SUMMARY

2020/43 ECJ clarifies 'worker' status under EU law in gig economy ruling (UK)

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The European Court of Justice (ECJ) has ruled that, while it is for national courts to make decisions about employment status, a courier working for Yodel in the UK appeared to have been correctly classified as self-employed, given the latitude he had over accepting jobs, working for competitors, providing substitutes and deciding his work schedule. The crucial factors were independence and subordination.

Background

There has been a steady stream of claims in the UK in recent years from workers in the gig economy who have been arguing that they have been misclassified as self-employed when they should be treated as 'workers' for employment rights purposes. The trend has generally been for gig economy workers to succeed in showing they have worker status. However, in *Uber BV – v – Aslam [2018] EWCA Civ 2748* the Court of Appeal was split 2:1 on this point and the case of *Independent Workers' Union of Great Britain – v – Roofoods Ltd t/a Deliveroo* TUR1/985 (2016) was a notable exception to the prevailing trend.

There have been multiple cases about the employment status of individuals working in the gig

economy throughout Europe, but the ECJ has not, until now, been called upon to address the issue of whether they are 'workers' under EU law directly.

Facts

This case was referred to the ECJ by the Watford Employment Tribunal (ET). It involved a Yodel parcel courier (B) who argued that, although he had signed a contract stipulating that he was a self-employed independent contractor, he was in fact a 'worker' for the purposes of the UK's Working Time Regulations 1998 (WTR). If successful, this would have entitled him, among other things, to paid holidays.

Although B chose to work exclusively for Yodel, he was free to deliver parcels for third parties at the same time. He was able to appoint a substitute if they had appropriate skills and qualifications, did not have to accept any parcels and could set a limit on the number of them he was willing to deliver. B used his own vehicle and mobile phone but had to use Yodel's handheld delivery device (on which he received training). Parcels needed to be delivered between certain hours, but couriers could use their discretion over the exact timing, route and order in which deliveries were made.

The ET observed that the WTR define a worker as someone who undertakes to do or perform work 'personally', yet the Yodel couriers were not in fact required to do so because they had the right to ask someone else to do the deliveries for them. In line with the judgment of the UK Supreme Court (SC) in *Pimlico Plumbers Ltd – v – Smith* [2018] UKSC 29, such an individual could not be a 'worker' for the purpose of UK law. Nonetheless, the ET asked the ECJ for a ruling on whether the WTR personal service requirement was compatible with the requirements of the Working Time Directive (WTD). In the event of the ECJ deciding Yodel couriers should be classified as workers for WTD purposes, the ET also asked for guidance on how to calculate working time in a situation where couriers could be delivering parcels for multiple businesses at the same time and organising their activities as they preferred.

The ECJ's decision

Surprisingly, the ECJ issued a 'reasoned order' rather than a judgment. This is still a binding decision, but it means that the ECJ considered the legal issues to have already been decided by its existing case law, or that the answers involved no reasonable doubt.

While the WTD does not define the concept of 'worker', the ECJ noted that previous judgments had established the concept to have an autonomous meaning specific to EU law. The ECJ also noted that being classified as an independent contractor under national law does

not prevent a person being classified as an employee within the meaning of EU law, "if his independence is merely notional, thereby disguising an employment relationship".

The ECJ considered that the WTD does not cover independent contractors who are afforded the discretion to:

provide substitutes;
choose whether to accept tasks, or unilaterally set the maximum number of those tasks;
provide services to any third party, including direct competitors; and
fix their own working hours within certain parameters and tailor their time to suit their personal convenience, rather than solely the interests of the putative employer.

These factors pointed towards self-employment, provided that:

the independence of the contractor does not appear to be fictitious; and
it is not possible to establish the existence of a relationship of subordination between that person and their putative employer.

On the facts of this case, the ECJ concluded that it was ultimately for the referring national court to decide if B should be classified as a worker because it required an assessment of all the circumstances. However, it pointed out that:

Yodel couriers appeared to have a "great deal of latitude" in relation to the company.
The court should examine the consequences of this and ask whether, despite all this apparent discretion, the courier's independence is merely notional.
In addition, the court would need to see if it was possible to establish a subordinate relationship.
Yodel only had limited control over the choice of any substitute. It could not give precedence to its own preferences.
B had an absolute right not to accept the tasks assigned to him and could himself set a binding limit on the number of tasks which he was prepared to perform. He could also work for direct competitors at the same time.
Although it was true that deliveries needed to be made during specific time slots, that was inherent in the very nature of a delivery service.

Taking account of all these factors, the ECJ observed that B's independence did not *appear* to be fictitious and there did not *appear* to be a relationship of subordination between him and

Yodel.

Commentary

The UK courts have tended to focus on three key issues when determining whether an individual has 'worker' status – substitution, control and whether the individual can really be said to be running their own business of which the putative employer is a customer.

On the current UK tests, if the individual has an unfettered right to appoint a substitute, they are not a 'worker' – this was the decisive factor in the *Deliveroo* case (above) where delivery riders were found to be self-employed. In contrast, in the *Pimlico Plumbers* case, the absence of an express right of substitution, combined with the degree of control exercised by the company and the conclusion that the individuals were not really running their own business, proved decisive in finding that they were properly classified as 'workers'. Similar factors were relevant in the *Uber – v – Aslam* case.

In the case at hand, there seems little doubt that Yodel couriers are not workers for the purposes of UK law, given the very broad right of substitution, the limited control Yodel exercises over them, and their ability to provide services for multiple parcel delivery companies simultaneously. It will be welcome confirmation for gig economy operators that the EU law angle that those pursuing such claims had hoped to fall back on has been largely ruled out by the ECJ's ruling. The questions of 'independence' and 'subordination' may become a greater focus in future UK cases, however, and are likely to be considered by the SC when it rules on *Uber – v – Aslam*. Generally, it seems it will become more difficult for these sorts of worker status cases to succeed where there are clear rights of substitution and a high degree of latitude in the operation of the working relationship.

Comments from other jurisdictions

Belgium (Pieter Pecinovsky, Van Olmen & Wynant): The qualification of the employment status of platform workers is also a hot topic in Belgium. In 2018 the Administrative Commission for the determination of the nature of the employment relationship ruled twice that Deliveroo riders were deemed to be employees and not independent workers (there is no intermediate category of workers as in the UK). The Commission did so looking at eight specific criteria for the transport of goods and logistics sector which create a rebuttable presumption that there is an employment relationship if the situation fulfils the majority of criteria. In that case, the Commission said that the Deliveroo riders do not bear any financial risk; have no responsibilities and decision-making power over financial resources of the company; have no decision-making power on purchasing policy; have no power of decision regarding pricing

policy or delivery rates; have no obligation to achieve a certain result in respect of the agreed work; and do not present themselves as a company compared to third parties. In contrast, the riders have the possibility to recruit people and they are the owner of means of transport (bicycle). As they fulfilled six of the eight criteria there was a presumption that the Deliveroo riders were employees. The next step is to see whether the presumption can be rebutted by looking at the four general criteria: the will of the parties; the free organisation of the work; the free organisation of the working time; and the hierarchical control of the client/employer over the rider. Also, these criteria pointed to an employment relationship. The Commission pointed to the algorithms which sanction riders who are not available when Deliveroo wants them to be and to the strict safety and delivery instructions that would sanction riders who do not follow the exact itinerary as prescribed by the app. However, in the summer of 2019 the Labour Court of Brussels annulled these rulings because of procedural reasons. The court will investigate the nature of the employment relationship and a judgment is expected by September 2021. In the meanwhile, the public labour prosecutor is also bringing Deliveroo before the labour court because its own investigation has found that Deliveroo should have registered its riders as employees at the National Office of Social Security. A long story made short: the discussion is far from over in Belgium.

Germany (Dominik Ledwon and Stephan Sura, Luther Rechtsanwaltsgesellschaft mbH): The ECJ Order of 22 April 2020 basically reflects the legal situation in Germany. For years, there hasn't been any decision by a German Labour Court regarding the question whether gig economy workers perform work as employees under an employment relationship or are to be classified as self-employed. Most likely, the problem could have been argued with drivers for Uber in Germany. However, the question did not make its way to the Labour Courts due to previous administrative and civil court proceedings which deprived Uber's classic business model of its foundation because of violations of the Passenger Transportation Act (*Personenbeförderungsgesetz*, "PbefG") (Oberverwaltungsgericht Hamburg 24 September 2014 Case 34 3 Bs 175/14; Oberlandesgericht Frankfurt am Main 9 June 2016 Case 6 U 73/15; EELC case report 2018/9 – Germany (Ledwon). As a result, Uber restructured its services in Germany into pure agency services for taxi drivers or chauffeurs ('UberX', 'Uber TAXI').

Under German employment law, there is a great chance that gig economy workers who perform work for digital platforms are to be considered as self-employed in most cases as well. A legal definition of 'employee' can be found in Section 611a of the German Civil Code (*Bürgerliches Gesetzbuch*, "BGB"). According to Section 611a, an employee is obliged by the employment contract to perform work for another person, subject to his or her instructions and in personal dependency. The right to issue instructions of the employer may relate to the content, performance, time and place of work. Thus, those who are not essentially free to

organise their work and determine their working hours are seen as employees. In addition, an employee is usually obliged to perform the work personally and cannot provide substitutes. In order to determine whether an employment contract exists, an overall assessment of all circumstances shall be made. If the reality of the working relationship indicates that it is an employment relationship the designation in the contract does not matter. Thus, even if for example the contracts with gig economy workers state that executing work happens on a self-employed basis, German Labour Courts will assume an employee status if the work reality indicates that it is an employment relationship.

Finally, in December 2019 the Munich Higher Labour Court ruled that so-called 'crowdworkers' are generally self-employed (Landesarbeitsgericht München 4 December 2019, Case 8 Sa 146/19). The underlying case concerned a digital platform that acted as an agent for smaller jobs of several companies. The users only concluded a general agreement with the platform. There was no obligation to accept assignments, neither was there an obligation to provide services personally. Only experience points were granted for correctly fulfilled work, leading to more lucrative assignments being offered. The Munich Higher Labour Court ruled that no employment relationship had been established in such a case as there was no obligation to accept assignments. Even if a person made a large part of their living from such assignments, they were still independent as to when and to what extent they accepted them. Individual specifications of the platform which are essential for an orderly conduct of business would not change this general independency. The case has now been dealt with by the German Federal Labour Court (*Bundesarbeitsgericht*), Case 9 AZR 102/20.

In the light of the ECJ Order of 22 April 2020 the decision of the Munich Higher Labour Court can be regarded as correct. Even if general provisions of the platform encourage the taking of a higher number assignments, gig economy workers are essentially free to organise their work, especially time and place, can determine their working hours on their own and even provide substitutes. As long as there is no actual right of the platform to determine the place, time and volume of work, a user must be considered self-employed.

This legal opinion is also accepted by German legal literature. The personal dependency as well as the obligation to work at a special time or place are the key elements for an employment relationship, which also needs to be considered with gig economy workers. Especially the obligation to work at a particular time or place could nevertheless only be assumed if users are obliged to take assignments even when the app is turned off. Some commentators focus more on the fact that the platform operators often influence the performance of the gig economy workers through the design of sophisticated quality

management in the form of codes of conduct, compensation-relevant evaluation and reputation mechanisms or sanction measures, right up to the blocking or deletion of the user account – criteria which carry more weight in France or the UK with regards to Uber for example.

In summary, an employment relationship of gig economy workers in Germany can only be assumed when the platform operator controls the key elements of work: place, time and volume of work along with the remuneration. As long as users can independently decide on when and where to work, provide substitutes, are free to work for competitors and not work for a platform at all, they stay self-employed as has also been found in the ECJ Order of 22 April 2020.

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