Press Summary

21 November 2023

Independent Workers Union of Great Britain (Appellant) v Central Arbitration Committee and another (Respondents)

[2023] UKSC 43

On appeal from [2021] EWCA Civ 952

Justices: Lord Lloyd-Jones**,** Lord Briggs, Lord Stephens, Lady Rose, Lord Richards

Background to the Appeal

This appeal concerns the collective bargaining rights of a group of Deliveroo riders working in the Camden and Kentish Town area of London. These riders became members of the Independent Workers Union of Great Britain ("**the IWGB**"). In November 2016, the IWGB made a formal request to Deliveroo to recognise the union for collective bargaining on behalf of riders in Camden and Kentish Town.

Deliveroo rejected this request, and the IWGB made an application to the Central Arbitration Committee ("**the CAC**") under Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992 ("**the 1992 Act**"). This schedule sets out the procedure to be followed when an employer does not agree to recognise and bargain with a union. The procedure does not oblige the employer to conclude a collective agreement with a recognised union, but it may ultimately result in a method for collective bargaining being imposed on the employer. The CAC is the quasi-judicial body which, under Schedule A1, has power to order an employer to recognise a union and engage in collective bargaining if certain conditions are met. One of those conditions is that the people the union seeks to represent are "workers" within the meaning of section 296 of the 1992 Act.

Having analysed the nature of the relationship between the riders and Deliveroo, the CAC accepted Deliveroo's argument that the riders in question were not workers within that definition. It rejected an additional argument made by the IWGB that refusing to recognise the Union would breach the riders' rights under article 11 of the European Convention on Human Rights ("**the ECHR**"), which protects freedom of peaceful assembly and association.

The IWGB sought permission to challenge the CAC's decision by judicial review. The High Court granted permission for the IWGB to bring its claim on one ground only: that the CAC's decision breached the riders' human rights under article 11 ECHR. The IWGB's other grounds were held to be unarguable. Accordingly, the IWGB's challenge proceeded on the basis that the riders do not fall within the domestic definition of "worker" under the 1992 Act, but this definition should be read down to include the riders in order to comply with their article 11 rights, as required under section 3 of the Human Rights Act 1998.

The High Court rejected that argument and dismissed the IWGB's claim. The IWGB appealed to the Court of Appeal, who upheld the High Court's judgment. The IWGB appealed again to the Supreme Court.

Judgment

The Supreme Court unanimously dismisses the IWGB's appeal. It holds that the riders were not in an employment relationship for the purposes of article 11 ECHR, and the provisions of that article which protect trade union activity do not apply to them. The CAC's decision to reject the IWGB's application stands. Lord Lloyd-Jones and Lady Rose give a joint judgment, with which the other members of the Court agree.

Reasons for the Judgment

Article 11 ECHR protects the general rights of freedom of peaceful assembly and freedom of association with others, and a specific right to form and join trade unions which applies in more limited circumstances **[37]**. The case law of the European Court of Human Rights is clear that the right to form a trade union only arises in the context of an employment relationship. The concept of an employment relationship for the purposes of article 11 is freestanding and does not depend on the definitions of workers or employees used in domestic law **[61]**.

The European Court has held that to decide whether there is an employment relationship for the purposes of article 11, a court should have regard to the factors set out in the International Labour Organisation Employment Relationship Recommendation, 2006 No 198. That recommendation makes the point that the assessment 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 contract or other agreement between the parties. The correct approach requires the Court to consider many different factors, focussing on the practicalities of the relationship and how it operates in reality **[61]**.

Applying this approach to the facts of the case, the riders do not have an employment relationship with Deliveroo for the purposes of article 11 **[71]**. The CAC had rigorously scrutinised the substance of the relationship between Deliveroo and the riders. It examined in detail how the new contract between Deliveroo and the riders operated in practice and gave close scrutiny as to whether the provisions in that contract genuinely reflected the true relationship between the parties **[70]**.

Some findings of the CAC were particularly significant. First, the contract between the riders and Deliveroo gives riders a broad and virtually unfettered right to appoint a substitute to take on their jobs. This right, on its face, is totally inconsistent with there being an employment

relationship **[69].** The CAC found that Deliveroo did not police a rider's decision to use a substitute and riders would not be criticised or sanctioned for doing so. Secondly, the CAC found that Deliveroo did not terminate riders' contracts for failing to accept a certain percentage of orders or failing to make themselves sufficiently available. The riders were free to work or not as convenient to them. Finally, the CAC found that Deliveroo did not object to riders working simultaneously for Deliveroo's competitors. In all the circumstances, the CAC was entitled to conclude that the provisions in the contract genuinely reflected the reality of the relationship and that that was not an employment relationship **[70]**.

As the riders do not have an employment relationship, they are not able to rely on the trade union rights conferred by article 11. However, as there is some lack of clarity in the case law, the Court also addresses the scope of the collective bargaining rights that article 11 confers for those workers who do have an employment relationship. The European Court of Human Rights has reiterated that states have a wide margin of discretion in how they choose to protect trade-union freedom **[129]**, and it has not held that article 11 goes so far as to include a right to compulsory collective bargaining **[134]**. While states can go further than the Convention requires, as the UK has done by enacting Schedule A1, it would not be a breach of article 11 for a state to decline to legislate for compulsory collective bargaining **[130]**.

References in square brackets are to paragraphs in the judgment.