Neutral Citation Number: [2018] EWHC 3342 (Admin)

Case No: CO/810/2018

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 December 2018

**Before** :

**THE HONOURABLE MR JUSTICE SUPPERSTONE**

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**Between :**

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| **THE QUEEN on the application of THE INDEPENDENT WORKERS UNION OF GREAT BRITAIN** | **Claimant** |
| **- and -** | |
| **CENTRAL ARBITRATION COMMITTEE** | **Defendant** |
| **- and -** | |
| **ROOFOODS LIMITED t/a DELIVEROO** | **Interested Party** |

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**John Hendy QC, Katharine Newton and Madeline Stanley**
(instructed by **Harrison Grant Solicitors**) for the **Claimant**
**The Defendant was not represented**
**Christopher Jeans QC and Tom Cross**
(instructed by **Lewis Silkin LLP**) for the **Interested Party**

Hearing dates: 14-15 November 2018

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# Approved Judgment

**Mr Justice Supperstone :**

## Introduction

1. The Claimant, the Independent Workers' Union of Great Britain ("the Union"), is an independent trade union. The Union submitted an application to the Central Arbitration Committee ("the CAC") dated 28 November 2016 that it should be recognised for collective bargaining purposes by Roofoods Limited t/a Deliveroo ("Deliveroo") under the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act") for collective bargaining purposes in respect of a group of delivery drivers (known as "Riders") who work in the Camden & Kentish Town zone ("CKT zone") in London. Deliveroo is a well-known food and drinks delivery company.

2. Following a four-day hearing by the CAC, by a decision dated 14 November 2017 and subsequently revised on 20 November 2017 ("the Decision"), the CAC found that the Riders in the proposed bargaining unit are not workers within the meaning of s.296 of the 1992 Act and thus were not eligible to be the subject of a recognition claim (para 134).

3. By a claim form filed on 12 February 2018 the Union challenged that decision on five grounds. On 26 April 2018 Butcher J refused permission on the papers on all grounds. On 15 June 2018 Simler J, at a renewed application for permission, granted permission to challenge the Decision on one ground alone. Having concluded that Grounds 1-3 and 5 failed to raise arguable errors of law as grounds for judicial review, Simler J stated at paragraph 42 in her judgment:

> "With some hesitation I have reached a different conclusion in relation to ground 4, which argues that the collective bargaining rights in Art.11 [ECHR] 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. In relation to this ground, therefore, I am persuaded that it merits fuller consideration and have concluded that permission should be granted in relation to ground 4…"

4. Mr John Hendy QC appears, together with Ms Katharine Newton and Ms Madeline Stanley, for the Claimant. Mr Christopher Jeans QC and Mr Tom Cross appear for Deliveroo.

## Legislative Framework

5. Schedule A1 to the 1992 Act provides a statutory framework within which independent trade unions can apply for recognition to be entitled to conduct collective bargaining in respect of a "bargaining unit". "Collective bargaining" for that purpose refers to "negotiations relating to pay, hours and holidays" or other agreed matters (para 3).

6. A trade union can seek recognition from an "employer" only in respect of "workers" (s.70A of Sch.1, para 1 of the 1992 Act).

7. Section 296(1) of the 1992 Act provides:

> "(1) 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…"

8. Article 11 of the European Convention on Human Rights ("ECHR") provides:

> "(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."

**Factual Background**

9. The Union seeks to rely on the definition of worker in s.296(1)(b) ("limb (b)").

10. The parties agreed that the CAC should consider the question of workers' status by reference to a new contract introduced on 11 May 2017 ("the New Contract").

11. The terms of the New Contract are set by Deliveroo and there is no scope for individual negotiation (Decision, para 52).

12. The New Contract headed "SUPPLIER AGREEMENT" states by way of "BACKGROUND":

> "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. 'You' should be read as meaning either your 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."

13. Clause 2 ("SUPPLIER SERVICES") states, so far as is material:

> "2.1 Deliveroo authorises You to arrange the provision of Services from time to time on the terms set out in this Agreement.
>
> 2.3 You are not obliged to do any work for Deliveroo, nor is Deliveroo obliged to make 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."

14. Clause 4 ("FEES AND INVOICING") provides at clause 4.1:

> "Deliveroo will pay you a delivery fee ('Delivery Fee') for each completed delivery."

15. Clause 5 ("WARRANTIES") states:

> "5.1 As strict conditions of this Agreement you warrant upon commencement and continuously throughout the term of this Agreement that:
>
> (a) You have the right to reside and work in the United Kingdom and have all necessary visas, licences and permits allowing you to do so;
>
> (b) You have no unspent convictions for any criminal offence;
>
> (c) You will comply with all other legal obligations (including the Highway Code) which apply to you or the provision of the Services from time to time;
>
> (d) You will ensure that, to allow customers to track the progress of deliveries, Deliveroo is able to track using GPS

> technology the progress of any delivery which you agree to accept."

16. Clause 8 ("RIGHT TO APPOINT A SUBSTITUTE") states:

> "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 such 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."

17. Clause 10 ("TERMINATION") provides at clause 10.1:

> "You may terminate this Agreement with Deliveroo at any time and for any reason on giving Deliveroo immediate notice in writing."

18. The CAC in the Decision at paragraphs 66-86 considers "**How the parties conduct themselves in practice**". At paragraphs 76-86 the CAC considers "Substitution in practice". This section of the Decision includes the following findings:

> "68. Riders with a CKT Ops Code are paid on a 'fee per delivery' ('FPD') basis, also sometimes known as 'drop fee'. This means that they are paid a fee for each delivery they complete. Riders in CKT are normally paid £3.75 per delivery,

> however the fee offered to Riders for each delivery varies to some degree depending on demand…
>
> 78. A few, if that, Riders use substitutes…
>
> 79. Most Riders do not use a substitute…
>
> 80. A few Riders do however and one Rider who gave evidence on behalf of Deliveroo, … explained that he regularly engages a substitute by giving a friend his App to download and password details…
>
> 82. 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…
>
> 83. Some Riders are also signed up with other food delivery organisations such as Uber Eats, and Deliveroo does not object to this - … The Union does not believe that it is a vast majority, but accept a goodly proportion may.
>
> 84. Some Riders can and do have several apps open at once, including the Deliveroo App, and take jobs as and when they are offered, from whichever company offers first at the moment they are available. …"

19. Under the heading "**Discussion and conclusions**" the Decision includes the following:

> "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. …
>
> 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.

> 102. Some Riders do few and intermittent jobs for Deliveroo but many Riders do as much work as possible in so far as they can given any other commitments, and place themselves as close as possible to restaurants so they will be offered work by the Deliveroo algorithm. They rely on it as their main source of income. But that is not the applicable test under s.296 of the Act. The delivery has to be undertaken by a person, however it does not have to be the Rider that personally performs it. Riders are free to substitute at will. We also appreciate the high level of trust required in the substitute by the Rider… But that does not make the substitution provisions a sham. The factual situation in this case is very different from, for example, that of Uber private hire drivers, or Excel or City Sprint.
>
> 104. Mr Hendy made a secondary submission pursuant to Article 11 ECHR and s.3 Human Rights Act 1996. 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 Ground of Challenge

20. The single ground of challenge in respect of which permission was granted by Simler J (see para 3 above) is set out in the Statement of Facts and Grounds in the claim form in the following terms:

> "Ground 4: the CAC erred in failing to address the Union's arguments in respect of Article 11.
>
> 27. 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 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.
>
> 28. 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."

21. Mr Hendy and Mr Jeans agree that their written submissions raise four issues:

    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**).

22. I shall consider these issues in turn. However, before doing so I will deal with a preliminary point that has arisen. Mr Jeans submits that the permission granted by Simler J was limited to ground 4 as drafted in the claim form, and that the heading to that ground indicates it concerns an alleged failure by the CAC to address the Union's arguments in respect of Article 11 (see para 19 above). Mr Jeans contends it is a complaint about a failure by the CAC to engage with the Union's argument or to provide reasons for dismissing the argument. In order to advance the submissions that Mr Hendy now makes, Mr Jeans submits the Union requires permission to amend ground 4.

23. At the hearing I granted permission to amend. I did so without deciding whether it was strictly necessary for there to be an amendment or not. Having reviewed the material before Simler J and the terms of her judgment, it seems to me quite clear that when granting permission on ground 4 she was aware of the arguments that Mr Hendy now advances. In any event, having granted permission to amend, I now grant permission to challenge the Decision on the basis of the submissions that Mr Hendy advances, which I consider to be at least arguable. Mr Jeans did not suggest that the claim form requires formal amendment.

## The Submissions of the Parties and Discussion

### *Issue 1: whether Article 11(1) is engaged*

24. It was common ground before the CAC that the Riders in respect of whom the application was made did not fall within limb (a) of s.296(1). The Union argued that they fell within limb (b), contending that under their contracts with Deliveroo they "undertook" to do or perform work "personally". That submission was rejected (see para 18 above). By ground 5 of their grounds of challenge the Union sought to argue that the CAC erred in its interpretation of the "limb (b)" worker personal service requirement. However permission was refused on that ground (and on ground 1, which was a challenge to the CAC's decision on the basis that it erred in its construction of the substitution clause in the New Contract). I agree with the statement of Simler J at para 34 of her judgment that:

> "the statutory requirement of personal service is express and both the Court of Appeal and now the Supreme Court in *Pimlico Plumbers* have confirmed that the contractual obligation of personal service may be defeated by a substitution clause that is inconsistent with such an obligation, and will be defeated by a generalised right of substitution."

25. However Mr Hendy submits that the concept of workers' status, as defined within s.296, is an entirely domestic concept. In EU law the term "worker" has a particular meaning. The CJEU confirmed in *Betriebsrat der Ruhrlandklinik gGmbH v Ruhrlandklinik gGmbH* [2017] IRLR 194 at para 27:

> "…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, the legal characterisation under national law and the form of that relationship, as well as the nature of the legal relationship between those two persons, not being decisive in that regard."

26. Mr Hendy contends that there is no suggestion in any of the Strasbourg case law that the right to collective bargaining is itself dependent on any question of workers' status, other than the last sentence of Article 11(2). In support of this construction he points to the opening words of Article 11(1) which explicitly state that the rights contained therein apply to "*everyone*". The only exceptions are the categories of work specified in the last sentence of Article 11(2) which refer to "members of the armed forces, police and the administration of the State". Yet even in relation to these categories the ECtHR has held that the essence of trade union rights protected by Article 11 may not be impaired. In *Demir v Turkey* the Grand Chamber stated at para 97:

> "… the Court considers that the restrictions imposed on the three groups mentioned in Article 11 are to be construed strictly and should therefore be confined to the 'exercise' of the rights in question. These restrictions must not impair the very essence of the right to organise…"

27. It is the *Demir* case on which Mr Hendy principally relies in support of his submission on Article 11(1). At paragraph 154 the Grand Chamber in *Demir* stated:

> "Consequently, the Court considers that, having regard to the developments in labour law, both international and national, and to the practice of contracting states in such matters, 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, it being understood that states remain free to organise their system so as, if appropriate, to grant special status to representative trade unions. Like other workers, civil servants, except in very specific cases, should enjoy such rights, but without prejudice to the effects of any 'lawful restrictions' that may have to be imposed on 'members of the administration of the state' within the meaning of Article 11(2)—a category to which the applicants in the present case do not, however, belong."

28. Mr Hendy refers to a number of other international instruments which, he contends, equally guarantee the right to collective bargaining. Article 23(4) of the United

Nations Declaration of Human Rights 1948 is in identical terms: "*Everyone has the right to form and join trade unions for the protection of his interests*". Article 8(2) of the International Covenant on Economic, Social and Cultural Rights 1966 and Article 22(1) of the International Covenant on Civil and Political Rights 1966 are similarly worded, both of which were cited in *Demir* at paragraphs 40-41. In addition Mr Hendy refers to Article 4 of ILO Convention 98 on the Right to Organise and Collective Bargaining and the ILO Committee of Experts on the Application of Conventions and Recommendations in its *General Survey on the Fundamental Conventions concerning Rights at Work in the light of the ILO Declaration on Social Justice for a Fair Globalisation*, 2008, ILO, 2012 at para 209 which refers to the right to collective bargaining covering organisations representing, *inter alia*, the self-employed. Article 2 of ILO Convention No.87 on Freedom of Association and Protection of the Right to Organise (ratified by the UK in 1949) provides that:

> "Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation."

29. Mr Hendy submits that a restriction on the right to achieve statutory recognition under Schedule A1 to the 1992 Act is a restriction on the right to collective bargaining under Article 11. Schedule A1 is a mechanism which allows for the enjoyment of the right to collective bargaining. A statutory barrier within the 1992 Act to recognition under this scheme necessarily, he submits, engages Article 11. Whether or not a statutory barrier can be justified is, Mr Hendy observes, a separate matter.

30. In support of this submission Mr Hendy refers, in particular, to three cases: *Unite The Union v United Kingdom* [2017] IRLR 438 (ECtHR); *Pharmacists' Defence Association Union v Boots Management Services Ltd* [2017] EWCA Civ 66, [2017] IRLR 355; and *Wandsworth LBC v Vining* [2017] EWCA Civ 1092, [2018] ICR 499.

31. In *Boots* Underhill LJ stated at para 47:

> "In my view… the reasoning in the *Unite* case acknowledges the possibility that the absence or inadequacy of a statutory mechanism for compulsory collective bargaining might in particular circumstances give rise to a breach of Article 11. Such a reading is consistent with the logic of the reasoning in *Demir* itself… It is fair to say that various observations by the Court, and indeed the outcome of the case itself, tend to suggest that complaints based on the denial of a right to compel an employer to engage in collective bargaining may face an uphill struggle; but the point at this stage is simply that the attempt is not excluded *in limine*."

Underhill LJ continued at paragraph 54:

> "… It follows from the recognition by the Court in *Demir* that 'the right to bargain collectively with the employer' is an 'essential element' of the rights protected by Article 11 that a complaint that domestic law does not accord such a right in a

> particular case will fall within the scope of Article 11. But, at the risk of spelling out the obvious, it does not follow from that that Article 11 confers a universal right on any trade union to be recognised in all circumstances. It is self-evident that any right to be recognised conferred by domestic law will have to be defined by rules which identify which unions should be recognised by which employers in respect of which workers and for what purposes…"

32. In *Vining* the challenge was to the exclusion of local authority parks police members from statutory collective redundancy consultation requirements by s.188 of the 1992 Act on the ground that, by s.280 of the 1992 Act, members of the "police service" (including local authority parks police) were not within the definition of "worker" in respect of which the right of consultation was conferred. The court held the collective redundancy consultations as envisaged by s.188 are encompassed within Article 11 rights. Sir Terrence Etherton MR, giving the judgment of the court, stated at paragraph 64 that:

> "If, accordingly, the rights in question fall within the scope of article 11, the United Kingdom is under a positive obligation to secure the effective enjoyment of those rights. That does not mean that it is under an obligation to ensure that they are available to all employees in all circumstances, but it does mean that where a legislative scheme is in place it must strike a fair balance between the competing interests and any provision of that scheme which restricts its availability to particular classes of workers requires to be justified, albeit that the state is recognised to have a wide margin of appreciation. The relevant principles are discussed at paras 33-47 and 54-55 in the judgment of Underhill LJ in [*Boots*]… on the basis of *Demir* and the later European Court of Human Rights decision in *Unite The Union v United Kingdom*…"

33. Mr Jeans accepts that the term "worker" is not limited to an employee but may include some persons who are self-employed. Mr Hendy submits that the power of substitution is not fatal where, as here, Deliveroo is plainly interested in the attributes of substitutes (see clause 8.2 of the New Contract, set out para 16 above), nor is the absence of an obligation to work (see *Uber v Aslam* [2018] ICR 453 at para 27). However I agree with Mr Jeans that the Strasbourg case law does not support Mr Hendy's submission that the Riders are workers in the particular circumstances found by the CAC to exist (see para 19 above). They are not under the New Contract in an "employment relationship" with Deliveroo.

34. *Demir* concerned the rights of civil servants to bargain collectively with their employer. The Grand Chamber stated at paragraph 154 (see para 27 above):

> "…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… Like

> other workers, civil servants, except in very specific cases, should enjoy such rights…"

35. In *Vining*, a case that concerned employees made redundant by their employer, Sir Terence Etherton MR stated (at paragraph 61) that

> "… since the decision of the European Court of Human Rights in *Demir*…it has been established that 'the right to bargain collectively with the employer has, in principle, become one of the essential elements' of the rights afforded by article 11, and that those rights are enjoyed by employees of public authorities as well as by employees in the private sector (subject to article 11(2))…"

36. I am not persuaded that any of the other cases to which Mr Hendy referred extend the right collectively to bargain beyond an employment relationship. In *Boots*, in the passage I have cited at paragraph 31 above, Underhill LJ stated that the "essential element" recognised by *Demir* was a right to bargain collectively with the employer. *Unite The Union* concerned the State's abolition of a right to bargain collectively which had previously been held by agricultural workers. As Mr Jeans observes the nature of the relationship between the agricultural workers and those with whom there had been negotiation on their behalf was not in issue.

37. In support of his contention that the engagement of Article 11(1) requires an employment relationship, Mr Jeans refers to the decision of the Grand Chamber in *Sindicatul "Pastorul Cel Bun" v Romania* [2014] IRLR 49. In that case the state had declined to register a union formed of members of the clergy. The Grand Chamber did not share the government's view that members of the clergy must be excluded from the protection afforded by Article 11 on the ground that they perform their duties under the authority of the Bishop, and hence outside the scope of the domestic rules of labour law. At paragraph 141 the Grand Chamber stated:

> "The only question arising here is whether such duties, 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."

The judgment continues:

> "142. In addressing this question, the Grand Chamber will apply the criteria laid down in the relevant international instruments (see, mutatis mutandis, *Demir* and *Baykara*)… In this connection, it notes that in Recommendation no.198 concerning the employment relationship…, the International Labour Organisation considers 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. In addition the ILO's Convention no.87… which is

> the principal international legal instrument guaranteeing the right to organise, provides in Article 2 that 'workers and employers, without distinction whatsoever' have the right to establish organisations of their own choosing. …
>
> 143. Having regard to the above considerations, the Court observes that the duties performed by the members of the trade union in question entail many of the characteristic features of an employment relationship.
>
> …
>
> 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 applicable to the facts of the case."

38. In *D v Commissioner of Police of the Metropolis* [2018] 2 WLR 895 at para 153 Lord Mance said:

> "If the existence or otherwise of a Convention right is unclear, then it may be appropriate for domestic courts to make up their minds whether the Convention rights should or should not be understood to embrace it."

That is not the present case. The Convention right is clear from the Strasbourg jurisprudence.

***Conclusion***

39. I do not consider that, on the findings made by the CAC, the Riders have the right for which the Union contends under Article 11(1). Neither domestic nor Strasbourg case law supports this contention. Article 11(1) is not engaged in this case.

40. Having reached this conclusion I can take the other issues more shortly.

**Issue 2: whether any interference with the Riders' Article 11(1) rights is justified by Article 11(2)**

41. The Union accepts that the "restriction" in the legislation to "workers" as defined (incorporating the personal service obligation) is "prescribed by law" in s.296 of the 1992 Act.

42. The critical question on Art.11(2) is whether, as Deliveroo contends, the restriction is "*necessary in a democratic society… for the protection of the rights and freedoms of others*".

43. Mr Jeans submits that the "rights and freedoms of others" include freedom of business and freedom to contract on terms the business chooses to offer, including freedom from the imposition of bargaining arrangements. The freedom of business is reflected

in the common law doctrine of restraint of trade and in Article 16 of the EU Charter of Fundamental Rights.

44. I accept Mr Jeans' submission that the restriction in s.296 is "rationally connected" (applying Lord Sumption's criterion in *Bank Mellat (No.2) v HM Treasury* [2013] UKSC 39 at para 20) to the objective of preserving freedom of business and contract by limiting the cases in which the burden of collective bargaining should apply.

45. Further, Mr Jeans submits the interference is proportionate and strikes a fair balance between competing interests in that it is limited to preventing those who do not have to do work or perform work personally from invoking compulsory recognition procedures. It does not affect any person who is contractually obliged personally to work.

46. Any interference with Art.11(1) is of a limited nature. The personal service obligation does not prevent Riders from belonging to the Union if they choose to do so, or prevent the making of voluntary arrangements. All that it precludes is the compulsory mechanism provided by Schedule A1 of the 1992 Act.

47. Mr Jeans makes the point that absent the personal service requirement there is no reason why the collective bargaining provisions would not apply between commercial parties such as franchisors and franchisees, commercial agents and their principals, and licensors and licensees.

48. Both the Strasbourg Court's decisions on Article 11 and domestic case law has recognised the breadth of discretion given to the decisions of a representative legislature on matters of social or economic policy (see *Axa v HM Advocate* [2012] 1 AC 868, per Lord Hope at para 32, and Lord Reed at para 131; and also see *Manole and "Romanian Farmers Direct" v Romania* (Application No.46551/06) at paras 70-71). In *Unite* the Court observed (at para 60) that:

> "…the social and political issues involved in achieving a proper balance between the interests of labour and management are of a sensitive nature. The starting point is, therefore, that the United Kingdom enjoys a wide margin of appreciation in determining whether a fair balance has been struck between the protection of the public interest in the abolition of the [Agricultural Wages Board] and the applicant's competing rights under Article 11 of the Convention."

49. Mr Jeans submits that if, as Underhill LJ observed in *Boots* (at para 47), a complaint based on the denial of the right to compel an employer to engage in collective bargaining may face "an uphill struggle" (see para 31 above), a complaint against a "non-employer" must face a greater struggle still.

50. An additional reason why this is so, Mr Jeans contends, is because the three matters covered by collective bargaining, and in respect of which compulsory bargaining can be enforced, are "pay, hours and holiday" (see Schedule A1, para 3(3)). Two of these (hours and holiday) have no real significance when there is no obligation to work personally; and any discussion of the third (pay) is limited by the absence of an obligation to do work personally. In relation to pay, Mr Hendy says the evidence

shows that the Riders are not in a position to influence their conditions of pay once they have been denied the right to bargain collectively.

51. Mr Hendy submits that it is not at all clear why Parliament adopted the definition of worker it did in s.296, there being no obvious reason why a contractual obligation to provide personal service is a necessary condition for effective collective bargaining. That being so, the court is not able to carry out the steps of the test set out in *Bank Mellat*. Mr Hendy describes the objectives put forward by Mr Jeans as being speculation on his part.

52. Furthermore, Mr Hendy submits, regulation of competition is not a right or interest protected by the Convention. Where, as in the present case, one right is protected by the Convention and the other is not, then only "indisputable imperatives" can justify interference with enjoyment of the Convention right (*Chassagnou v France* [2000] 29 EHRR 615 at para 113).

53. Mr Hendy accepts that a domestic court may decide that a measure of latitude should be permitted in appropriate cases, but the doctrine of the "margin of appreciation" as applied in Strasbourg has no application in domestic law (*R (on the application of Steinfeld and Keidan) v Secretary of State for International Development* [2018] UKSC 32, per Lord Kerr at paras 28 and 29). In any event Mr Hendy submits there is little margin of appreciation to permit the restriction of an essential element of Article 11 (see *Demir* at para 119).

54. However, in the present case, Mr Hendy suggests, there is no considered opinion of Parliament to justify the conclusion that the Riders should be denied the right to bargain collectively whereas plumbers such as the claimant in *Pimlico Plumbers* should enjoy that right.

55. I do not accept, assuming for present purposes that Article 11 is engaged, that any rights the Riders may have had under Article 11 have been breached. The restriction is prescribed by law. The sole test for determining whether an individual is a worker for the purposes of s.296(1)(b) is the existence of a contractual obligation of "personal performance" (*Pimlico Plumbers* at para 32, per Lord Wilson). I am satisfied that this definition of "worker", for the reasons advanced by Mr Jeans, achieves a fair balance between the competing interests. In my view the restriction is both "rationally connected" and proportionate. Essentially for the reasons advanced by Mr Jeans I consider it to be a restriction "necessary in a democratic society… for the protection of the rights and freedoms of others".

**Issue 3: whether the CAC should have "read-down" s.296(1)**

56. The Union does not seek a declaration under s.4 HRA that s.296(1) is in breach of Art.11. The issue is whether s.296(1) should be "read down".

57. It is common ground that the correct approach to the application of s.3 of the Human Rights Act 1998 ("HRA") is to be found in the decision of the House of Lords in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557. The relevant principles are set out in the judgment of Lord Nicholls at paragraphs 26-33 where he stated, so far as is material:

> "**30**. … The question of difficulty is how far, and in what circumstances, section 3 requires a court to depart from the intention of the enacting Parliament. The answer to this question depends upon the intention reasonably to be attributed to Parliament in enacting section 3.
>
> **31**. … once it is accepted that section 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, it becomes impossible to suppose Parliament intended that the operation of section 3 should depend critically upon the particular form of words adopted by the parliamentary draftsman in the statutory provision under consideration…
>
> **33**. Parliament, however, cannot have intended that in the discharge of this extended interpretive function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend, Lord Rodger of Earlsferry, 'go with the grain of the legislation'…"

58. Mr Hendy submits that the vulnerability of workers and the imbalance of power at the workplace (see *Autoclenz Ltd v Belcher* [2011] ICR 1157) supports the contention that in "employment" statutes, the thrust and grain is the protection of workers so that it is permissible for courts to adopt a construction which is the most (or more) favourable to the worker (see Alan Bogg, "The Common Law Constitution at Work": *R (on the application of UNISON) v Lord Chancellor* 92-180 81(3) MLR 509). Mr Hendy submits that if this is true in matters of domestic construction it must be the more so where the construction is intended to give effect to the essential elements of a Convention right explicitly designed to protect the interests of the worker as against the putative employer.

59. As for the public policy objective behind limb (b) worker status in s.296 of the 1992 Act, Mr Hendy refers to the judgment of Lord Wilson in *Pimlico Plumbers* at para 9:

> "From 1970 onwards Parliament has taken the view that, while only employees under a contract of service should have full statutory protection against various forms of abuse by employers of their stronger economic position in the relationship, there were self-employed people whose services were so largely encompassed within the business of others that they should also have limited protection, in particular against discrimination but also against certain forms of exploitation on the part of those others; and for that purpose Parliament has

> borrowed and developed the extended definition of a 'workman' first adopted in 1875."

60. Having regard to this objective, which Mr Hendy contends identifies the "underlying thrust" and "the grain" of the statute, Mr Hendy submits that there are various ways in which the definition in s.296 can be properly construed so as to achieve the goal of s.3 of the HRA.

61. There are, Mr Hendy submits, three options for the court to adopt. Option One, having regard to the evidence of the limited examples of substitution and that for most Riders substitution was not normal (see the Decision, paras 78-79, and para 18 above), Mr Hendy submits that the findings of the CAC that the workforce did "*normally work*" by way of personal service, satisfies a definition of personal service which gives effect to Article 11.

62. Option Two has regard to Lord Wilson's statement in *Pimlico Plumbers* at para 32 that there are cases in which it is helpful to assess the significance of the right of substitution by reference to whether the "*dominant feature*" of the contract remained personal performance on the putative limb (b) worker's part. The application of the dominant feature test will thus be consistent with the grain of the legislation. Adopting this approach Mr Hendy submits that the requirement of "*personal service*" should be construed so as to include a worker who spends most of, or at least a substantial (non-trivial) amount of his working time personally executing work for the person who has contractually engaged him, at least to the extent of those services which the putative worker in fact executes personally. Personal service, in this context, includes personally engaging a substitute in accordance with the conditions imposed on such engagement by the employer.

63. Option Three is based on the contention that the Riders fall within the definition of Home Worker in the National Minimum Wage Act 1998, that they carry out their work at places not under the control or management of Deliveroo, and that as Home Workers there is no rational basis for excluding them from exercising Article 11 rights. *James v Redcats (Brands) Ltd* [2007] LCR 1006 makes clear that "a home worker need not work at home at all" (per Elias J (President) at para 13).

64. I do not accept these submissions.

65. As for Option One, I agree with Mr Jeans that the words "normally works" cannot be severed from the material sentence in s.296 as a whole. The question is whether the contract under which the individual "normally works" contains the relevant obligation, namely the personal work obligation. The CAC found that it did not. As Simler J stated in her judgment (at para 39) refusing permission:

> "The phrase in s.296(1) of the 1992 Act, 'normally work', cannot be isolated in the way the claimant seeks to isolate it. It must be read in the context of the section as a whole. The focus of the provision is on the contract under which the work is done and not simply on whether the work is done or the way it is done. To qualify on a plain reading of s.296(1)(b) the contract under which Riders 'normally work' must be a contract by which they promise (or undertake) to do the work

> personally. In other words, the focus is on what the contract requires and whether it requires personal service. If, as the CAC found, the contract does not oblige the Rider to work personally, it is irrelevant as a matter of construction of s.296(1) whether he normally uses a substitute or not."

66. As for Option Two, the Supreme Court in *Pimlico Plumbers* stated that the existence of an obligation of personal performance was the sole test and a generalised right of substitution means that there is no such obligation. It is clear from the judgment of Lord Wilson (at paras 32-34) that the sole test of "personal obligation" cannot be usurped by a "dominant feature of the contract" test.

67. Realistically Mr Hendy did not press Option Three. I reject Mr Hendy's suggestion that the words "*or otherwise*" could be read into s.296(1)(b) to give effect to the Convention right (Skeleton Argument, para 118). That, as Mr Jeans observes, is the equivalent of inserting the words "or not" i.e. it achieves the opposite meaning from that which is intended.

68. In my view all three options fall foul of the *Ghaidan* principles. Each option is inconsistent with the "underlying thrust" of s.296(1).

**Issue 4: whether the CAC failed to address the Union's arguments in respect of Article 11**

69. The Union contend that the CAC erred (at para 104 of the Decision) in dismissing the Union's Article 11 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.

70. Mr Jeans points out that this secondary submission of the Union was only put forward in a supplementary skeleton argument on the eve of the hearing before the CAC. In the Union's closing submissions, which ran to some 79 pages, it was only dealt with briefly at paragraphs 19-21, and in Appendix 1 to the submissions at pages 73-78 which deal in the main with ILO instruments and material.

71. The CAC nonetheless considered the Union's case on Article 11, and succinctly and, as Mr Jeans observes, "trenchantly", gave its reasons for rejecting it: "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" (see para 18 above). The CAC was plainly of the view, on the basis of the facts of the case and having regard to the submission made on behalf of the Union, that Article 11 is not engaged. In my view, the CAC was not required to say any more than it did at paragraph 104 of the Decision.

**Conclusion**

72. For the reasons I have given, the sole ground of challenge in respect of which permission has been granted is not made out. Accordingly, this claim for judicial review is dismissed.