Browne Jacobson

Collective bargaining rights

28 November 2023 Sarah Hooton

The Supreme Court's judgment in Independent Workers Union of Great Britain v Central Arbitration Committee and another has been issued, with the Supreme Court agreeing with the position taken by both Deliveroo and the CAC that Deliveroo riders do not fall within the scope of collective bargaining rights.

The Supreme Court was asked, amongst other things, to determine whether Deliveroo riders fall within the scope of Article 11 of ECHR (freedom of assembly and association). The Supreme Court agreed with the previous decision of the Court of Appeal (read the judgment), finding that Article 11 applies only to those in an "employment relationship". This term is not to be defined by reference to domestic interpretations of "worker" or "employee" but rather is an autonomous term that applies to all the members of the Council of Europe. It is a multifactorial test, focussing on how the relationship operates in practice (and not just the contractual terms), and one which takes into account the factors set out in ILO Recommendation No 198.

Here, the Supreme Court was satisfied that the CAC had appropriately considered the unfettered substitution right, including whether the contractual terms genuinely reflected the true relationship, and that this by itself was sufficient to exclude Deliveroo riders from an "employment relationship". However, there were also other factors which further supported this conclusion – including that riders are free to reject offers of work, to make themselves unavailable, and to undertake work for competitors, all of which were "fundamentally inconsistent with any notion of an employment relationship".

Although the above was enough to determine the appeal, the Supreme Court also went on to consider whether Article 11 gave a right to compulsory collective bargaining and concluded that it did not. If, therefore, the riders had fallen within the scope of Article 11, it would not be a breach of those rights to define those who benefit from Schedule A1 of the Trade Union and Labour Relations (Consolidation) Act 1992 in a way which excludes them.

With increasing numbers working within the gig and platform economies, certainty over status and clarity over rights will be welcomed. Whilst this case highlights the significance of the right of substitution, it is important to note that a widely drafted unfettered written substitution clause will not be enough – it is how that clause operates in practice that is key.

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