar, the principles and case law on s.230 ERA should also guide their approach to s.296 TULRCA.[13] Although clearly aware of the potential for divergent interpretations of the two provisions, in the CAC's view it 'would be odd for there to be a misalignment given the companion nature of the two statutes'.[14]

However, there are reasons for doubting the two definitions of worker status should be interpreted in the same manner. First is that, as recognised by the CAC, the starting point for interpreting s.296

[11] TULRCA 1992, s.296.
[12] ERA 1996, s.230.
[13] *Deliveroo* (CAC) (n 2), [90]-[91].
[14] Ibid., [91].

must be 'the principle that words are chosen with care and for good reason'.[15] It follows that any textual differences between the statutory definitions of worker status should be reflected in how these provisions are interpreted and applied unless there are good reasons for glossing over the different language used by Parliament.

There are 'significant' textual differences between the ERA and TULRCA definitions.[16] The s.296 definition extends to those who 'normally works' or 'seeks to work' under a personal work contract, whereas the s.230 definition does not expressly include these groups. The TULRCA definition is also more expansive than the ERA, in that it only excludes individuals providing services to 'professional clients' from being workers whereas the ERA also excludes those providing services to 'customers', and those working for customers or clients as part of a 'business undertaking' they carry on. These differences should lead the courts to adopt divergent interpretations of worker status in some cases.

We should also be wary of harmonising the ERA and TULRCRA worker concepts given the two statutes relate to different regulatory spaces. The CAC was therefore wrong to emphasise the 'companion nature' of the two pieces of legislation; while both statutes broadly deal with worker protective issues, this overlooks the fact that they were enacted at different times to deal with entirely different issues. The s.296 status governs access to collective labour rights, whereas s.230 relates to individual rights such as minimum wage entitlements and holiday pay. Under a purposive approach to statutory interpretation, or on application of the 'mischief rule',[17] it is not at all clear that the two pieces of legislation are intended to solve the same problem and so should be interpreted in the same manner. Those workers identified by Parliament as needing rights to minimum rest breaks and statutory sick pay are not necessarily the same group as those who should benefit from the collective rights contained in TULRCA.[18] It is therefore doubtful whether

[15] Ibid.
[16] M. Freedland and N. Kountouris, 'Some Reflections on the Personal Scope of Collective Labour Law' (2017) 46 ILJ 52, 53.
[17] *Heydon's Case* [1584] EWHC Exch J36.
[18] As recognised in *R (BBC) v CAC* [2003] ICR 1542, per Moses J at [19]: 'section 296(1) is relevant to those provisions dealing with collective rights and obligations. Where rights are conferred on individuals the definition of worker is less inclusive.'

the courts should interpret and apply the two 'worker' statuses identically, even before considering the impact of the Article 11 Convention right to freedom of association.

Article 11 and Collective Bargaining

Turning now to the rejection of IWGB's human rights arguments in their judicial review application. This section examines the High Court's findings that there was no interference with the Riders' freedom of association (Issue 1); that any interference would nevertheless have been justified under Article 11(2) (Issue 2); and that it was not possible to read s.296 in a manner which included the Riders (Issue 3). It is argued that the court's conclusions in respect of the scope of Article 11 were wrong, and that they failed to adequately address the issue of justification. In the following section, we then go on to suggest that s.296 can, and should, be read to include the Riders.

Issue 1: The Scope of Article 11

Article 11 states that 'everyone' has the right to freedom of association, 'including the right to form and join trade unions for the protection of [their] interests', and the ECtHR has found that the right to bargain collectively is 'one of the essential elements' of this right.[19] The question is therefore not whether the Riders and IWGB have the right to freedom of association, they clearly must, but whether the right to bargain collectively is engaged in the present case. The High Court answered this in the negative. Applying the ECtHR case of *Sindicatul Păstorul cel Bun v Romania*,[20] they found the Article 11 right to collective bargaining only applies within the context of an 'employment relationship'. As there was no employment relationship on the CAC's findings the IWGB had no right to bargain collectively, so denying them access to the recognition procedure could not interfere with their freedom of association. However, this approach to Article 11 misinterprets the

[19] *Demir and Baykara v Turkey* (2009) 48 EHRR 54.
[20] *Sindicatul Păstorul cel Bun v Romania* (2014) 58 EHRR 10.

scope of the right, and is inconsistent with the jurisprudence of both the ECtHR and the UK Court of Appeal.

There are two ways of interpreting the trade union related aspects of Article 11. The first views these as part of the general right to freedom of association, rather than separate rights contained in the same Article. Freedland and Kountouris describe this as collective labour law being 'continuous' with freedom of association.[21] On this approach the Riders and IWGB must have the right to bargain collectively because the right is just one element of Article 11 which is held by 'everyone'. The ECtHR decision in *Sigurdur Sigurjónsson v Iceland* supports this interpretation of Article 11, with the Court finding that 'the right to form and join trade unions in that provision is an aspect of the wider right to freedom of association, rather than a separate right'.[22] The view that the collective labour rights contained in Article 11 are continuous with freedom of association and held by everyone is also supported by the international law materials the ECtHR uses to guide the interpretation of Article 11.[23] Most important among these is the jurisprudence of the ILO, which stresses that the rights to freedom of association are held by everyone 'without distinction',[24] and that the right to collective bargaining should extend to self-employed workers.[25]

The second approach to Article 11 interprets the trade union elements as distinct rights held only by those in employment relationships, albeit contained in the same Article as the general right to association. This view is implicit in the High Court's decision. But while an 'employment relationship' test was used to determine the application of Article 11 in *Sindicatul* it was not applied in other Article 11 judgements, and is best limited to the rather specific context of that case.[26] One disadvantage of the discontinuous view of Article 11 is that it requires a line be drawn between those aspects of freedom of association enjoyed by 'everyone', and those that only exist in

[21] M. Freedland and N. Kountouris (n 16), 55.
[22] *Sigurdur Sigurjónsson v Iceland* (1993) 16 EHRR 462, [32].
[23] Universal Declaration of Human Rights, Article 23; International Covenant on Economic, Social and Cultural Rights, Article 8; International Covenant on Civil and Political Rights, Article 22. All cited in *Demir* (n 19), [40]-[41]. See also the EU Charter of Fundamental Rights, Article 12..
[24] ILO Convention 87 (1948), Article 2. Cited in *Sindicatul* (n 20), [142].
[25] ILO General Survey (2012), [209]; ILO Committee on Freedom of Association (2012) Report No 363, Case 2602, [461]. See M. Freedland and N. Kountouris (n 16), 64-7.
[26] Where the test was used to determine whether the refusal to register a union established by Clergy members fell within the area of the Church's religious autonomy rather than being an Article 11 issue.

employment relationships. This is difficult given that those individuals not in employment relationships must clearly still have the right to form and joins trade unions to protect their interests. It is absurd to think that denying Deliveroo Riders the opportunity to form or join a union would not violate their freedom of association. Is it only the right to collective bargaining that is separate from the general right to freedom of association, perhaps along with the right to strike? Given this, the preferable interpretation of Article 11 is to characterise the right to collective bargaining 'as essentially part of or continuous with' the general right to freedom of association.[27] On this understanding of Article 11 one need not ask whether an employment relationship exists to determine its scope; any decision or rule determining who can or cannot do any action collectively engages freedom of association, although many restrictions will of course be justifiable.

Even following the approach to Article 11 taken in *Sindicatul* however, the High Court should have found that Article 11 was engaged. The ECtHR's decision makes clear that the existence of an employment relationship is to be determined by reference to the 'facts relating to the performance of work and the remuneration of the worker', rather than the contractual relationship between the parties.[28] Further, the status accorded to the worker under domestic law does not settle the matter. The question must instead be settled by reference to factors identified by the ILO as indicators of an employment relationship.[29] This contrasts with the approach under English law, and is likely to lead to a wider view of what counts as an employment relationship.[30] The High Court should therefore have considered whether these indicators were present before concluding that there was no Article 11 interference because the Riders were not in an employment relationship.

Proper application of the approach in *Sindicatul* indicates that Article 11 is engaged in the present case. As in *Sindicatul*, 'many of the characteristic features of an employment relationship' identified by the ILO in Recommendation 198 are present.[31] For instance, Deliveroo takes the

[27] M. Freedland and N. Kountouris (n 16), 70.
[28] *Sindicatul* (n 20), [142].
[29] Ibid., [142]-[148].
[30] Compare for example the treatment of Church officials in *Sharpe v Worcester Diocesan Board of Finance* [2015] EWCA Civ 399. See P. Collins, 'The inadequate protection of human rights in unfair dismissal law' (2018) 47 ILJ 504, 512-15.
[31] *Sindicatul* (n 20), [143].

decision over who is appointed as a Rider, sets the rights and obligations of the Riders, and the work is carried out according to their instructions. The Riders are integrated into the enterprise, carry out work for the benefit of Deliveroo, and there is an ongoing relationship between the Riders and Deliveroo. Many Riders rely on deliveries as their primary or sole source of income, and their remuneration is paid on a periodic basis. Other indicators are also present, albeit less clearly. The specification of the workplace for example, because although the Riders are free to choose which area they deliver in, Deliveroo determines the locations that work actually takes place, both by deciding which areas are covered by their service and specifying collection and drop off points via the app.

The ILO indicators of an employment relationship are overwhelmingly present for the Deliveroo Riders, and as in *Sindicatul* those factors that point the other way are not 'sufficient to remove the relationship … from the ambit of Article 11'.[32]. That the Riders need not carry out the duties personally is not determinative, particularly as the vast majority of Riders *do* perform the work themselves, and that the existence of an employment relationship depends on the 'facts' of the work rather than the contractual agreement. That the Riders supply their own tools should similarly not bar them from being in an employment relationship. As with Uber drivers, Deliveroo Riders' central contribution to the enterprise is their personal work (delivering food) rather than the supply of capital or 'their ability to organize other factors of production'.[33] As such, the High Court should have concluded that the Riders and IWGB have a right to collectively bargain on either the continuous or discontinuous approach to Article 11.

In addition to misapplying the ECtHR jurisprudence, the High Court's decision is inconsistent with the Court of Appeal decision in *Pharmacists' Defence Association Union ('PDAU') v Boots Management Services Ltd*.[34] The question in *Boots* was whether the PDAU's inability to trigger the derecognition procedure contained in TULRCA Part VI violated their Article 11 right to collective

[32] *Sindicatul* (n 20), [145].
[33] M. Freedland and N. Kountouris (n 16), 68.
[34] [2017] EWCA Civ 66.

bargaining. The court ultimately found against the union, but did accept that Article 11 was engaged.[35] The court found that the positive obligations imposed by Article 11 mean that in principle, 'the absence or inadequacy of a statutory mechanism for compulsory collective bargaining might in particular circumstances give rise to a breach of article 11'.[36] Following this, Article 11 is engaged where the rules 'which identify which unions should be recognised by which employers in respect of which workers' operate to 'constrain access to collective bargaining for a particular union (or its members)'.[37] The effect of this is that the rules determining who can and cannot access mandatory collective bargaining frameworks must *necessarily* fall within the scope of the positive obligations imposed by Article 11. Applying this to the case at hand it is clear the High Court erred in finding that Article 11 was not engaged.

One final point on the applicability of Article 11, seemingly overlooked by the High Court, is that trade unions themselves have freedom of association rights under the ECHR. This is the consistent view of the ECtHR,[38] and was accepted by the Court of Appeal in *Boots*. When combined with the classification of collective bargaining as an essential element of Article 11 it is, with respect, difficult to see how preventing IWGB from accessing the statutory recognition mechanism could fail to come within the scope of their Article 11 rights. The IWGB's exclusion from the recognition framework therefore violates the unions' freedom of association unless it can be justified.

Issue 2: Justification

Despite finding no interference with Article 11, the High Court did consider the question of justification, concluding that any interference with freedom of association would nevertheless be necessary in a democratic society. There is unfortunately not space here to fully consider whether s.296 strikes a fair balance between all the competing rights and interests at stake. Instead, we focus more narrowly on the High Court's treatment of this issue.

[35] Ibid., [54]-[55].
[36] Ibid., [47].
[37] Ibid., [54].
[38] *Wilson and Palmer v UK* (2002) 35 EHRR 20; *Demir* (n 19); *National Union of Rail, Maritime and Transport Workers v UK* (2015) 60 EHRR 10; *Unite the Union v UK* (2016) ECHR 1150.

The IWGB's case involves an alleged failure to secure their right to collective bargaining rather than any direct interference with freedom of association by the state, so concerns the extent of positive obligations imposed by Article 11. The High Court did not make this distinction, but this is not significant, because the boundaries between positive and negative obligations 'do not lend themselves to precise definition',[39] and 'the applicable principles are broadly similar'.[40] In both contexts 'regard must be had to the fair balance to be struck between the competing interests of the individual and the community as a whole',[41] and any interference with Article 11 must be prescribed by law, pursue a legitimate aim, and be necessary in a democratic society to achieve those aims.[42] States are free to choose the 'ways and means' of meeting their positive obligations under the Convention, but the 'particular solution adopted' must strike a 'fair balance',[43] meaning it must be proportionate.[44] Finally, in assessing the adequacy of the balance, the ECtHR affords a margin of appreciation to domestic authorities.[45]

The question in the present case is therefore whether s.296 TULRCA, as the 'particular solution' adopted for securing the Article 11 right to collectively bargain, strikes a proportionate balance between competing rights and interests. Although the High Court correctly identified the relevant principles, their analysis of this issue fell short in several respects. Significantly, the aims they identify as being pursued by s.296 either fail the test of legitimacy, or of being rationally connected to the Article 11 interference.

The court found that the underlying aim of excluding IWGB from the recognition framework was 'the objective of preserving freedom of business and contract'.[46] The aims of preserving business freedom and freedom of contract will ordinarily both be legitimate objectives for the state to pursue. In the present context however, 'freedom of business' means the freedom of a business not

[39] *Sindicatul* (n 20), [132].
[40] *Demir* (n 19), [111].
[41] *Sindicatul* (n 20), [132].
[42] Ibid., [150].
[43] *Hatton v UK* [2003] 37 EHRR 28, [123]
[44] *Barbulescu v Romania* [2017] IRLR 1032.
[45] *Eweida v UK* (2013) 57 EHRR 8,.
[46] *Deliveroo* (HC) (n 5), [44].

to engage in collective bargaining, which should not be classed as a legitimate aim under the ECHR. Not only does it run contrary to the UK's international law obligations to promote collective bargaining but, as collective bargaining is an essential element of Article 11, aiming to preserve business freedom from collective bargaining amounts to aiming to prevent the exercise of freedom of association. Preventing the enjoyment of Convention rights cannot itself be a legitimate ground for interfering with rights; some further aim must be identified. Finally, the ECtHR recognises that social dialogue between workers and employers, which includes collective bargaining, is an 'important tool for achieving social justice and harmony'.[47] Aiming to prevent collective bargaining should therefore not be classed as legitimate under the ECHR.

In addition, while maintaining freedom of contract is a legitimate aim, there is no rational connection between this and the interference with IWGB's freedom of association. Excluding IWGB from the recognition procedure is only rationally connected to maintaining freedom of contract if requiring Deliveroo to engage in collective bargaining limits their freedom of contract. But this is not the case. On the contrary, the process of collective bargaining is an *exercise* of freedom of contract rather than a limitation of it. Collective bargaining limits a businesses' freedom of contract only in the sense that they have less power to unilaterally dictate the terms on which they engage workers, due to the more equal bargaining relationship that exists when negotiating with a union compared to individual workers. This view of freedom of contract, as a 'verbal symbol' that distorts 'social fact' and does not denote 'a reality' is familiar to labour lawyers,[48] but is not the understanding generally adopted by the courts. Imposing a duty to bargain collectively on Deliveroo is not inconsistent with the principle of contractual freedom protected by Article 16 of the EU Charter for example, as it does not restrict Deliveroo's ability 'to assert its interests effectively in a contractual process to which it is party and to negotiate the aspects determining changes in the working conditions of its employees with a view to its future economic activity'.[49] A duty to bargain collectively should therefore not be regarded as limiting an employers' freedom of

[47] *Sindicatul* (n 20), [130].
[48] P. Davies and M. Freedland, *Kahn-Freunds Labour and the Law,* 3rd ed. (London: Stevens, 1983), 25.
[49] *Alemo-Herron v Parkwood Leisure Ltd* [2013] IRLR 744, [33].

contract as normally understood by the courts. Particularly if, as under TULRCA, the duty is simply to negotiate rather than to reach any agreement.

It follows that the objectives identified as being pursued by denying IWGB access to the recognition framework are not capable of justifying the interference with Article 11. The aim of preventing collective bargaining is not legitimate, and the aim of preserving freedom of contract is not rationally connected to the interference. It would no doubt be possible to identify aims that are both legitimate and rationally connected to the rules restricting access to the statutory recognition framework; ensuring fair economic competition for example. However, the aims identified by the High Court cannot support their conclusion that the interference with Article 11 is justified.

A further problem with the court's assessment of the balance struck by s.296 is that they mischaracterise the extent of the interference with Article 11. The court thought that '[a]ny interference with Art.11(1) is of a limited nature', because s.296 only excludes Riders without a personal obligation from participating in the recognition procedure. Workers who are contractually obliged to provide work are not excluded, and the Riders remain free to join unions and attempt to enter voluntary collective bargaining. However, this overlooks the fact that it is the unions' freedom of association at stake, as well as the individual Riders, and that the interference with IWGB's Article 11 right to bargain collectively is extensive. The IWGB have been locked out of the only available statutory route to collective bargaining with Deliveroo, a result that seems inconsistent with the ECtHR's principle that Convention rights must be 'practical and effective' rather than 'theoretical and illusory'.[50] This calls into question the courts' evaluation of the seriousness of the interference, and their subsequent conclusion that the restrictive scope of s.296 is proportionate.

It is certainly true that it will be an 'uphill struggle' to persuade a court that s.296 violates the positive obligations imposed by Article 11.[51] Some indications that this might be possible however,

[50] *Demir* (n 19), [66].
[51] *Boots* (n 34), [47].

are perhaps surprisingly contained in Underhill LJ's Court of Appeal judgement in *Boots*. In that case Underhill LJ stated that denying the PDAU access to the derecognition procedure would violate Article 11, and that he was prepared to use the interpretive power in s.3 HRA to avoid this if necessary.[52] He interpreted Article 11 as requiring that PDAU had a 'reasonably practicable route' to recognition if the majority of workers supported it,[53] which would not be the case if it were not possible for a union to use the statutory framework to force the derecognition of the non-independent union, and then apply to be recognised themselves. This is analogous to the position the IWGB find themselves in; locked out of the statutory recognition mechanism, with no 'reasonably practicable' route to collective bargaining. The reasoning in *Boots* therefore suggests the court should have found a violation of Article 11.

Issue 3: Interpreting s.296

Were a domestic court to find a violation in the present case they would then have to determine whether s.3 of the HRA enables them to read s.296 as being compatible with Article 11, i.e. in a manner which includes the Riders. The High Court thought that it would not be possible to 'read down' s.296 in such a way, and rejected the alternate readings suggested by John Hendy QC on the basis that these went against the grain of the legislation. We will not assess this aspect of the courts' reasoning in detail as it follows from our argument below – that s.296 can and should have been read to include the Riders even without the aid of the HRA – that it would be eminently possible for the court to reach this result using the interpretive powers of s.3.

Section 296 and Substitution Clauses

It has so far been argued that Article 11 should have a bearing on the interpretation of s.296 TULRCA 1992, and that a more thorough engagement with Article 11 is required than provided by

[52] Ibid., [62].
[53] Ibid., [66].

either the CAC or the High Court. Even accepting that the same legal principles should be applied to s.296 as s.230(3)(b) ERA however, the existing case law on 'worker' status and substitution clauses should have led the CAC to classify the Riders as workers. Specifically, the threshold for the personal service criterion ought to have been lowered, and the Riders' substitution power found to be compatible with an obligation of personal service.

In their decision, the CAC proceeded on the basis that the 'principles set out in the extensive body of case law [on s.230(3)(b) were] of general application' to the interpretation of 'worker' in s.296 TULRCA.[54] Any further discussion surrounding the substitution question, and the relevant principles, was sparse. Rather, in assessing whether, per s.296, there was an undertaking to perform work personally, the facts of the case simply seemed to be tested against whether there was a 'genuine and unfettered right of substitution that operates both in the written contract, and in practice'.[55]

The language of a genuine unfettered right to substitution has become a phrase commonly used to define the outer limits of the personal service criterion,[56] and suggests that the CAC was relying on case law on personal service for s.230 worker and employee status to assess the requirement to do work personally in s.296 TULRCA. The applicable principles are summarised by the Court of Appeal in *Pimlico*, indicating that while: a) an *unfettered* right to substitution is inconsistent with the personal service criterion;[57] b) a qualified right's compatibility will depend upon its conditionality, taking into account *inter alia* the nature and degree of fetters, or the extent to which 'the right to substitute is limited *or occasional*'.[58] This second limb 'blurs the line between the norm ('degree of fetter') and factual practice ('limited or occasional')',[59] such that the impact of a conditional substitution clause on status is dependent upon not only the degree to which its

[54] *Deliveroo* (CAC) (n 2), [91].
[55] Ibid., [103].
[56] *Ready Mixed Concrete Ltd. v Minister of Pensions and National Insurance* [1968] 2 QB 497; *Pimlico Plumbers Ltd v Smith* [2017] ICR 657 [84].
[57] *Pimlico* (n 56) [84]
[58] Ibid. (emphasis added). Subject of course to the *Autoclenz* interpretive obligation to ensure that it is in fact an accurate reflection of the true nature of the relationship.
[59] M. Ford, 'Pimlico Plumbers: Cutting the Gordian Knot of Substitution Clauses?' (*UK Labour Law Blog*, 19 July 2018) <https://uklabourlawblog.com/2018/07/20/pimlico-plumbers-cutting-the-gordian-knot-of-substitution-clauses-michael-ford-qc/> accessed 09 January 2019.

drafting is conditional, but also how accurately that conditionality represents practice.[60] This is further complicated by the additional consideration that the fact that a contractual right (such as substitution) was *not* exercised does not necessarily 'render the right meaningless'.[61] Even if a worker has always performed work personally therefore, the question remains whether the nature of the *obligation*, properly constructed, is an undertaking to do work personally. Crucially for our purposes, this formulation which distinguishes between conditional and unconditional substitution clauses, has been applied *without distinction* to cases about employee status and s.230 worker status cases.

Though not directly articulated, it was against this background that the CAC entered into their analysis of the personal service requirement, and concluded that:

> The central and insuperable difficulty for the Union is that we find that the [unconditional] 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.[62]

The CAC found that because *some* Riders may have exercised the contractual right to engage a substitute *at some point* (however statistically marginal),[63] it was not the panel's role to question either the business prudence of Deliveroo granting their Riders such a power,[64] or even the fact that the drafting of the substitution clause may simply have been to 'prevent the Riders from being classified as workers'.[65] Both were permissible aims, and did not defeat the validity of the unconditional substitution clause. It is this aspect of the reasoning that is particularly troubling.

[60] It may be that 'limited or occasional' means the same as 'limited and occasional', but it is proposed that the deliberate use of these words, and the approach taken by tribunals in dealing with the criterion, suggest 'limited' and 'occasional' have meanings relating to different features of the substitution clause and its operation.
[61] *Consistent Group Limited v Kalwak* [2008] EWCA Civ 430, [58]; *Autoclenz v Belcher* [2011] UKSC 41.
[62] *Deliveroo* (CAC) (n 2), [100].
[63] Ibid, [78]-[79].
[64] Ibid., [98].
[65] Ibid., [99].

The CAC concluded that the words of the contractual agreement reflected the reality of the agreement between the parties, because Deliveroo did seem to offer their Riders a truly unconditional right to substitution.[66] And applying the principles set out earlier, as soon as the genuinely unfettered right to substitution is identified, it automatically barred the personal service requirement.[67] The panel therefore did not have to consider how realistic or frequent the *actual* exercise of that substitution clause was.

However, there are serious questions about the doctrinal validity of such an approach. If 'principles of general application' from s.230(3)(b) are to be used to guide how we interpret s.296, then we must consider all such relevant principles. One of the most significant of these is set out in *Byrne Bros* by Mr Recorder Underhill, as he then was. When analysing s.230(3)(b) ERA 1996, he suggested that although the 'same considerations' that would be relevant for employee status would also be relevant for s.230(3)(b) worker status, the 'boundary [for each test must be] pushed further in the putative worker's favour'.[68] In short, the same tests for employee status can be applied to s.230(3)(b) worker status, but with a lower threshold. While the validity of such an approach can be questioned,[69] it is nonetheless the case that the tests used to determine s.230(3)(b) worker status *are* broadly parallels of those tests used for employee status.[70] This means that if the personal service test from 'employee' status is used to assess personal service for the purposes of s.296, the boundary for personal service must be lower than that test is applied to assess employee status.

Unfortunately, this 'lower boundary' requirement for tests transplanted from employee status seems to have been largely forgotten by the courts. When discussing the contours of the s.230(3)(b) personal service requirement in *Pimlico*, the Supreme Court relied on authorities for employee status personal service for 'guidance',[71] without making it clear that this 'guidance' must be

[66] Ibid.
[67] *Pimlico Plumbers* (CA) (n 56), [84].
[68] *Bryne Bros Formwork Ltd v Baird* [2002] ICR 667 (EAT), [17(5)].
[69] Jeremias Prassl, 'Members, partners, employees, workers? Partnership law and employment status revisited. *Clyde & Co LLP v Bates van Winkelhof* (2014) 43 ILJ 495, 502.
[70] See the cases at (n 1).
[71] *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29, [20]; specifically *MacFarlane v Glasgow City Council*, EAT/1277/99 and *Echo & Express Publications Ltd. v Tanton* [1999] ICR 693 (CA).

modified to accommodate the lower threshold for the personal service obligation in s.230(3)(b). This is troubling, because the absence of any such clarification clearly manifested itself in the CAC's approach in *Deliveroo*, where the personal service question for s.296 was assessed in exactly the same way as one would assess it for the purpose of employee status.

Following the reasoning in *Byrne Bros* therefore, if the personal service test from employee status is used to assess s.296 personal service, the threshold *must* be adjusted downwards. While there is no obvious answer to where this lower threshold for the personal service test should be set, a modest proposal would be to remove the automatic incompatibility that is assumed between an unfettered right of substitution and an obligation of personal service. Even where the contractual right is unfettered, a tribunal should nonetheless assess how limited or occasional the exercise of the right actually is, as well as other circumstantial factors such as the profitability of substitution and the administrative ease involved in *actually* exercising the substitution right. In the alternative, if a tribunal was dealing with a conditional right to substitute then the threshold would similarly have to be lowered to accommodate more permissive and frequent forms of substitution, while still being compatible with personal service.

Applied to the facts in *Deliveroo*, and when allied with an *Autoclenz* analysis, this lower threshold leads to the conclusion that, while the contractual terms *did* represent the reality of an unfettered right to substitution, a further factual analysis which looked at the exercise of that right suggests that it should not prevent the finding of personal service as required for s.296 'worker' status. Persuasive factors include the statistically-marginal exercise of that right, the lack of profitability of doing so, as well as the fact that such an unconditional substitution right runs counter to Deliveroo's business interests.[72] Further limits to exercising the substitution right also include the conditions placed upon Riders that make substitution undesirable or unlikely. Namely, the Riders' personal responsibility to ensure substitutes have the 'requisite skills and training, and to procure that [substitutes] provide the warranties [also imposed on the Riders]',[73] as well as Riders' inability

[72] *Deliveroo* (CAC) (n 2), [103].
[73] *Deliveroo* (HC) (n 5), [16].

to substitute to anyone who had previously had their 'Supplier Agreement terminated by Deliveroo for a serious or material breach of contract'.[74] The irresistible impression would be that the substitution clause, while genuine, was exercised so infrequently and so undesirable that the underlying assumption in the work relationship was that there would indeed be an undertaking of personal performance from the Rider. This suggested approach remains a conservative proposal for what the lower threshold for personal service, as demanded by a proper doctrinal analysis of 'worker' status, could look like. The threshold could quite reasonably be much lower than articulated in the previous paragraphs,[75] or the personal service requirement could be interpreted in a wholly different way.[76] Also notable is the Taylor Review recommendation that Government should 'ensure that the absence of a requirement to perform work personally is no longer an automatic barrier to accessing basic employment rights'.[77] The Government's response did not explicitly accept this point, committing only to legislate 'to improve the clarity of the employment status tests' and prevent businesses from 'trying to misclassify or mislead their staff'.[78] The future of the personal obligation requirement for 'worker' status therefore remains uncertain.

Conclusion

The IWGB's attempt to access the statutory recognition framework and enter into collective bargaining with Deliveroo raises questions about the impact of Article 11 on the personal scope of collective labour rights, and the proper treatment of substitution clauses for worker status. This note has critiqued the conclusions reached by the CAC and High Court on both aspects of the case. The High Court's conclusions regarding the scope of Article 11 are incompatible with established ECtHR and domestic jurisprudence, and their scrutiny of the balance struck by s.296 interference fell short of that required. Furthermore, we believe it is certainly possible to interpret s.296

[74] Ibid. Note the striking similarity to the clause in *Leyland* (n 1).
[75] See the three suggestions put to the High Court in *Deliveroo* (HC) (n 5), [61]- [63].
[76] M. Ford (n 59).
[77] Good Work: The Taylor Review of Modern Working Practices, (2018), 36. Although personal obligation was still thought to be relevant for 'employee' status.
[78] Good Work Plan, (December 2018), Cm9755, 9.

TULRCA to classify the Deliveroo Riders as workers, and that this result should have been reached either with or without the use of s.3 of the HRA.

Stepping back, the case touches upon the broader issues of the appropriate scope of employment law protections when human rights are at stake, and the proper boundary between competition law and labour law (i.e. when does collective bargaining become an antitrust issue). While we have not addressed these matters directly, it follows from the above arguments that human rights have the potential to broaden the personal scope of employment protections, and that Article 11 is an important consideration when striking the balance between free competition and collective bargaining.