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# *Deliveroo* in the Supreme Court: The Right to Collective Bargaining and the Employment Status of Platform Workers

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## ABSTRACT

This article examines the recent decision of the UK Supreme Court in *Independent Workers Union of Great Britain v Central Arbitration Committee* [2023] UKSC 43 ('*Deliveroo*') and considers its wider implications for the employment status of those working in the 'gig' or 'platform' economy more broadly. Before assessing the reasoning of the Court, this article suggests that the increasing prominence of platform work has challenged many aspects of the traditional law on employment status. It proceeds to analyse the approach of the Court to the interpretation of article 11 of the European Convention on Human Rights ('ECHR'), insofar as it establishes that states are under a positive obligation to secure workers' rights to collective bargaining only where the workers in question stand in an 'employment relationship'. It then explores the Court's interpretation of the weight to be attached to the contractual right to appoint a substitute in the inquiry into the existence of any such employment relationship. Finally, it contemplates options for reform of the present law on employment status. Ultimately, it is argued that the Supreme Court adopts an unduly restrictive approach with wider implications for the 'purposive' trend of modern employment law. In the light of that observation, this article briefly makes the case for statutory reform.

*Keywords: employment law, platform work, collective bargaining, employment status, collective labour law*

## I. INTRODUCTION

The legal regulation of platform work in the context of a wider 'gig economy'—broadly, the 'buying and selling of labour via digital platforms'[1]—ranks amongst the major challenges to the protective capabilities of UK employment law in the twenty-first century. The prevalence of

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[1] Matthew Taylor and others, 'Good Work: The Taylor Review of Modern Working Practices' (Department for Business and Trade and Department for Business, Energy and Industrial Strategy, July 2017) ('Taylor Review') 25 <https://assets.publishing.service.gov.uk/media/5a82dcdce5274a2e87dc35a4/good-work-taylor-review-modern-working-practices-rg.pdf> accessed 28 September 2024; Alex J Wood, Nick Martindale and Brendan Burchell, 'Gig Rights and Gig Wrongs. Initial Findings from the Gig Rights Project: Labour Rights, Co-Determination, Collectivism and Job Quality in the UK Gig Economy' (Gig Rights Project 2023) 3 <https://www.bristol.ac.uk/media-library/sites/business-school/documents/Gig%20Rights%20&%20Gig%20Wrongs%20Report.pdf> accessed 28 September 2024.

such work has notably accelerated the contemporary 'erosion of the "standard employment relationship"', traditionally characterised by an indefinite contract of employment and the attendant expectation of continuous, long-term service with a single employer.[2] Specifically, platform workers sit uncomfortably with the law's tripartite division of employment status which, for the purpose of allocating statutory rights, distinguishes not simply between employees and the genuinely self-employed (in respect of whom statutory employment protection is altogether excluded) but—in contrast with other jurisdictions—also provides for an intermediate category of 'worker'.

Platform companies depend for the flexibility that supports their business models on the deliberate negation of employment status. They engage recruits on standard-form contracts, with standard terms offered on a 'take it or leave it' basis. These contracts typically go to great lengths to characterise such individuals as self-employed 'independent contractors'. The reward for doing so is highly prized: they are under no obligation to provide even basic statutory employment rights, such as holiday pay or the minimum wage, of any kind. That platform workers lack contracts of employment and do display some of the ordinary features of self-employed work, such as greater flexibility in determining their working hours, indicates—at least under UK law—that they are not 'employees'.[3] Nevertheless, it is not uncommon that sham contractual terms, drafted by proverbial 'armies of lawyers',[4] operate to disguise the reality of a working relationship in which the putative worker is to a significant extent materially subordinate to, and in turn required to obey the detailed managerial instructions of, the putative employer. Platform workers, and those in the gig economy more generally, are for this reason thought to be particularly vulnerable to exploitation. It is perhaps little surprise, therefore, that in a number of recent cases[5] the courts and employment tribunals have been called upon to determine whether platform workers might in fact meet, and so gain access to the rights and entitlements attaching to, the statutory definition of 'worker'.[6] This has coincided with an increasing reliance on strategic employment status litigation, by which platform workers, often with the aid of independent trade unions, have sought to establish formal 'legal recognition as workers'.[7]

The focus of this article is the latest such case to reach final appellate level: the Supreme Court's recent judgment in *Independent Workers Union of Great Britain v Central Arbitration Committee* ('*Deliveroo*').[8] *Deliveroo* concerned the unsuccessful efforts of the Independent Workers' Union of Great Britain ('IWGB') to invoke article 11 of the ECHR so as to bring a group of Deliveroo riders—contractually designated as self-employed—within the UK's statutory framework for compulsory collective bargaining. A condition of access to this procedure is 'worker' status. The central issue here was the extent to which it could be said that the riders were workers insofar as they provided their services to Deliveroo *personally*—both a core element of the statutory definition and a relevant consideration in the context

[2] Alan Bogg and Ricardo Buendia, 'The Law and Worker Voice in the Gig Economy' in Valerio De Stefano and others (eds), *A Research Agenda for the Gig Economy and Society* (Edward Elgar Publishing 2022) 74. Other forms of increasingly common atypical work include that which is performed through agencies and on the basis of periodic fixed-term contracts.

[3] Guy Davidov, 'Who Is a Worker?' (2005) 34 Industrial Law Journal 57, 62–65.

[4] *Consistent Group Ltd v Kalwak* [2007] IRLR 560 (EAT) [57] (Elias J P).

[5] See in particular *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29, [2018] 4 All ER 641; *Uber BV v Aslam* [2021] UKSC 5, [2021] 4 All ER 209.

[6] The standard definition (on which see below), substantially mirrored in all other relevant employment statutes, is given in section 230(3)(b) of the Employment Rights Act 1996 ('ERA 1996').

[7] Bogg and Buendia (n 2) 80.

[8] [2023] UKSC 43, [2024] 2 All ER 1 ('*Deliveroo* (UKSC)').

of article 11. In that light, this contribution aims to provide a critical account of the decision and, more broadly, to demonstrate its significance for platform work.

In so doing, this article examines in particular detail two aspects of the Supreme Court's reasoning. First, after providing some background, it considers the Court's conclusions on the personal scope of article 11 and the notion that it is engaged only in the context of an 'employment relationship'. It then turns to the question of substitution clauses—contractual terms indicating that putative workers are free to allow others to undertake their work for them (conventionally understood to be inconsistent with the requirement of personal service)—and their relevance to the employment status inquiry. In both areas, though particularly the latter, it is suggested that the Court adopts an unduly restrictive approach with wider implications for the 'purposive' trend of modern employment law.[9] Ultimately, *Deliveroo* is an important case inasmuch as it reveals that the present law on employment status bears negatively on both the individual *and* collective dimensions of employment law. To the extent that platform workers, often amongst the most precarious, are thus denied the protections afforded thereunder, it accentuates the necessity of statutory reform. This article then concludes by offering suggestions in that vein, drawing partly on recent European developments.

## II. Employment Status and Platform Work

Access to the spectrum of statutory employment rights under UK law, as noted above, is contingent on the designation of a given individual as either an 'employee' or 'worker'. Section 230(1) of the Employment Rights Act 1996 defines the former as 'an individual who has entered into or works under... a contract of employment'. The latter category, by contrast, bestows a more limited range of rights on individuals working under 'any other contract... whereby the individual undertakes to do or *perform personally* any work or services for another party to the contract'.[10] Thus, in addition to the basic entitlements of workers, employees—subject to relevant qualifying conditions—have, amongst other rights, the right not to be unfairly dismissed,[11] the right to receive statutory redundancy pay,[12] the right to request flexible working and the benefit of other work-life balance provisions,[13] and the right to minimum notice periods in the event of dismissal.[14] Workers, conversely, are afforded a comparatively narrow set of protections, principally embodied in the legislation on anti-discrimination,[15] working time,[16] and the National Minimum Wage.[17]

In the absence of a statutory definition of 'employee' beyond a circular reference to the requirement of a contract of employment, it has been left largely to the common law to develop the principles applicable to the determination of employment status, with its traditional distinction between contracts 'of service' (indicative of employment) and contracts 'for

[9] See for example Guy Davidov, *A Purposive Approach to Labour Law* (1st edn, OUP 2016); Joe Atkinson and Hitesh Dhorajiwala, 'After *Uber*: Purposive Interpretation and the Future of Contract' (*UK Labour Law Blog*, 1 April 2021) <https://uklabourlawblog.com/2021/04/01/after-uber-purposive-interpretation-and-the-future-of-contract-by-joe-atkinson-and-hitesh-dhorajiwala/> accessed 19 March 2024.
[10] ERA 1996, s 230(3)(b) (emphasis added).
[11] ibid s 94(1).
[12] ibid s 135(1).
[13] ibid s 80F(1)(a); Children and Families Act 2014, pts 7–10.
[14] ERA 1996, s 86(1).
[15] Equality Act 2010, s 83(2)(a).
[16] Working Time Regulations 1998, SI 1998/1833.
[17] National Minimum Wage Act 1998, s 1(2)(a); National Minimum Wage Regulations 2015, SI 2015/621.

services' (suggestive of those in business on their own account or self-employment).[18] The present approach adopted by courts and tribunals to examining whether a given individual can be said to be an employee involves consideration of multiple factors and broadly follows the principles summarised by MacKenna J in the High Court in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*.[19] There must first be an 'irreducible minimum' of 'mutuality of obligation', in the form of an ongoing reciprocal commitment to provide one's labour in return for the giving of wages or other remuneration.[20] The court or tribunal must then look to the degree of control exercised by the putative employer over the individual in question, the extent of their subordination and integration within the main business undertaking, and the allocation of financial risk as between the parties.[21] Finally, there can be no contractual terms that, in their material application, are inconsistent with the relationship of employer and employee. This requirement has, in practice, centred largely on whether the substance of the relationship commits the individual, and they alone, to render their services *personally*.[22] As such, broadly framed clauses that offer the ability to appoint a substitute—contractual terms denying the obligation of personal service in its entirety—have been held to be 'wholly inconsistent' with employee status.[23]

The modern realities of platform work are plainly incongruous with many of these orthodox principles. Platform workers enjoy, at least in theory, a greater level of autonomy than employees (for example, in selecting the time, location, and duration of work) and are thus less obviously subordinate to—and subject to the precise control of—putative employers. That they are generally under an obligation to provide work only when they are 'logged on' to the relevant app suggests a lack of 'mutuality of obligation'.[24] Moreover, these workers often bear the economic risks of failing to work—their income fluctuating in proportion to the number of 'gigs' performed—and may supply their own tools and equipment, underlining a lesser degree of integration than that which characterises more typical employment. Finally, the insertion of substitution clauses into the contracts under which they operate, increasingly a matter of standard practice,[25] raises complications in respect of the requirement of personal service. Platform workers thus occupy what might be described as a legal 'no man's land' regarding the exact nature of their employment status,[26] to which the 'employee' paradigm is manifestly unsuited.

On closer examination, however, the position of platform workers and employees in the orthodox sense may not be as distinct as is often suggested by the relevant written contractual documentation. Alan Bogg and Ricardo Buendia emphasise, for instance, the disparity between 'formal contractual appearances' and platform workers' particular 'vulnerability to contractual exploitation'.[27] Platform workers frequently operate through 'structures of extensive direct and indirect legal control', largely under the contractual guise of self-employment,

[18] Bob Hepple, 'Restructuring Employment Rights' (1986) 15 Industrial Law Journal 69, 70. See also ERA 1996, s 230(2).
[19] [1968] 2 QB 497 (QB).
[20] *Nethermere (St Neots) Ltd v Gardiner* [1984] IRLR 240 (CA) [22] (Stephenson LJ).
[21] Hugh Collins, KD Ewing and Aileen McColgan (eds), *Labour Law* (2nd edn, CUP 2019) 203–07.
[22] ACL Davies, *Perspectives on Labour Law* (2nd edn, CUP 2009) 88.
[23] *Express & Echo Publications Ltd v Tanton* [1999] IRLR 367 (CA) [32] (Peter Gibson LJ).
[24] Bogg and Buendia (n 2).
[25] Collins, Ewing and McColgan (n 21) 212.
[26] Tony Dobbins, 'Why a "No Man's Land" Employment Status Fuels Gig Worker Unrest' (*Social Sciences Birmingham*, 16 February 2024) <https://blog.bham.ac.uk/socialsciencesbirmingham/2024/02/16/why-a-no-mans-land-employment-status-fuels-gig-worker-unrest/> accessed 2 June 2024.
[27] Bogg and Buendia (n 2) 75.

notwithstanding that many aspects of their work—ranging from payment to permissible delivery routes—are tightly circumscribed and enforced on pain of discipline.[28] Broadly stated, they are akin to 'dependent contractors': those 'substantively distinguishable' from employees but whose work is nevertheless often characterised by a degree of subordination and economic dependence on a single user of one's labour that is not reflective of genuine self-employment.[29] Many individuals in the platform economy may, therefore, qualify for more limited statutory protection as 'workers'. The judicial approach to the statutory worker concept has broadly been to apply the above principles albeit with a lower 'pass-mark',[30] reflective of the genuine differences between employees and workers though conscious of the importance of statutory regulation of precarious work relations. Therefore, many of the considerations relevant to the determination of 'employee' status at common law are also applicable to the question of worker status, with the important difference that personal service is a statutory *requirement* in respect of the latter.

In recent years, the worker status inquiry has been at the centre of a growing acceptance that statutory employment provisions should generally be applied with particular regard for the protective legislative purpose that underpins them.[31] This purposive approach mandates a highly contextual analysis of individual working arrangements, notwithstanding the terms of any contract, such that where their substance betrays the vulnerabilities inherent in the typical employment relation—chiefly, subordination and dependence—a putative worker should be regarded as falling within the ambit of the relevant protective legislation.[32] The decision of the Supreme Court in *Uber BV v Aslam* establishes that it is this perspective from which courts and employment tribunals should address the question of worker status; indeed, it is precisely these features of work that entail that it 'cannot safely be left to contractual regulation'.[33]

The significance of the purposive approach becomes especially clear when it is understood that worker status not only governs access to individual entitlements, such as the minimum wage, but is also the threshold for the enjoyment of most *collective* labour rights. The relevant provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 ('TULRCA 1992') state that only workers are entitled to the Act's trade union-related protections and, importantly, the benefit of the statutory collective bargaining procedure.[34] In this respect, the state's positive obligation to secure individuals' freedom of association under article 11 of the ECHR, encompassing a specific trade union freedom which the European Court of Human Rights ('ECtHR') has recognised to include a right to collective bargaining,[35] may influence the scope and interpretation of domestic legislation. It is the reach of article 11 in relation to the right to bargain collectively, and its impact on the statutory requirement of personal service, with which *Deliveroo* was centrally concerned.

[28] ibid.
[29] Davidov, 'Who Is a Worker?' (n 3) 61–62.
[30] *Byrne Brothers (Formwork) Ltd v Baird* [2002] IRLR 96 (EAT) [17] (Underhill QC).
[31] Davidov, *A Purposive Approach* (n 9) 4.
[32] Alan Bogg, 'For Whom the Bell Tolls: "Contract" in the Gig Economy' (*Oxford Human Rights Hub*, 7 March 2021) <https://ohrh.law.ox.ac.uk/for-whom-the-bell-tolls-contract-in-the-gig-economy/> accessed 2 June 2024.
[33] *Uber* (n 5) [75] (Lord Leggatt); Atkinson and Dhorajiwala, 'After *Uber*' (n 9).
[34] Section 296 of the TULRCA 1992 accordingly defines 'worker' in terms substantially similar to the definition given in the ERA 1996.
[35] *Demir and Baykara v Turkey* (2008) 48 EHRR 54.

## III. BACKGROUND TO *DELIVEROO*

In November 2016, the IWGB formally approached Deliveroo to request that it be recognised on a voluntary basis for the purposes of collective bargaining in respect of a group of riders in London. Deliveroo rejected this request, and the union subsequently sought to invoke the statutory recognition procedure under schedule A1 of the TULRCA 1992. This scheme enables 'a trade union which is refused recognition by an employer to use the legal process to require the employer to enter into collective bargaining',[36] itself limited in scope to 'negotiations relating to pay, hours and holidays'.[37] Applications under schedule A1 are heard by the adjudicative body responsible for administering the recognition procedure, the Central Arbitration Committee ('CAC'), which must determine a number of preliminary matters in assessing the suitability of a request for recognition. Amongst these are the requirement that the union represents 'a group or groups of workers' within the meaning of section 296 of the TULRCA 1992.[38]

Following its preliminary assessment, the CAC concluded that the riders were not workers, with the result that the IWGB was not entitled to be recognised. The central obstacle to a finding that they enjoyed worker status was the existence of a broad substitution clause in their written contracts, introduced by Deliveroo shortly prior to the formal hearing. The CAC had found that the riders operated under an 'unfettered and genuine right of substitution' reflected 'both in the written contract and in practice'.[39] This was considered to militate against the requirement of personal service and so was 'fatal to the Union's claim'.[40] The CAC also relied on the substitution clause to dismiss an alternative argument based on the right to collective bargaining protected by article 11 of the ECHR. It thus rejected the submission that article 11, by virtue of the interpretative duty under section 3 of the Human Rights Act 1998 ('HRA 1998'), required a broad construction of section 296 of the TULRCA 1992 that minimised the significance of personal service in the worker status inquiry so as not to exclude the riders from the ambit of schedule A1.

Permission for judicial review of the CAC decision was granted by Simler J on the sole ground of article 11. The High Court dismissed this challenge, upholding the findings of the CAC.[41] The Court of Appeal rejected a further appeal, with Underhill LJ affirming that the CAC was entitled to regard the substitution clause as a 'decisive' 'contra-indicator of worker status' even under the somewhat looser test for determining when article 11 is engaged.[42] Both the High Court and the Court of Appeal found, crucially, that there had been no interference at all with article 11 because the riders were not, as ostensibly required by Strasbourg jurisprudence, in an 'employment relationship' with Deliveroo. The principal issues before the Supreme Court were, therefore, whether the riders fell within the scope of article 11 insofar as it protects a right to collective bargaining and, accordingly, whether the

[36] *R (Kwik-Fit Ltd) v Central Arbitration Committee* [2002] EWHC 277 (Admin) [6] (Elias J).
[37] TULRCA 1992, sch A1, para 3(3).
[38] ibid sch A1, para 1 (emphasis added).
[39] *Independent Workers' Union of Great Britain (IWGB) v RooFoods Ltd (t/a Deliveroo)* [2018] IRLR 84 (CAC) ('*Deliveroo* (CAC)') [104].
[40] ibid [101].
[41] *R (Independent Workers Union of Great Britain) v Central Arbitration Committee* [2018] EWHC 3342 (Admin), [2019] IRLR 249.
[42] *R (Independent Workers Union of Great Britain) v Central Arbitration Committee* [2021] EWCA Civ 952, [2022] 2 All ER 1105 ('*Deliveroo* (CA)') [77].

UK could be said to be under a positive obligation to legislate to prevent their exclusion from the statutory recognition procedure.[43] Given the Supreme Court's conclusions, it did not need to consider whether any restriction on article 11 was justified in accordance with the usual ECHR proportionality analysis, or the merits of issuing a declaration of incompatibility under section 4 of the HRA 1998 if section 296 of the TULRCA 1992 could not be read down. The primary focus of the following sections is the Court's interpretation of article 11 and its application to the particular working arrangements of the riders concerned. This article suggests that in neither area are the Court's conclusions entirely defensible.

## IV. Collective Bargaining and the Personal Scope of Article 11

The unanimous judgment of the Supreme Court was given by Lord Lloyd-Jones and Lady Rose, with whom Lord Briggs, Lord Stephens, and Lord Richards agreed. After briefly reviewing the essential factual findings of the CAC,[44] the Court proceeded first to consider the proper coverage of article 11 of the ECHR. This section contends that the interpretation adopted by the Court is, ultimately, unjustifiably narrow, in that it both lacks the support of ECtHR jurisprudence and is normatively unsatisfactory in view of the features of modern platform work. The result is to deny platform workers the protection of the Convention in circumstances where they are arguably most in need of it.

Article 11 protects both a general right to freedom of association, enjoyed by '[e]veryone', and a more specific right to form and join trade unions for the protection of one's interests.[45] The content of this trade union freedom has been acknowledged by the ECtHR to import a number of other rights, including a right that trade unions 'should be heard' by employers,[46] a right to non-discrimination on the basis of trade union membership,[47] and—in a more recent development—the right to strike.[48] Significantly, despite its longstanding insistence to the contrary, the Strasbourg Court accepted in *Demir and Baykara v Turkey* that a distinct right to collective bargaining now also forms, in principle, one of the 'essential elements' of the trade union freedom.[49] The Supreme Court's task in *Deliveroo* was to determine whether this aspect of article 11 was engaged in view of the riders' working arrangements and, if so, what the consequence of this would be.

On one view, the trade union freedom should, as Mark Freedland and Nicola Kountouris maintain, be conceived as 'essentially part of or continuous with' the general right to freedom of association.[50] This suggests that the right to collective bargaining forms simply one element of a right enjoyed by 'everyone', irrespective of employment status, so that any interference with it will automatically engage article 11. A conflicting approach may be identified in a more 'discrete' interpretation of article 11 which understands the collective labour

[43] *Deliveroo* (UKSC) (n 8) [10] (Lord Lloyd-Jones and Lady Rose).
[44] ibid [21]–[36].
[45] Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR') art 11(1).
[46] *Swedish Engine Drivers' Union v Sweden* (1976) 1 EHRR 617 [40].
[47] *Wilson v United Kingdom* (2002) 35 EHRR 20.
[48] *National Union of Rail, Maritime and Transport Workers v United Kingdom* (2015) 60 EHRR 10. It should be noted that the ECtHR recognised the right to strike to be 'clearly protected' by article 11 of the ECHR, though declined to hold that it was one of its core or essential aspects: [84].
[49] *Demir* (n 35) [154].
[50] Mark Freedland and Nicola Kountouris, 'Some Reflections on the "Personal Scope" of Collective Labour Law' (2017) 46 Industrial Law Journal 52, 55.

rights that it protects to operate only in more limited circumstances.[51] On this latter view, the right to bargain collectively will not be engaged unless the individuals in question can be characterised as 'dependent employees', or at least where their working arrangements reveal them to be in a position other than one of self-employment.[52]

The reasoning of the Court in *Deliveroo* was ultimately governed by the discrete interpretation. The Court commenced its analysis with the assertion that the trade union freedom under article 11 represents merely a 'specific sub-set of the general freedom of association', applicable to a narrower class of individuals.[53] As such, the Court dismissed the argument of counsel for the IWGB that the reach of article 11 should be interpreted on the wider basis that the 'right to bargain collectively is enjoyed by every individual with an occupational interest to protect'.[54] In so doing, it rejected the significance of *Manole v Romania*,[55] a Strasbourg authority appearing to suggest that the right extends also to the genuinely self-employed. There, the ECtHR found that the inability of a group of self-employed farmers to establish a trade union under Romanian law constituted an interference with their right to collective bargaining, albeit one that was justified under article 11(2) of the ECHR. However, the Supreme Court indicated that the judgment could be adequately rationalised as an application not of the trade union freedom but of the more general right to freedom of association. On this basis, the Court determined that the decision did not detract from the necessity of the discrete approach.[56]

Central to the Court's interpretation of the scope of article 11 was the notion that the right to collective bargaining, and the trade union freedom more widely, is engaged in the exclusive context of an 'employment relationship'.[57] In reaching this conclusion it relied principally on the decision of the ECtHR in *Sindicatul 'Păstorul Cel Bun' v Romania* ('*The Good Shepherd*')[58] in which the ECtHR suggested that this is the 'only [material] question' in assessing whether members of the Romanian clergy enjoyed the right to form a recognised trade union.[59] There, the existence of an employment relationship was said to depend on the application of 'relevant international instruments', chief amongst which included the criteria set out in Recommendation 198 of the International Labour Organization ('ILO').[60]

Therefore, *Deliveroo* represents clear authority for the principle that platform workers must stand in an employment relationship as a fundamental precondition of access to the right to bargain collectively under article 11 of the ECHR. The Court's endorsement of the discrete approach to article 11 is, admittedly, not without some justification. As the Court of Appeal emphasised, a wider interpretation of the trade union freedom risks an overly artificial route for determining the reach of the right to collective bargaining, detached from a more focused inquiry into the presence of an employment relationship.[61] Moreover, obvious practical difficulties are likely to be faced if the right may be asserted by 'everyone' or even by

[51] Joe Atkinson, 'Employment Status and Human Rights: An Emerging Approach' (2023) 86 MLR 1166, 1181–82.
[52] Freedland and Kountouris (n 50); ibid 1182.
[53] *Deliveroo* (UKSC) (n 8) [37] (Lord Lloyd-Jones and Lady Rose).
[54] ibid [38].
[55] App no 46551/06 (ECtHR, 16 June 2015).
[56] *Deliveroo* (UKSC) (n 8) [45]–[46] (Lord Lloyd-Jones and Lady Rose).
[57] ibid [39]–[46].
[58] (2014) 58 EHRR 10.
[59] ibid [141].
[60] ibid [142]; ILO Recommendation R198: Employment Relationship Recommendation (Recommendation Concerning the Employment Relationship) (95th Conference Session Geneva 15 June 2006) ('ILO Employment Relationship Recommendation'). The content of the Recommendation is discussed in Section V below.
[61] *Deliveroo* (CA) (n 42) [52] (Underhill LJ).

those with an 'occupational interest to protect',[62] and the discrete interpretation aligns with the insistence in domestic law that only statutory workers are entitled to collective labour protection.[63] Indeed, the statutory worker concept, with its emphasis on a contract to perform work personally, is central to the 'legal structure of collective labour law in the UK'; a narrower construction of the trade union freedom represents a more 'modest', and perhaps therefore realistic, means of extending its coverage to platform workers.[64]

Nevertheless, this section contends that the Supreme Court in *Deliveroo* adopted an unduly restrictive understanding of the right to collective bargaining. Its interpretation ultimately lacks the definitive support of Strasbourg jurisprudence and is liable arbitrarily to exclude platform workers, for whom the right is especially significant, from its remit.

In considering the rulings of the ECtHR and the international materials on which it has relied in construing the personal scope of article 11, it is not obvious that the right to collective bargaining necessarily depends on the prior existence of an employment relationship. The decision in *Sigurjonsson v Iceland*,[65] for instance, appears to approve a broader, 'continuous' approach. The Supreme Court dismissed this as irrelevant to *Deliveroo* on the basis that it involved the application of the general right to freedom of association, as distinct from the trade union freedom.[66] However, it did not address the ECtHR's explicit remark in that case that the trade union freedom 'is an aspect of the wider right to freedom of association, rather than a separate right'.[67] The ILO itself, on whose instruments the Strasbourg Court so heavily relied in *The Good Shepherd*, has also indicated that collective labour rights, such as the right to collective bargaining, form aspects of freedom of association held by all 'without distinction'.[68] Finally, it is significant, and should not be understated, that the employment relationship test has not been applied by the ECtHR in a decision beyond the specific facts of *The Good Shepherd*.[69]

A more compelling objection, however, is normative in nature: the nature of platform work as an increasingly prevalent form of atypical working necessitates a broader conception of article 11. *Deliveroo* thus illustrates, more fundamentally, 'a failure of the law to keep pace with changing employment practices'.[70] It is in the particular context of platform work that the danger of sham or false self-employment—the tendency of putative employers to mischaracterise the nature of a given employment relation so as to contract out of statutory regulation—is most pronounced. Many platform workers, such as the Deliveroo riders, may be virtually indistinguishable from statutory workers (and thus, on a purposive view, worthy of collective labour protection) but for the stringent requirement of personal service in English law. If the domestic statutory definition of 'worker' serves to exclude those in material need of the right to bargain collectively, it seems inappropriate that a similarly restrictive barrier should exist at

[62] *Deliveroo* (UKSC) (n 8) [38] (Lord Lloyd-Jones and Lady Rose).
[63] Alan Bogg and Michael Ford, 'Employment Status and Trade Union Rights: Applying Occam's Razor' (2022) 51 Industrial Law Journal 717, 728–29.
[64] Alan Bogg, 'Taken for a Ride: Workers in the Gig Economy' (2019) 135 LQR 219, 220–21.
[65] (1993) 16 EHRR 462.
[66] *Deliveroo* (UKSC) (n 8) [42] (Lord Lloyd-Jones and Lady Rose).
[67] *Sigurjonsson* (n 65) [32].
[68] ILO Convention C087: Freedom of Association and Protection of the Right to Organise Convention (Convention concerning Freedom of Association and Protection of the Right to Organise) (31st Conference Session 9 July 1948, entered into force 4 July 1950) 68 UNTS 17, art 2.
[69] Joe Atkinson and Hitesh Dhorajiwala, '*IWGB v RooFoods*: Status, Rights and Substitution' (2019) 48 Industrial Law Journal 278, 284.
[70] Keith Ewing, 'Judicial Backpedalling on Trade Union Rights in the Gig Economy: Deliveroo in the United Kingdom Supreme Court' (*Institute of Employment Rights*, 13 December 2023) <https://www.ier.org.uk/comments/judicial-backpedalling-on-trade-union-rights-in-the-gig-economy/> accessed 3 June 2024.

the level of the ECHR. This is not to suggest that these individuals should enjoy the automatic protection of the Convention; after all, there must still be an unjustified interference with the right to collective bargaining in a context in which states are recognised as possessing a particularly wide margin of appreciation.[71] The Supreme Court was not prepared in *Deliveroo*, for example, to accept the existence of a positive obligation to secure a general right to *compulsory* collective bargaining.[72] Therefore, the riders' exclusion from schedule A1 of the statutory recognition procedure would not have constituted an interference with article 11 even if they fell within its scope. However, the consequence of the discrete interpretation of article 11 is to deny individuals in a substantially similar position to statutory workers even *prima facie* access to the right to form and join trade unions itself. As Keith Ewing observes, the result is to leave the riders in a position where they are unable to promote their substantial occupational interests in *any* meaningful capacity by means of collective action.[73] The somewhat artificial quality of this reasoning is reflected in the Court of Appeal's 'awkward' suggestion that to prevent a group of self-employed individuals from forming a trade union might interfere with their *general* freedom of association, notwithstanding the absence of a right under article 11 to 'associate as a trade union'.[74]

The restriction of access to the trade union freedom under article 11 to those in an employment relationship also conflicts with what has been recognised to be a growing understanding of collective labour rights as distinctly *human* rights.[75] Ordinarily, the enjoyment of human rights, by their very nature, does not turn on the employment status of those whom they are minded to protect.[76] Valerio De Stefano further suggests that vulnerability to the managerial prerogatives that employers hold over employees is amplified in respect of non-standard work, due to its precarious nature, in view of which full access to the right to collective bargaining is 'essential to secure [the] protection of... human dignity at the workplace'.[77] The characteristics of platform work, as previously elaborated, only reinforce this perspective.

Ultimately, therefore, the formulation proposed and rejected in *Deliveroo*—that the right to collective bargaining ought to extend to those with occupational interests to protect—seems a more appropriate articulation of the personal scope of article 11. The Supreme Court's focus on the presence of an employment relationship sits somewhat uneasily with the general jurisprudence of the ECtHR and its recent acknowledgement, even in one of its more restrictive decisions, that article 11 of the ECHR 'safeguards a trade union's freedom to protect the occupational interests of its members by collective action'.[78] It is also arguably inconsistent with the nature of the right as a human right and denies its benefit to platform workers already excluded from its ambit by a restrictive domestic statutory definition.

[71] *Deliveroo* (UKSC) (n 8) [44] (Lord Lloyd-Jones and Lady Rose).
[72] ibid [139].
[73] Ewing (n 70).
[74] Atkinson (n 51) 1182, fn 126; *Deliveroo* (CA) (n 42) [51].
[75] Atkinson (n 51) 1181; Valerio De Stefano, 'Non-Standard Work and Limits on Freedom of Association: A Human Rights Based Approach' (2017) 46 Industrial Law Journal 185.
[76] De Stefano (n 75) 195.
[77] ibid 198.
[78] *Unite the Union v United Kingdom* (2016) 63 EHRR SE7 [53]. In *Unite the Union*, the ECtHR dismissed the trade union's application that the abolition of the Agricultural Wages Board of England and Wales, the primary avenue for collective bargaining in the agricultural sector, constituted an interference with article 11 of the ECHR. This was so, it suggested, because agricultural workers remained free to seek to bargain collectively with their employers on a voluntary basis, even in circumstances where this would be, in most practical respects, a virtual impossibility: [59]–[61]. In reaching this outcome, however, the Strasbourg Court attached significance to the fact that, in contrast to the riders in *Deliveroo*, these workers continued at least to enjoy the benefit of other aspects of article 11, such as the right of their unions to be heard by employers: [65].

## V. Employment Status: Rights to Substitution and the Existence of an Employment Relationship

Having determined that the right to bargain collectively will be engaged only where there exists an employment relationship, the Supreme Court then directly applied this test to the working arrangements of the riders in *Deliveroo*. The principal argument of this section is that, even accepting this to be the appropriate test, it was nevertheless improperly applied. In placing undue emphasis on the riders' ostensible right of substitution, *Deliveroo* appears tacitly to endorse the retreat of a purposive approach to employment status of the kind considered and strongly approved by the Court in *Uber*.

The Court agreed with the ECtHR's assessment in *The Good Shepherd* that whether the individuals' working arrangements gave rise to an employment relationship for the purposes of article 11 was to be determined primarily by reference to the criteria set forth in the ILO Employment Relationship Recommendation.[79] Although the Recommendation is not binding as a matter of domestic law, the Court concluded that, as a result of the reliance placed on the Recommendation by the Strasbourg Court in *The Good Shepherd*, it had been expressly 'incorporated into the Convention test for the identification of an employment relationship under art 11'.[80] The language of this instrument is, in many respects, highly purposive. The Preamble to the Recommendation foregrounds 'the objectives of decent work', calls for vigilance for attempts to 'disguise the employment relationship', and accentuates the need to ensure sufficient protection of 'the most vulnerable workers' in national law and practice.[81] Its substantive content provides that the inquiry must be 'guided primarily by the *facts* relating to the performance of work and the remuneration of the worker', irrespective of the contractual terms under which the worker operates.[82] At paragraph 13, the Recommendation specifies a range of relevant indicators of an employment relationship, including the degree of control and subordination, the level of integration, and any obligation of personal service. Where 'one or more' of these indicators are present, an employment relationship should be presumed.[83]

Outwardly, therefore, even within the more restrictive interpretation of article 11 of the ECHR, the Supreme Court enjoyed sufficiently broad latitude to employ a highly contextual approach to assessing the employment status of the riders. As the Court itself noted, the notion of an employment relationship under article 11 is an 'autonomous concept' divorced from the strictures of the domestic statutory worker definition.[84] As the CAC, High Court, and Court of Appeal had done, the Supreme Court identified as the central difficulty for the riders the extent of their obligation to provide services to Deliveroo personally.

It is helpful at this stage, in that connection, to summarise the CAC's and Supreme Court's findings as to the nature and operation of the substitution clause present in the riders' written contracts. The thrust of the ILO Recommendation, and of analogous jurisprudence in domestic law,[85] is that the mere existence of an alleged contractual right to substitute is not

[79] *Deliveroo* (UKSC) (n 8) [41], [57]–[60] (Lord Lloyd-Jones and Lady Rose).
[80] ibid [61].
[81] ILO Employment Relationship Recommendation (n 60) (emphasis added).
[82] ibid para 9 (emphasis added).
[83] ibid para 11(b).
[84] *Deliveroo* (UKSC) (n 8) [61], [65] (Lord Lloyd-Jones and Lady Rose).
[85] ibid [50]–[56].

of itself fatal to a finding of an employment relationship or worker status. This is particularly so where such a right is either not genuine, in the sense of being a partial or complete sham, or where personal service remains the 'dominant feature' of individual working arrangements.[86] Therefore, the focus throughout the appellate history of *Deliveroo* has been on the degree to which the riders enjoyed a *genuine* right of substitution which materialised in practice.

Deliveroo emphasised in its contract with the riders that it was 'not prescriptive' about any decision to appoint a substitute.[87] The CAC observed that the substitution clause had indeed been utilised by some riders, albeit that only a 'few, if that', did so as most saw little need to.[88] Of the 100 riders who formed the bargaining unit proposed by the IWGB to the CAC, the Supreme Court was able concretely to identify only two such instances: one rider who 'regularly engaged a substitute' and another who had done so on an apparently isolated occasion.[89]

The riders' right to appoint a substitute was reflected, therefore, in the actual practice of their working arrangements in an extremely limited—almost statistically insignificant—manner. However, this did not preclude the Supreme Court from ultimately finding that '[s]uch a broad power of substitution is, on its face, *totally inconsistent* with the existence of an obligation to provide personal service which is essential to the existence of an employment relationship within art 11'.[90] The riders were not entitled to the right to collective bargaining under article 11, as they fell altogether beyond its scope.

It may be too early to conclude that this outcome, of itself, heralds a decisive retreat of the purposive approach mandated by *Uber* and mirrored in the terms of the ILO Recommendation.[91] However, what this apparent departure from that approach does suggest is that the observation of some commentators that *Uber* had sounded the 'death knell for the written contract' in the determination of employment status is perhaps premature.[92] The reasoning by which the Supreme Court judged that the riders were not in an employment relationship with Deliveroo is open to objection on two main grounds.

First, the Court appears to have paid insufficient regard to the 'primacy of facts' principle which forms the essence of any purposive employment status inquiry,[93] obliging courts and tribunals to assess the practical substance of any contractual provision as it applies on the ground. The Supreme Court suggests that it is adequate that a broad substitution clause exists, and that it has been used on at least one prior occasion, for it automatically to negate the

[86] *James v Redcats (Brands) Ltd* [2007] IRLR 296 (EAT) [67] (Elias J P); *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] 4 All ER 745; *Pimlico Plumbers* (n 5); *Uber* (n 5).
[87] *Deliveroo* (UKSC) (n 8) [25] (Lord Lloyd-Jones and Lady Rose).
[88] ibid [28].
[89] ibid [29].
[90] ibid [69] (emphasis added).
[91] While the focus in *Uber* was one of domestic statutory interpretation, it has also been read to endorse and inform a generally purposive approach to the determination of employment status in all relevant contexts: see for example Bogg and Ford, 'Employment Status and Trade Union Rights' (n 63) 740; *Deliveroo* (UKSC) (n 8) [56] (Lord Lloyd-Jones and Lady Rose).
[92] Alan Bogg and Michael Ford, 'The Death of Contract in Determining Employment Status' (2021) 137 LQR 392, 399; Bogg, 'For Whom the Bell Tolls' (n 32).
[93] Nicola Kountouris, 'Not Delivering: The UK "Worker" Concept before the UK Supreme Court in *Deliveroo – IWGB v CAC and Another* [2023] UKSC 43' (2024) 0(0) European Labour Law Journal <https://doi.org/10.1177/20319525241242796> accessed 28 September 2024; Alan Bogg, 'Taken for a Ride, Again: Deliveroo Riders in the Supreme Court' (*Oxford Human Rights Hub*, 5 December 2023) <https://ohrh.law.ox.ac.uk/taken-for-a-ride-again-deliveroo-riders-in-the-supreme-court/> accessed 4 June 2024.

presence of any employment relationship. Such 'contractual tunnel vision'[94] forgoes a more sensitive examination of the riders' working arrangements, viewed holistically and with regard to the statistically meagre nature of the exercise of the right.[95] The Court also fails to offer a convincing answer to what the CAC termed the 'substitution conundrum':[96] why would Deliveroo riders exercise their theoretical substitution right instead of simply declining to log onto the app? Conversely, why would Deliveroo afford its riders absolute discretion in appointing a substitute of their choosing, given the extensive nature of the training with which they were each individually provided?

Additionally, despite acknowledging the employment relationship test under article 11 to be a freestanding concept unconstrained by provisions of domestic law, the Court seems to have effectively equated it with the statutory worker status inquiry. This is evident insofar as the apparent absence of an obligation of personal service was treated, of itself, as conclusively fatal to the riders' claim. The ILO Recommendation criteria note, however, that it is but one relevant indicator to be considered alongside a range of other factors.[97] Whereas the Court identified a number of other factors pointing to the lack of an employment relationship in *Deliveroo*, such as the ability of riders to undertake work for competitors, limited mutuality of obligation, and a lack of integration,[98] it did not consider any factors favouring inclusion. It might reasonably have considered the fact, recognised by the CAC, that delivery times are monitored on pain of disciplinary action and dismissal.[99] It might also have examined the inability of prospective riders to negotiate contracts differing from Deliveroo's standard terms, as would be expected of genuinely independent contractors.[100] Indeed, in *National Union of Professional Foster Carers v Certification Officer*,[101] the Court of Appeal did not regard the absence of a contract—a requirement of section 296 of the TULRCA 1992—as fatal to the existence of an employment relationship in the context of article 11 of the ECHR when applying the same test. The simple presence of a substitution clause, even one that is not a complete sham, should not have denied such a finding in respect of the riders in *Deliveroo*.

*Deliveroo* ultimately illustrates the ease with which broadly framed substitution clauses may be permitted to deny platform workers access not only to individual entitlements but also to methods of collective redress, such as the right to collective bargaining. This is so notwithstanding the possibility that any such clause might be of practical irrelevance to the vast majority of a given workforce. To this extent, it marks the tentative retreat of purposivism and the resurgence of a worker status inquiry that is concerned principally with the written terms of the relevant contract. In so doing, it contributes to the further marginalisation of both the individual and collective aspects of non-standard work. The interpretation of personal service offered by the Supreme Court is in essence, as Bogg suggests, 'tantamount to permitting contracting-out of employment protection'.[102] Inasmuch as it is conceivable that Deliveroo's sole purpose in introducing the substitution clause was to deny the riders worker

[94] Kountouris (n 93).
[95] Atkinson and Dhorajiwala, 'Status, Rights and Substitution' (n 69) 294.
[96] *Deliveroo* (CAC) (n 39) [98].
[97] Ewing (n 70).
[98] *Deliveroo* (UKSC) (n 8) [71]–[72] (Lord Lloyd-Jones and Lady Rose).
[99] *Deliveroo* (CAC) (n 39) [84].
[100] Bogg, 'Taken for a Ride, Again' (n 93); Gwyneth Pitt, '"The Simple Things You See Are All Complicated": Thoughts on Deliveroo' (*UK Labour Law Blog*, 15 January 2024) <https://uklabourlawblog.com/2024/01/15/the-simple-things-you-see-are-all-complicated-thoughts-on-deliveroo-by-gwyneth-pitt/> accessed 5 June 2024.
[101] [2021] EWCA Civ 548, [2021] 4 All ER 826.
[102] Bogg, 'Taken for a Ride' (n 64) 221.

status,[103] it has, therefore, successfully achieved this aim. This state of affairs is not only something that the Court had been so keen to avoid in *Uber*, but which it had also identified as the very normative foundation of the purposive approach.[104]

## VI. Reform and Future Directions: Platform Work and Personal Service

The final brief observation of this article is that *Deliveroo*, and its attachment to the requirement of personal service as an essential feature of both the statutory worker concept and the notion of an employment relationship within article 11 of the ECHR, plainly demonstrates the necessity of statutory reform. Indeed, it may now be that personal service has become so entrenched in the general employment status jurisprudence that, if platform workers are to receive adequate legal protection, statutory reform is the 'only possible solution'.[105] The fundamental message of *Deliveroo* is that platform workers may easily be denied the protection of the ECHR for lack of personal service, which offers little redress in view of a restrictively interpreted statutory definition to the same effect. In this sense, the judgment vividly accentuates an anxiety that the Taylor Review was minded to address: that the obligation of personal service often represents, particularly where platform work is concerned, an 'automatic barrier to accessing basic employment rights'.[106]

An obvious consequence of *Deliveroo*, in the absence of reform, is a likely increase in platform companies' reliance on substitution clauses as a straightforward means of evading the statutory obligations owed to potential workers.[107] The Supreme Court's rather limited interpretation of article 11 also permits such terms to obstruct efforts on the part of platform workers to organise and demand that these companies enter into structures of collective bargaining.

One solution to this dilemma might be to legislate to abolish the requirement of 'personality in work' entirely.[108] It is submitted that this is not a desirable outcome. As has been seen already, too great an adherence to the notion of personal service risks exclusionary effects; nevertheless, it should not be forgotten that it serves a useful purpose in distinguishing between different kinds of work relations[109] and in reconciling the competing demands of 'universalism' and 'selectivity' in establishing the coverage of employment law.[110]

What is required, therefore, is a reassessment of personal service that preserves its value as an indicator of worker status in the platform economy but which does not, in the presence of other factors favouring inclusion, serve to deny statutory employment protection altogether. Relevant insights may, in this respect, be drawn from the European Commission's recently proposed Platform Work Directive.[111] The Directive proposes a 'legal presumption that an employment relationship exists between the digital labour platform and a person performing platform work', based largely on the degree of control to which the platform subjects

[103] *Deliveroo* (CAC) (n 39) [99].
[104] *Uber* (n 5) [76] (Lord Leggatt).
[105] Pitt (n 100).
[106] Taylor Review (n 1) 36.
[107] Kountouris (n 93).
[108] ibid.
[109] ibid.
[110] Guy Davidov, 'Setting Labour Law's Coverage: Between Universalism and Selectivity' (2014) 34 OJLS 543.
[111] Commission, 'Proposal for a Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work' COM (2021) 762 final.

the putative worker.[112] Significantly, it suggests that a substitution clause will not negate worker status where 'the freedom... to use subcontractors or substitutes' is effectively restricted.[113] Perhaps the greatest strength of a test of this kind lies is its accommodation of a more explicitly purposive approach, circumventing the 'automatic incompatibility that is assumed between an unfettered right of substitution and an obligation of personal service'.[114]

Beyond a more limited role for personal service, and the level of control that platform companies exercise over putative workers, an employment relationship should generally be presumed where individuals lack the ability to resist the unilateral imposition of contractual terms. This, too, has its basis in a purposive conception of statutory regulation; Bogg and Buendia emphasise that 'gig employers leverage their structural dominance' in the design of 'take it or leave it' written contracts,[115] and the Supreme Court acknowledged in *Uber* that it is this fact that 'gives rise to the need for statutory protection in the first place'.[116]

More generally, reform must address the various features of platform work that often present as ostensible characteristics of genuine independence and entrepreneurship—such as flexibility in working time or in choosing whether to work at all—but which are in reality often highly 'fictitious' in nature.[117] A chasm typically exists between the formal aspects of the written contract and the informal practice of platform work, and it is for this reason that repeated reference has been made to the intrinsic value of a purposive approach. Statutory indicators of worker status should leave as little room as possible for courts and tribunals to engage in a formalistic employment status inquiry that prizes any one factor over the *substance* of a given individual's working arrangements.[118]

## VII. Conclusion

In the light of the vulnerabilities inherent in modern platform work, *Deliveroo* offered a valuable opportunity for the Supreme Court to clarify the personal scope of collective labour law. Ultimately, this is an opportunity which it largely declined to undertake. The intention of this article has been to demonstrate that the Supreme Court advanced a more restrictive interpretation of article 11 than strictly necessary by limiting access to the right to bargain collectively to individuals in an 'employment relationship'. Even applying this test, however, in its emphasis on the riders' contractual right of substitution, the Court arguably misconstrued the relevant ILO criteria and signalled the at least temporary retreat of what has come to be understood as the necessity of a distinctly purposive approach to the worker status inquiry. More broadly, *Deliveroo* might be said to underscore the limits of employment status litigation as a means by which to bring platform workers within the protective fold of employment law.

The effect of *Deliveroo* is to enshrine the obligation of personal service as an essential precondition of access to both the individual and collective dimensions of employment law. However, the decision is of more general significance in that it demonstrates that the law on

[112] ibid art 4.
[113] ibid art 4(2)(d).
[114] Atkinson and Dhorajiwala, 'Status, Rights and Substitution' (n 69) 293.
[115] Bogg and Buendia (n 2) 75.
[116] *Uber* (n 5) [76] (Lord Leggatt).
[117] Annika Rosin, 'The Right of a Platform Worker to Decide Whether and When to Work: An Obstacle to their Employee Status?' (2022) 13(4) European Labour Law Journal <https://doi.org/10.1177/20319525221128887> accessed 28 September 2024.
[118] Ewing (n 70).

employment status has failed to keep pace with significant advances in the modern labour market and the dramatic growth in platform work. Reform that reduces the statutory relevance of personal service, and that reinstates a contextual approach centred on the substance of individual working arrangements, is urgently required.