## Two Steps Forward, One Step App? Worker Status and Access to Fundamental Trade Union Rights in the United Kingdom

# TWO STEPS FORWARD, ONE STEP APP? WORKER STATUS AND ACCESS TO FUNDAMENTAL TRADE UNION RIGHTS IN THE UNITED KINGDOM

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Abstract: The recent decision of the UK Supreme Court in *Independent Workers Union v Central Arbitration Committee* marks a retrogressive step in the protection of fundamental employment rights in the UK. In that case, the Court found that Deliveroo Riders were neither "workers" for the purpose of domestic employment law, nor were they in an "employment relationship" for the purposes of accessing trade union rights within the context of Article 11 of the European Convention on Human Rights. The consequence of this decision is to further exclude vulnerable gig economy workers—who are already engaged in precarious app or platform based work—from the basic or core protections offered not only by domestic legislation, but also by international fundamental (social) rights. This article argues that, in so doing, the Supreme Court failed adequately to engage with the underlying protective purpose of the statutory regime as already recognised in its pre-existing case law, while also underestimating the normative value of the right to bargain collectively, as well as individual labour rights, as fundamental social rights.

**Keywords:** Collective bargaining, trade union rights, fundamental social rights, the gig economy, employment status, the worker.

## I. Introduction

Perhaps the most fundamental—and yet contested—issue within contemporary employment law is the question of *who* is entitled to benefit from employment law protections. The emergence of new forms of flexible, atypical and platform work has meant that the answer to this question is no longer obvious, if indeed it ever was. The personal scope of *collective* employment rights has been particularly contentious as evidenced by the recent decision of *Independent Workers Union of Great Britain v Central Arbitration Committee* ("*Deliveroo*"),

where the United Kingdom Supreme Court (UKSC) denied Deliveroo Riders both worker status, and thereby access to (fundamental) collective bargaining rights.[1]

As the highest appeal court, dealing with only the most significant of cases, it is relatively rare that the UKSC gets the opportunity to pronounce on issues of employment law.[2] The Court's relative lack of activity in this field is partly due to the nature of the dispute resolution process in the employment context, designed as it is to avoid the formality, cost, and delay associated with the traditional (adversarial) judicial system.[3] An additional, and related, factor is the perceived need for institutional expertise in the resolution of employment disputes, which ultimately led to the development of specialist dispute resolution bodies. A notable example is the permanent and independent Central Arbitration Committee (CAC), which is a quasi-judicial body composed of persons experienced in industrial relations, the purpose of which is to resolve *collective* employment disputes.[4] In particular, the CAC operates the statutory recognition and derecognition procedures which govern the relationship between employers and trade unions for the purposes of collective bargaining, among other functions, thereby complementing the direct relationship between employers and workers (who may or may not be trade union members), and that between trade unions and their members.

It was a decision of the CAC, holding that Deliveroo Riders were not in an "employment relationship" for the purposes of collective bargaining rights under Article 11 of the European Convention on Human Rights (ECHR), that formed the basis of the appeal in *Deliveroo.*[5] Affirming the unanimous decision of the Court of Appeal,[6] the UKSC itself unanimously upheld the CAC's findings in relation to employment status, thereby negating the access of the affected Deliveroo Riders to the fundamental trade union protections provided by Article 11 of the ECHR. It is argued here that the decision in *Deliveroo* is demonstrative of wider deficiencies in the UKSC's role as both a "human rights" court with regard to

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[1] [2023] UKSC 43, judgment given on 21 November 2023.

[2] Niall O'Connor, "Labour Law in the United Kingdom Supreme Court" in Joaquín García Murcia, Iván A Rodríquez Cordo and Diego Álvarez Alonso (eds), *The Impact of the Supreme Courts on the Development of Labour Law in Europe* (KRK 2023) 370, 374.

[3] Report of the Royal Commission on Trade Unions and Employers' Associations 1965–1968 (the Donovan Report).

[4] See TULRCA1992, ss 259-265 for the composition and functions of the CAC. See also Zoe Adams and others (eds), *Deakin and Morris' Labour Law* (7th edn, Hart 2021), 212.

[5] *Deliveroo* [2023] UKSC 43.

[6] *Independent Workers Union of Great Britain v Central Arbitration Committee* [2022] ICR 84 (CA), agreeing with the Queen's Bench decision: [2018] IRLR 911.

(international) fundamental rights protection, but also—and relatedly—as a "labour" court with regard to the protection of employment rights.

The UKSC's function in relation to ECHR rights is evidently curtailed by its inability to strike down primary legislation, with its power instead limited either to interpreting legislation, so far as it is possible, in accordance with Convention rights, or to issuing a declaration of incompatibility if domestic legislation is found to contravene the Convention.[7] Decisions such as *Deliveroo* demonstrate further deficiencies in the UKSC's fundamental rights reasoning in the employment context, thereby also exposing its limitations as a labour court. In particular, it is suggested here that domestic courts are eliding the concept of an employment relationship in the human rights context with legislative conceptions of "worker" status, in a similar way to the elision that occurred between the worker and the employee concepts, largely due to the application of similar common law contractual concepts to both categories, despite the purported purpose of the worker category in extending legislative protections. As the discussion here will also show, despite recent decisions suggesting a more nuanced approach to the relationship between (protective) statute and contract, the UKSC continues to be influenced by common law contractual reasoning, and which has the capacity to undermine the protection of employment rights, both as (domestic) legislative and (international) fundamental, rights.

In *Deliveroo,* the Court's rather formalist interpretative approach, combined with weaknesses within the domestic legislative regime governing the protection of collective rights, negates access to fundamental trade union freedoms.[8] In particular, the UKSC overlooked the important fundamental rights implications of domestic law governing employment status, and which in turn acts as a gateway to accessing important substantive employment rights. Despite not strictly being a case concerned with employment status in domestic—as opposed to Convention—law, the Supreme Court's "contractual" approach to characterising the employment relationship in *Deliveroo*, stands in marked contrast to the more expansive approach adopted in other recent employment status cases, notably *Pimlico Plumbers* and *Uber*, which both involved a careful assessment of a wide range of factors in order to ascertain

[7] Ss 3, 4 Human Rights Act 1998. Mark Elliott and Robert Thomas, *Public Law* (4th edn, OUP 2020) 762.
[8] On the limits of human rights-based interpretation in the (collective) employment context, see K D Ewing, "Trade Union Activities, Industrial Action and the Human Rights Act" (2023) 52 *ILJ* 230; Alan Bogg and Michael Ford, "Employment Status and Trade Union Rights: Applying Occam's Razor" (2022) 51 *ILJ* 717, discussing *National Union of Professional Foster Carers v Certification Officer* [2021] ICR 1397 ("*Foster Carers*").

the existence of worker status, and which are also reflective of international (human rights) trends in determining access of gig economy workers to basic employment rights.[9]

Many recent cases concerning employment status have arisen in the context of the "gig" or "platform" economy, which is characterised by one-off or short-term contracts, without being tied to a physical location, with potentially multiple hirers, and with a particular reliance on the concept of self-employment as an essential facilitator of the business model.[10] In *Uber,* for example, the UKSC placed particular emphasis on the protective function of the underlying employment legislation.

In contrast, the Supreme Court's characterisation of the relationship between the riders and Deliveroo lacks a *genuine* contextual analysis. The Supreme Court, as did the CAC, essentially focused on the single issue of "substitution" and the related absence of "personal service", without engaging in any depth with other factors which might point towards the existence of an "employment relationship" for the purposes of Article 11 of the ECHR ("Article 11 workers", to use the term adopted by the Supreme Court to describe individuals who are in such a relationship).[11] The Supreme Court's decision thereby introduces further uncertainty and inconsistency into the law governing employment status both within, and beyond, the context of the gig economy. The lack of a contextual reading in *Deliveroo* is perhaps all the more surprising given that this case explicitly arose within the context of the protection of collective fundamental rights of Article 11 workers under the ECHR, and which itself is interconnected with a rich seam of international social rights with which the UKSC failed adequately to engage, notably the International Labour Organization's (ILO) Recommendation 2006 (No 198) on the Employment Relationship, which contains indicative criteria concerning employment status, and which has influenced the European Court of Human Rights' (ECtHR) interpretation of an "employment relationship" for the purposes of Article 11 of the ECHR. Despite recognising this connection, the UKSC went on to rely on ILO Recommendation 198 essentially to *restrict* access to employment rights, and with scant acknowledgement of the wider fundamental (social) rights context, including the role of collective bargaining in determining working conditions which may themselves be underpinned by fundamental social rights.

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[9] See *Uber and others v Aslam and others* [2021] ICR 657 ("*Uber*"); *Pimlico Plumbers Ltd and another v Smith* [2018] ICR 1511 ("*Pimlico Plumbers*"). See also Jeremias Adams-Prassl, "*Uber v Aslam:* '[W]ork relations … cannot safely be left to contractual regulation'" (2022) 51 *ILJ* 955, 962.

[10] Alessio Bertolini and Ruth Dukes, "Trade Unions and Platform Workers in the UK: Worker Representation in the Shadow of the Law" (2021) 50 *ILJ* 662, 664.

[11] *Deliveroo* [2023] UKSC 43, [61].

The analysis here is conducted through the lens of the "worker" concept, which arises at domestic, European Union (EU), and international level, and with varying degrees of connection to fundamental social rights concepts. In contrast with EU law and European Convention law, the connection between international social rights and the domestic employment law conception of the worker is perhaps more distant, a distance that may have obscured the importance of the fundamental rights context at issue in *Deliveroo*. Indeed, a complex web of overlapping categories of worker status has emerged within UK law, including in its interaction with international and European fundamental rights sources, with varying purposes and objectives, and which are set against differing legal and normative backdrops. Notably, and as discussed further below, the concept of the "worker" can be found within EU free movement law (free movement of workers), and which is now domestically applicable in a modified form through the citizens' rights provisions of the EU-UK Withdrawal Agreement (Withdrawal Agreement workers); Article 11 of the ECHR (Article 11 workers); and domestic employment law (the domestic law worker). Even within the same domestic legislative framework, the "worker" can have differing meanings depending on the purpose of the underlying provision, including its connection to human rights concepts, despite the omission of that term from the text of the ECHR.[12]

What is clear is that for the purposes of domestic employment law, without characterisation as at least a "worker", access to significant legislative—and notably collective bargaining—rights are denied to those working in the gig economy as well as other forms of atypical or non-standard work.[13] The appeal before the UKSC, therefore, centred around the question of whether the riders' relationship with Deliveroo could be characterised as an "employment relationship" within the context of the trade union protections granted by Article 11 of the ECHR, despite the absence of worker status within domestic law. In other words, the

[12] See for instance TULRCA 1992, s 296(1), which defines "worker" as a person who works (a) under a contract of employment; or (b) under any other contract whereby he undertakes to perform personally any work or services for another party who is not a professional client of his; or (c) is in employment under or for the purposes of a government department so far as such employment does not fall under (a) or (b). Section 244(5) provides that where a person holds any office or employment under the Crown on terms which do not constitute a contract of employment between him and the Crown, such terms will nevertheless be deemed to constitute a contract for certain purposes. See also Alan Bogg and Michael Ford, "Employment Status and Trade Union Rights" (n. 8), 730, 735.

[13] See Valerio De Stefano and Mathias Wouters, "The International Labour Organisation and the Future of Work" in Marc De Vos, Gordon Anderson and Evert Verhulp (eds), *The Cambridge Handbook of Technological Disruption in Labour and Employment Law* (CUP, 2023) 15; Mark Freedland and Nicola Kountouris, "Some Reflections on the 'Personal Scope' of Collective Labour Law" (2017) 46 *ILJ* 52; and Jeremias Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (OUP, 2017).

question was whether the Article 11 ECHR conception of employment status was broader than the domestic definition of the "worker".

The UKSC held that a wide substitution clause was incompatible with Article 11 worker status in the same way as for the domestic worker concept. A substitution clause essentially permits the individual to delegate performance of the work tasks to a third party. Such clauses may be drafted more or less broadly, and may be accompanied by additional conditions, for example relating to qualifications or experience, and the need to obtain the permission of the "hirer".[14] It is argued that in focusing solely on the issue of substitution, the UKSC failed adequately to recognise the differing legal and normative contexts within which the domestic conception of the worker, and the Convention's requirement of an "employment relationship" to access trade union rights, operate, while at the same time underplaying the protective function of the worker category in domestic law.[15] This argument proceeds in three parts.

Section II "Worker Status as a Gateway to Accessing Employment Protections" outlines the importance of the role granted to worker status as a gateway to accessing (fundamental) employment rights. Section III "Freedom of Association and Collective Bargaining as a Fundamental Right" then explores the role and normative value of freedom of association and the right to bargain collectively both within the domestic UK context as well as the wider fundamental (social) rights regime and demonstrates the deficiencies of the domestic legal order in this regard. This article thereby goes beyond the existing discussion on Article 11 of the ECHR by emphasising the significance of the right to bargain collectively as an essential facilitator of access to other substantive fundamental employment rights, with the consequence of enhancing the normative value of the right to collective bargaining as a fundamental social—as opposed to "only", a civil and political—right. This is linked to the related argument that domestic worker status is itself a significant fundamental rights gateway, and one which should consequently be interpreted broadly, leading to a mutual reinforcement with the concept of an "employment relationship" for the purposes of Article 11 of the ECHR. Finally, Section IV "Conclusion" argues that the recognition of the fundamental rights underpinning of the categories of employment status discussed here, allows for a proper consideration of the underexamined human rights components of those categories, in particular the core content or essence of the right to engage in collective bargaining as a component of wider trade union freedoms.

[14] *Premier Groundworks v Jozsa* (UKEAT/0494/08/DM), 17 March 2009.
[15] *Sindicatul Pastorul cel Bun v Romania* (2014) 58 EHRR 10, [145].

## II. Worker Status as a Gateway to Accessing Employment Protections

The domestic "worker" concept emerged as a legislative intermediary category between the more protective "employee" category, which grants access to the full range of common law and legislative employment rights and the "self-employed" category, which essentially excludes the individual from significant employment law protections. Worker status instead provides access to certain core employment rights protections, including trade union rights. "Worker" for these purposes is defined in s 296 of the Trade Union and Labour Relations (Consolidation) Act (TULRCA) 1992 as including not only an individual who works under an employment contract but also an individual who works, or normally works, or seeks to work "under any other contract [i.e. other than a contract of employment] 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 [emphasis added]".

The intermediary worker concept was a response to the proliferation of non-standard, flexible or intermittent work—a concept which sat uneasily with the rather strict common law tests for employee status.[16] Subsequent judicial developments have, however, tended to elide the worker and employee concepts, notably through the continued application of common law approaches to the *legislative* worker concept, with the consequence that once again, the rise of new forms of work within the context of the gig economy has meant that the existing domestic law governing employment status struggles to maintain its protective function, in the sense of facilitating access to employment rights.[17]

In *Deliveroo*, for example, the CAC had found that Deliveroo Riders were not workers within the definition in s 296 of TULRCA 1992, largely due to their essentially unrestricted and unpoliced contractual ability to designate a substitute to undertake deliveries in their place (substitution clause), which undermined the requirement to provide personal service. They were not, therefore, workers for the purposes of domestic law, essentially precluding access to the trade union protections provided for in TULRCA 1992, and which include the potential recognition of a relevant trade union for collective bargaining purposes. This case demonstrates the continued importance of domestic conceptions of worker status as a mechanism through which substantive employment rights can be accessed at both domestic and international level,

[16] Zoe Adams and others, *Labour Law* (n. 4), 261.
[17] Michael J Walton, "The Shifting Nature of Work and its Implications" (2016) 45 *ILJ* 111.

despite the purported (formal) independence of the Convention's Article 11 regime from domestic rules governing employment status, as also recognised by the UKSC.[18] At the same time, cases such as *Deliveroo* demonstrate the ongoing prevalence of the contract as a regulatory tool, with Deliveroo being able to rely on contractual provisions providing for possible substitution, even though this rarely occurred given that the riders were under no obligation to work, and the ability to work for other food delivery companies was limited in practice.[19]

The definition of the worker for the purposes of accessing most domestic legislative employment rights essentially requires the following three elements, namely: (1) a contract; (2) personal service; and (3) that the hirer must not be the individual's client or customer.[20] As already seen from the legislative definition above, s 296 of TULRCA 1992 is broader in that it does not exclude those who provide their services as a business to a client or a customer, i.e. point (3) above. In other words, access to collective rights within domestic law is already more inclusive than for most individual employment rights, in that it extends to self-employed workers who have contracted for personal services.[21] The courts have added the additional requirement that individuals must establish mutuality of obligation, in the sense of an exchange of wages for work, and which performs a function similar to consideration in the wider contract law context.[22] Despite the relative congruity across the definition of the worker within domestic legislation, there has, in fact, been an expansion in categories of worker status, with differing purposes, and operating within different legislative, indeed constitutional, contexts, and which thereby increases the potential application of judicial interpretative glosses on the underlying legislative protections.

For example, while the UK was a Member State of the EU, freedom of movement rights, including the right to work, attached to the category of "workers" in accordance with Article 45 of the Treaty on the Functioning of the European Union (TFEU) and related legislative protections, and which are of continued applicability within domestic UK law as mediated through the citizens' rights arrangements governing that country's departure from the EU.[23] Article 45 TFEU provides that "[f]reedom of movement for workers shall be secured

[18] *Deliveroo* [2023] UKSC 43, [65].
[19] *Ibid.,* [27]–[30].
[20] Employment Rights Act (ERA) 1996, s 230(3).
[21] Mark Freedland and Nicola Kountouris, "Some Reflections on the 'Personal Scope'" (n. 13), 70.
[22] *Byrne Bros (Formwork) Ltd v Baird* [2002] ICR 667, [25].
[23] Directive No 2004/38 [2004] OJ L158/77; Regulation No 492/2011 [2011] OJ L141/1; Directive No 2014/54 [2014] OJ L128/8; Directive No 2005/36 [2005] OJ L255/22; and Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2020] OJ L29/7, Part Two.

within the Union", but without defining what is meant by workers for the purpose of the protection of free movement rights within Union law. The Court of Justice of the European Union (CJEU) has, however, defined this concept broadly, with the essential feature of an employment relationship being 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", with the additional condition that the worker should be engaged in "genuine and effective", as opposed to "marginal and ancillary" economic activity.[24] The CJEU has found that job seekers also fall within the definition of the worker for the purposes of Article 45 TFEU.[25]

Similarly, in the context of EU employment legislation "worker" has an autonomous definition, a definition that is not dependent on domestic law categorisations of employment status. This is reflective of the fundamental constitutional status of the worker within EU law, both given its connection to Union citizenship, but also in the recognition of freedom of movement and the right to work, as fundamental rights in the EU Charter of Fundamental Rights.[26] This is not to suggest that domestic courts have—or in the case of the UK courts, had—no leeway in the interpretation and application of the EU worker concept within their national legal orders. Ultimately, it is for the referring national court (in the case of a preliminary reference to the CJEU) to ascertain if the individual in question is a worker, with the CJEU tending, in particular, to leave the question as to whether there was a relationship of "subordination", for the national court to determine.[27] For example, in *Jivraj*,[28] the UKSC in reliance on the CJEU case of *Allonby*,[29] found that in order to bring a discrimination complaint, the worker had to be in a relationship of subordination towards the service recipient, thereby excluding the self-employed from the concept of "employment under" a "contract personally to do work" within the Equality Act 2010[30] with the consequence of preventing their access to equality law protections.

The approach adopted in *Jivraj* overlooks the protective thrust of *Allonby*, with the CJEU in that case noting that classification as a self-employed person in domestic law "does not exclude the possibility that a person must be classified as a worker (…) if his independence

[24] Case C-66/85 *Lawrie Blum* ECLI:EU:C:1986:284 and Case C–357/89 *Raulin* ECLI:EU:C:1992:87.
[25] Case C–85/96 *Martínez Sala* ECLI:EU:C:1998:217, para 32.
[26] Art 15 of the EU Charter of Fundamental Rights (freedom to choose an occupation and right to engage in work) and art 45 of the EU Charter of Fundamental Rights (freedom of movement and of residence).
[27] Catherine Barnard, *The Substantive Law of the European Union*: *The Four Freedoms* (7th edn, OUP 2022), 240.
[28] *Jivraj v Hashwani* [2011] 1 WLR 1872.
[29] Case C-256/01 *Allonby* ECLI:EU:C:2003:190.
[30] Equality Act 2010, s 83 defines "employment".

is merely notional, thereby disguising an employment relationship".[31] This is not to say, however, that the EU law conceptualisation of the worker is itself without restrictions, with dividing line between "dependent labour" and "undertakings" (self-employed) representing a perhaps more "polarised structuring" of the labour market, and the absence of subordination can lead to the exclusion of the individual from worker status within the context of EU employment law, as has already occurred in the context of certain gig economy workers.[32]

The continued restrictive approach to employment status in the UK equality context, and which ultimately derived from EU law, would subsequently influence the domestic interpretation of worker status, with the Court of Appeal in *Bates van Winkelhof* finding that in the absence of a relationship of subordination, in the sense of being under the control or direction of the hirer, the individual could not be a worker, again denying their access to core employment rights, in that case the protections granted to whistleblowers.[33] Despite the eventual reversal of this decision by the UKSC,[34] it nevertheless demonstrates the potential distortion of the tests for worker status when removed from the (protective) legislative and constitutional context within which that concept operates. This much was also recognised by the UKSC in its seminal judgment in *Uber*, a gig economy case in which the Court emphasised the importance of the legislative—as opposed merely to the contractual—context of the relationship between the parties in determining the persons falling within the protective scope of the relevant legislation.[35]

In adopting this "purposive" approach, the UKSC relied on its earlier decision in *Autoclenz*,[36] in which the Court sought to ascertain whether worker status accurately encapsulated the contractual relationship as actually performed. What is meant by "purposive" is difficult to determine in practice, particularly given that concept's context dependence, whether that be the wider policy context or the relevant legislative framework.[37] Indeed, the interpretative gloss applied by (common law) courts can have the effect of restricting the scope of legislative protections, meaning that a purposive approach should not be equated with a

[31] Case C-256/01 *Allonby* ECLI:EU:C:2003:190, para 71.
[32] Mark Freedland and Nicola Kountouris, "Some Reflections on the 'Personal Scope'" (n. 13), 63; and Case C-692/19 *B v Yodel Delivery Network Ltd* ECLI:EU:C:2020:288 which also placed emphasis on the essentially unrestricted substitution ability, although this was a reasoned order, rather than a full judgment.
[33] *Clyde & Co LLP & Anor v Bates Van Winkelhof* [2013] ICR 883 (CA); ss 43A–43L ERA 1996.
[34] *Clyde & Co LLP and another v Bates van Winkelhof* [2014] ICR 730 (SC).
[35] *Uber* [2021] ICR 657 (SC).
[36] *Autoclenz Ltd v Belcher* [2011] ICR 1157 (SC).
[37] Douglas Brodie, "Collectivism in Labour Law: Only by Exception" (2022) 51 *ILJ* 464, 468, 470.

"worker-protective" purpose, particularly in the context of *collective* rights, which may be viewed as an exception to the norm of *individual* negotiation.[38]

There were two potential senses in which the approach adopted by the UKSC in *Autoclenz* could be described as purposive. The first (contractual) approach is to determine whether the employment contract as performed reflects the true nature of the parties' relationship. The second (statutory) approach involves ascertaining whether the characterisation of the employment relationship undermines the application of protective legislation that was intended to apply to such relationships.[39] Both approaches are mutually reinforcing and can be said to operate at different levels, with the statutory approach applicable to the characterisation of the relationship, while the contractual approach is used to determine whether the individuals in question fall within that type of relationship.[40] In *Uber*, this led to the UKSC emphasising the protective purpose of the underlying legislation which provided for the minimum wage and paid annual leave, and which was intended to extend employment protections to "vulnerable" individuals who were in a position of dependence in relation to the hirer.[41] Any contractual denial of worker status was therefore void, for having the effect of limiting access to these legislative rights. Specifically, the Court found that Uber exercised significant "control" over its drivers, for example by determining the fares that could be charged to passengers, as well as generally monitoring the drivers through the Uber app.[42] The overall conclusion was that Uber drivers operated under a worker contract while they were logged into the app.[43]

The reliance placed by the UKSC on the subordination (dependency) of the drivers also demonstrates a use of that concept that likely more closely aligns with the CJEU's intention in introducing subordination as a characteristic of the Union law conception of the worker.[44] In other words, the "ultimate question" in *Uber* was to determine whether the statutory provisions (construed purposively) were intended to apply to that particular relationship, with the UKSC finding that relationships characterised by subordination or dependence (ascertained through an assessment of the level of control) fell within the scope of the relevant legislative

[38] *Ibid.,* 473, 475 discussing the case of *Kostal UK v Dunkley* [2022] ICR 434 (SC).
[39] Alan Bogg and Michael Ford, "Between Statute and Contract: Who is a Worker?" (2019) 135 *LQR* 347.
[40] Joe Atkinson and Hitesh Dhorajiwala, "The Future of Employment: Purposive Interpretation and the Role of Contract after *Uber*" (2021) 85 *MLR* 787, 791.
[41] *Uber* [2021] ICR 657, [71].
[42] *Ibid.*
[43] *Ibid.,* [130].
[44] Christopher McCrudden, "Two Views of Subordination: The Personal Scope of Employment Discrimination Law in *Jivraj v Hashwani*" (2012) 41 *ILJ* 30.

protections.[45] Moreover, cases such as *Pimlico Plumbers* demonstrate the UKSC's willingness to assess the tests for worker status broadly, with the Court finding that a limited right of substitution, and which was overseen by the hirer, did not negate personal service for the purpose of granting worker status, where the dominant feature of the contract remained the provision of personal performance.[46] It was on the issue of personal service that the outcome of the UKSC's decision in *Deliveroo* would turn.

In that case, the relevant clause in the contract provided for "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", with only limited restrictions and despite the fact that such substitution occurred only rarely in practice. This clause was coupled with further provisions of the contract stipulating the self-employed status of the riders. It was the essentially unfettered nature of the substitution clause in *Deliveroo* that was fatal to the riders' claim for employment status, both within the domestic legislative context and for the purposes of access to trade union rights under Article 11 of the ECHR. But, in emphasising the unconditionality of the substitution clause, the Court overlooked the fact that it was likely inserted with the precise intention of avoiding worker status and the attendant access to collective legislative rights, as well as the fact that terms are offered to riders on a "take it or leave it" basis, without any scope for negotiation. Nevertheless, the absence of an employment relationship for the purposes of Article 11 of the ECHR meant that the relevant collective bargaining rights could not apply, despite their status as fundamental social rights.

The Supreme Court in its judgment, noted that the case law of the ECtHR makes clear that despite the use of the term "everyone" in Article 11 of the ECHR, the more specific trade union rights found in that provision are applicable only to those in an "employment relationship", albeit that this concept is not dependent on domestic conceptions of employment status.[47] In determining the existence of Article 11 worker status, regard must be had for the factors set out in the ILO Recommendation 198, which makes clear that the Court's assessment should be guided by facts relating to remuneration and the performance of work, and notwithstanding the characterisation of the relationship in any contract between the parties. The overall approach involves the consideration of different factors, with a focus on the practicalities of the relationship, including how it operates in reality.[48] The UKSC in its

[45] Joe Atkinson and Hitesh Dhorajiwala, "The Future of Employment" (n. 40), 792.
[46] *Pimlico Plumbers* [2018] ICR 1511, [34].
[47] *Deliveroo* [2023] UKSC 43, [61].
[48] *Ibid.*

judgment, held that the CAC was entitled to reach the conclusion that it did concerning worker status, with the broad substitution power, in particular, being inconsistent with an employment relationship.[49]

It has already been noted that the worker concept is an intermediary category between the employee and the self-employed, and has the purpose of *extending* core individual employment law protections, notably the minimum wage and paid annual leave, as well as collective rights, such as the right to pursue trade union recognition, to those in a position of dependence on a particular "hirer", but without being their "employee".[50] In other words, the very purpose of this legislative concept was to *expand* the category of individuals who are entitled to access basic employment protections, including access to the trade union recognition procedure for the purposes of collective bargaining. Collective bargaining rights are also by now well-established as an essential element of the trade union rights protected by Article 11 of the ECHR, and which only serves to emphasise the inadequacies in the domestic legislative collective bargaining regime in this regard.

## III. Freedom of Association and Collective Bargaining as a Fundamental Right

### *A. Collective bargaining in the domestic legislative context*

Collective bargaining has long played an important role as a source of labour norms in the UK given the absence until relatively recently of a comprehensive system of legislative employment protections. Collective bargaining is the process by which employers and trade unions negotiate within the aim of producing collective agreements, and which may operate at different levels, although the significance of *secto*r-level bargaining has declined significantly since the 1980s.[51] Trade union membership has also continued to fall, despite the slight recovery in numbers between 2017 and 2020.[52] Collective bargaining is defined in s 178 of TULRCA 1992 as negotiations relating to or connected with a number of listed matters, including: terms and conditions of employment; termination; discipline; allocation of work, trade union membership or facilities; and the machinery for consultation. These negotiations

[49] *Ibid.,* [69].
[50] Working Time Regulations 1998, Reg 2 "Interpretation"; National Minimum Wage Act 1998, s 54 "Meaning of 'worker', 'employee' etc"; and TULRCA 1992, s 296 "Meaning of worker and related expressions".
[51] Zoe Adams and others, *Labour Law* (n. 4), 53.
[52] Department for Business and Trade, "Trade Union Membership, UK 1995-2002: Statistical Bulletin", 24 May 2023.

take place between employers and the relevant trade unions, and were traditionally voluntary in nature i.e. free from legislative intervention, a situation that has been labelled as "collective laissez-faire".[53] Despite this, legislation has long played an important role in: (1) establishing the machinery through which collective bargaining is to take place; (2) providing for the duties on the parties to the collective bargaining process; and (3) governing the legal status of any collective agreements that result from collective bargaining. The extent of regulatory intervention means that the existing collective bargaining recognition scheme is one characterised by legal (labour law) rights and duties, while at the same time maintaining a high degree of "voluntariness", and with cases such as *Deliveroo* demonstrating the ease with which the entire legal machinery of ("mandatory") collective bargaining may be avoided.[54]

Collective agreements, in turn, serve two broad functions. The first function is to regulate relations between the parties to the agreement, for example by providing for procedures governing the resolution of disputes, or by setting out the machinery by which terms and conditions of employment are to be collectively negotiated. The second function is to regulate the terms of individual employment contracts, covering such substantive terms as pay, working hours, holidays, and overtime.[55] In contrast to the legal position in many continental European jurisdictions, there is a presumption within domestic UK legislation that collective agreements are not intended to be binding, unless the contrary intention is explicitly provided for in writing, but which only rarely occurs in practice.[56] Furthermore, the norms generated by collective agreements do not apply automatically, but must instead by incorporated—whether expressly, or impliedly—into the contract of employment through a "bridging" term, and only then if such provisions are "apt" for incorporation.[57] Given these limitations, an important question that has arisen in the domestic law context is the extent to which the employer is *required* to recognise and to collectively bargain with a trade union, whether on the basis of domestic law, or in accordance with the rights provided for in Article 11 of the ECHR.

There are three categories of trade union recognition within domestic law, each of which can be characterised by differing degrees of voluntariness and formality. "Voluntary recognition" is informal recognition that takes place outside of the statutory procedure. "Semi-voluntary" recognition arises where there has been a statutory request for recognition, but with

[53] Otto Kahn-Freund, "Legal Framework" in Allan Flanders and Hugh A Clegg (eds), *The System of Industrial Relations in Great Britain* (Basil Blackwell 1954).
[54] Keith Ewing and John Hendy, "New Perspectives on Collective Labour Law: Trade Union Recognition and Collective Bargaining" (2017) 46 *ILJ* 23, 44.
[55] Zoe Adams and others, *Labour Law* (n. 4), 53.
[56] See TULRCA 1992, s 179.
[57] *Young v Canadian Northern Rly Co* [1931] AC 83.

the employer agreeing to recognise the relevant trade union prior to any declaration by the CAC. Finally, "involuntary recognition" takes place where the CAC makes a declaration that the relevant trade union is recognised for the purposes of collective bargaining within a particular "bargaining unit". In the case of involuntary recognition, the CAC may order the method of collective bargaining in relation to pay, hours, and holidays, and only then if the parties have failed to agree on a method.[58] There remains, however, no substantive domestic law obligation for the parties to reach a subsequent collective requirement, with the parties being merely required to meet and bargain, rather than to come to an actual agreement.

The appeal before the UKSC in *Deliveroo* concerned the right to engage in such collective bargaining of a group of Deliveroo Riders based in the Camden and Kentish Town area of London (the relevant bargaining unit). The riders had become members of the Independent Workers Union of Great Britain (IWGB) in November 2016, which subsequently made a formal request for recognition to Deliveroo for the purposes of collective bargaining. "Recognition" is the mechanism through which collective bargaining for "independent" trade unions is established within domestic law. The process is defined in s 178(3) TULRCA 1992 as "the recognition of the union by an employer, or two or more associated employers, to any extent for the purpose of collective bargaining". A trade union's independence must be established in accordance with s 5 of TULRCA 1992, which requires the non-domination of, and non-interference by, the employer in the activities of the trade union.[59] As already noted, the CAC found in its decision of November 2017, that the riders were not workers for the purposes of domestic law, due to the presence of a wide substitution clause—which itself had been inserted only prior to the CAC hearing—and could not, therefore, embark on this recognition process as they did not provide the work "personally". The CAC's ruling in relation to worker status was upheld by the High Court, the appeal from which was also dismissed by the Court of Appeal.[60]

As we have seen, the question to be addressed on appeal was whether the riders might be in an employment relationship for the purposes of the right to access the fundamental trade union protections granted by Article 11 of the ECHR, and which includes the right to bargain collectively as a fundamental right. In the Court of Appeal, Underhill LJ found—in purported application of the ILO Recommendations—that the wide substitution clause was fatal to the

[58] *BALPA v Jet2.com* [2015] IRLR 543.
[59] *Blue Circle Staff Association v Certification Officer* [1977] IRLR 20; Trade Union Recognition (Collective Bargaining Method) Order 2000.
[60] *R (The IWGB) v Central Arbitration Committee* [2019] IRLR 249 (CAC); *The IWGB v Central Arbitration Committee* ("*Deliveroo*") [2022] ICR 84 (CA).

existence of an "employment relationship" for the purposes of Article 11 of the ECHR, as it had been for domestic conceptions of worker status.[61] In so doing, the Court of Appeal, as the UKSC would also do, not only overly relied on one indicator of an employment relationship in isolation, namely personal service, but it also overlooked the wider protective context of collective bargaining as a fundamental (social) right, including the particular vulnerabilities associated with the exclusion of gig economy workers from accessing those rights.[62]

### *B. The (social) rights regime governing collective bargaining*

The freedom of workers to associate in furtherance of their interests is recognised as a fundamental right in a number of international rights instruments.[63] Freedom of association has further been recognised as a fundamental principle of the ILO.[64] For example, ILO Convention No 98 obliges states to adopt measures, appropriate to national conditions, to encourage and promote collective bargaining, but which does not extend to a requirement to *mandate* collective bargaining.[65] The more particular right to bargain collectively has also been (more explicitly) singled out for protection in Article 6 of the European Social Charter and Article 28 of the EU Charter of Fundamental Rights. Of particular pertinence for the issues raised in *Deliveroo* is Article 11 of the ECHR, which governs freedom of assembly, and which is made up of the general freedom of "everyone" to "peaceful assembly and to freedom of association with others" a well as the more specific "right to form and to join trade unions for the protection of his interests".

The "right to form and to join trade unions for the protection of his interests" has been interpreted by the ECtHR as (non-exhaustively) including: (1) the right to form or join a trade union which appears on the face of the right itself; (2) the prohibition of closed-shop arrangements, i.e. a negative right *not* to join a union; (3) the right to seek to persuade the employer to hear what the union has to say; (4) the right to take collective action, including the

[61] *Deliveroo* [2022] ICR 84, [77].
[62] Valerio De Stefano, "Not as Simple as it Seems: The ILO and the Personal Scope of International Labour Standards" (2021) 160 *International Labour Review* 387, points out the malleability of the concept of the "employment relationship" in the presence of particular fundamental rights.
[63] Universal Declaration of Human Rights, art 23; International Covenant on Economic, Social and Cultural Rights, art 8; International Covenant on Civil and Political Rights, art 22; European Social Charter, art 5; and EU Charter of Fundamental Rights, art 12. On the relationship between freedom of association and the right to form and join trade unions, see Isabelle Van Hiel, "The Right to form and Join Trade Unions Protected by Article 11 ECHR" in Filip Dorssemont, Klaus Lörcher and Isabelle Schömann (eds), *The European Convention on Human Rights and the Employment Relation* (Hart, 2013) 286.
[64] See ILO Convention No 87 on the Freedom of Association and the Right to Organise 1948 and ILO Convention No 98 on the Right to Organise and Collective Bargaining 1949.
[65] ILO Convention No 98, art 4.

right to strike; and (5) the right to bargain collectively. These composite rights are interrelated and mutually dependent. For example, in order to encourage employers to enter into collective bargaining, particularly in a voluntary system such as exists in the UK, trade unions may need to resort to industrial—including strike—action.[66] Furthermore, despite the use of the singular "his interests", trade unions have themselves been found to fall within the scope of protection offered by Article 11(1) of the ECHR. As is well known, however, the UK legal system falls far short of espousing a "right" to strike, with that right instead essentially being characterised as a "freedom" protected by a series of immunities from liability in tort, with strike action also the subject of numerous—and increasing—legislative restrictions.[67] Being denied domestic worker status leads to exclusion from other trade union rights as well as from protections beyond the context of collective bargaining, despite the UKSC's insistence that there was nothing to stop the riders forming or joining a trade union or from encouraging Deliveroo to bargain voluntarily.[68] Domestic courts are, however, cognisant of the fact that exclusion from a statutory recognition scheme may constitute a violation of Article 11 of the ECHR, regardless of the potential for voluntary collective bargaining.[69]

The significance of the connection drawn between trade union rights and the freedoms of association and assembly should not be underestimated, given the fundamental nature of the latter in any democratic society, and which has also contributed to the ECtHR's non-restrictive interpretation of Article 11 of the ECHR. The ECtHR has thereby recognised that "trade union freedom is an essential element of social dialogue between workers and employers, and hence an important tool in achieving social justice and harmony".[70] At the same time, as the issue in *Deliveroo* so aptly demonstrates, the personal scope of the two rights differ, with the general freedom of association applying to everyone, while the more specific trade union rights offer protection only to those in an employment relationship. Lord Hendy in his submissions in *Deliveroo*, suggested a potentially wider scope, submitting that "if the objective is to improve by collective bargaining working terms and conditions, that involves the exercise of trade union rights".[71] Indeed, without worker (or employee) status, access to legislative employment

[66] *Wilson, National Union of Journalists and others v the United Kingdom* (2002) 35 EHRR 20, [46].
[67] Ruth Dukes, "The Right to Strike under UK Law: Not Much More than a Slogan? *Metrobus v Unite the Union* [2009] EWCA Civ 829" (2010) 39 *ILJ* 82; Trade Union Act 2016; Strikes (Minimum Service Levels) Act 2023.
[68] *Deliveroo* [2023] UKSC 43, [75].
[69] *Foster Carers* [2021] ICR 1397, [109].
[70] *Sindicatul Pastorul cel Bun v Romania* (2014) 58 EHRR 10, [130].
[71] *Deliveroo* [2023] UKSC 43, [38].

protections is radically curtailed and so there can perhaps be no more significant *improvement* in working conditions than being granted such status.

Article 11(2) of the ECHR further provides for the permissible restrictions on the rights found in Article 11(1) of the ECHR. As trade union rights are considered an aspect of freedom of association, rather than an independent right, the same conditions and restrictions apply, despite the recognition that the general right and the particular trade union right have differing personal scopes. In particular, the Court will not permit restrictions that affect the "essential elements" of trade union freedoms, that is to say elements "without which that freedom would become devoid of substance".[72] The ECtHR has not always adopted such an expansive conception of trade union rights as a component of the wider freedom of association, perhaps a symptom of that Court's failure to appreciate the practical operation and proper function of Article 11 of the ECHR in the employment context.[73]

In *National Union of Belgian Police*, for example, the ECtHR held that the right of a trade union to engage in collective bargaining did not constitute an essential element of Article 11 of the ECHR, thereby confining that provision to a right for the union to be "heard" in order to "strive for the protection of their members interests".[74] In other words, employer consultation with trade unions was merely one mechanism among other (unspecified) means by which to achieve these aims, while States were also to be granted a wide margin of appreciation in their choice of the precise means to be employed.[75] In *Wilson and Palmer*, the ECtHR maintained its position that collective bargaining was "not indispensable for the effective enjoyment of trade union freedom", while at the same time recognising the that it was "of the essence of the right to join a trade union for the protection of their interests that employees should be free to instruct or permit the union to make representations to their employer or to take action in support of their interests on their behalf".[76] In that case, the UK had infringed its positive obligations under Article 11 of the ECHR by permitting the use of financial incentives by employers in order to forgo trade union rights, and which eventually led to domestic legislative changes.[77]

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[72] *Demir and Baykara v Turkey* (2009) 48 EHRR 54, [144]; Keith Ewing and John Hendy, "The Dramatic Implications of *Demir and Baykara*" (2010) 39 *ILJ* 2.
[73] Zoe Adams and others, *Labour Law* (n. 4), 714.
[74] *National Union of Belgian Police v Belgium* (1979–80) 1 EHRR 578, [39].
[75] *Gustafsson v Sweden* (1996) 22 EHRR 409, [45]; see Antoine Jacobs, "Article 11: The Right to Bargain Collectively" in Filip Dorssemont, Klaus Lörcher and Isabelle Schömann (eds), *The European Convention on Human Rights and the Employment Relation* (Hart, 2013) 309, 310 for suggested alternative means.
[76] *Wilson and Palmer v United Kingdom* (2002) 35 EHRR 20, [44], [46].
[77] *Ibid.,* [48]; TULRCA 1992, s 145B contains this legislative response.

This recognition of the importance of the function of trade union activity as it relates to Article 11 of the ECHR, came to full fruition in the ECtHR's seminal decision in *Demir and Baykara v Turkey*, in which the Court departed from its pre-existing position that the right to bargain collectively did not constitute an essential element of the right to form and join a trade union within Article 11 of the ECHR. The ECtHR was particularly influenced by the "perceptible evolution" in the regulation of labour relations in both domestic and international legal systems, whether or not the relevant international instruments had been signed or ratified by the State in question.[78] The latter approach may have particular consequences for the UK given the wider context of scepticism towards international (social) rights instruments in that country, with human rights issues often being the most contentious aspects of employment litigation.[79] Notably, the UK attempted to secure an "opt-out" from the social provisions of the EU Charter of Fundamental Rights.[80] It has already been noted that Article 28 of the EU Charter of Fundamental Rights, which is found in the Charter's Solidarity Title, provides for a right of collective bargaining and action, which includes "the right to negotiate and conclude collective agreements at the appropriate levels". The CJEU has confirmed that the right to bargain collectively, as a component of Article 28 of the EU Charter of Fundamental Rights, is a "fundamental right".[81] However, this does not preclude the possibility that this particular provision constitutes a *principle* rather than a *right* for the purposes of the dichotomy provided for in Article 52 of the EU Charter of Fundamental Rights given that Article 28 is subject to Union laws, national laws and practices, thereby suggesting the need for further legislative implementation.[82]

Of course, the "constitutionalisation" of the right to strike and to bargain collectively as either EU general principles or fundamental Charter rights (or principles) is no panacea when it comes to accessing collective employment rights. Indeed, the CJEU has previously demonstrated the potential restriction of those rights in the face of competing (economic) rights, notably the economic freedoms of the EU's internal market, with the CJEU's "market access" approach, which views industrial action as a "restriction", and which is potentially

[78] *Demir and Baykara v Turkey* (2009) 48 EHRR 54, [78], [153].
[79] K D Ewing, "Trade Union Activities" (n. 8), 240.
[80] Catherine Barnard, "The 'Opt-Out' for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?" in Stefan Griller and Jacques Ziller (eds), *The Lisbon Treaty: EU Constitutionalism Without a Constitutional Treaty* (Springer 2008) 257. See Protocol No 30 On the Application of the Charter of Fundamental Rights to Poland and to the United Kingdom [2007] OJ C306/157, art 1(2).
[81] Case C-271/08 *Commission v Germany* ECLI:EU:C:2010:426, para 38.
[82] On the consequences of the need for legislative implementation for the distinction between rights and principles, see Case C-176/12 *Association de médiation sociale v Union locale des syndicats CGT and Others* ECLI:EU:C:2014:2, para 47.

incompatible with the rights-based approach adopted by the ECtHR in cases such as *Enerji Yapi-Yol Sen* and *Demir and Baykara*.[83] Moreover, collective bargaining rights sit rather uneasily with the EU's competition law regime.[84]

Charter-scepticism in the UK culminated in the exclusion of that rights instrument from the category of post-Brexit "retained EU law", though the general principles of EU law continued for a time to have a (more limited) formal interpretative role.[85] The Explanations to Article 28 of the EU Charter of Fundamental Rights make it clear that this right is "based on" Article 6 of the European Social Charter, with the right of "collective action" stipulated as being "recognised" by the ECtHR in its Article 11 ECHR jurisprudence. In other words, despite Brexit, the UK remains bound by a complex web of international and European social rights sources governing collective bargaining, including of course the European Convention itself, which tends to attract particular opprobrium from rights sceptics, at least as currently mediated through the Human Rights Act 1998.

In *Demir and Baykara*, reliance on this rich backcloth of international developments allowed the Court to conclude 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".[86] In that case, the annulment of existing collective agreements entered into between a trade union representing civil servants and the relevant local authority, was thereby found to constitute a breach of Article 11(1) of the ECHR, and which could not be justified in accordance with Article 11(2) of the ECHR, given the State's limited margin of appreciation in justifying interference with the exercise of trade union rights, although the extent of this discretion may also depend on whether the substance of the right is at issue.[87]

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[83] *Enerji Yapi-Yol Sen v Turkey* No 68959/01, 21 April 2009; *Demir and Baykara v Turkey* (2009) 48 EHRR 54. On the right to strike, see Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* ECLI:EU:C:2007:772; and Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* ECLI:EU:C:2007:809. On collective bargaining, see Case C-271/08 *Commission v Germany* ECLI:EU:C:2010:426; and Joined Cases C-297/10 and C-298/10 *Sabine Hennigs v Eisenbahn-Bundesamt* ECLI:EU:C:2011:560. See Catherine Barnard, "Article 28 – Right of Collective Bargaining and Action" in Steve Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (2nd end, Hart 2021) 801, 818.

[84] Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* ECLI:EU:C:1999:28.

[85] European Union (Withdrawal) Act 2018, s 5(4); Retained EU Law (Revocation and Reform) Act 2023, s 4.

[86] *Demir and Baykara v Turkey* (2009) 48 EHRR 54, [154].

[87] *Ibid.,* [119]; *National Union of Rail, Maritime and Transport Workers v The United Kingdom* (2015) 60 EHRR 10, [87], where it was said: "[i]f a legislative restriction strikes at the core of trade-union activity, a lesser margin of appreciation is to be recognised to the national legislature and more is required to justify the

Indeed, it is unclear how the notion of an "essential element" of a Convention right fits into wider discussions concerning the protection of the "essence", "core", or "substance" of those rights, but which themselves have an ambiguous role, particularly in their relationship to the proportionality principle.[88] It can be said that the distinction between essence and the periphery of a particular right relates to the idea that rights are "composed of components of varying importance", with the core or substance representing elements without which the right ceases authentically to be "itself".[89]

Engaging in collective representation and negotiation is undoubtedly a core function of trade unions, and yet the fragmentation of the labour market provoked by the emergence of platform work—coupled with the limitations inherent in the existing legal framework—has meant that "traditional" trade unions can struggle to engage in collective *bargaining* (whether within or outside the statutory recognition process), as opposed to other forms of representation and (political) activism.[90] Whether trade unions' collective bargaining function was encompassed within the essence or substance of trade union freedoms for the purposes of Article 11 of the ECHR has long been contentious. One of the suggested purposes of the concept of the essence of fundamental rights is to place "limits on limits". In other words, the Convention system (at least in theory), permits limitations only to the extent to which the *very substance* of the relevant right remains intact.[91] On this (absolutist) reading, the right to bargain collectively, while an essential element of trade union rights within the context of freedom of association, nevertheless falls outside of the core content or essence of those rights in that, as the ECtHR's case law makes clear, the right to engage in collective bargaining is subject to potential restrictions and limitations.

Furthermore, the ECtHR does not identify what the substance of the more specific right to engage in collective bargaining might entail, and which can be contrasted with that Court's more explicit engagement with the essence of the right to organise within the context of the broader right to *form* a trade union. In *Matelly*, for example, the Court noted that "[w]hile the

proportionality of the resultant interference, in the general interest, with the exercise of trade-union freedom. Conversely, if it is not the core but a secondary or accessory aspect of trade-union activity that is affected, the margin is wider and the interference is, by its nature, more likely to be proportionate as far as its consequences for the exercise of trade-union freedom are concerned".

[88] Darren Harvey, "The Essence of EU Fundamental Rights – Reflections in Light of the UK Experience" (2023) 5 *EHRLR* 438; and Sébastien Van Drooghenbroeck and Cecilia Rizcallah, "The ECHR and the Essence of Fundamental Rights: Searching for Sugar in Hot Milk" (2019) 20 *Ger Law J* 904, 910.

[89] Sébastien Van Drooghenbroeck and Cecilia Rizcallah, "The ECHR and the Essence of Fundamental Rights" (n. 88), 906.

[90] Alessio Bertolini and Ruth Dukes, "Trade Unions and Platform Workers" (n. 10), 662.

[91] Sébastien Van Drooghenbroeck and Cecilia Rizcallah, "The ECHR and the Essence of Fundamental Rights" (n. 88), 907.

freedom of association of military personnel may be subject to legitimate restrictions, the outright prohibition on forming or joining a trade union impairs the *very essence* of that freedom [emphasis added]".[92] This is evocative of wider approaches to the essence of fundamental rights, as adopted for example, by the CJEU, whereby interference with the essence of a right may be equated with extinguishing the *existence* of the right itself.[93] More broadly, the ECtHR has relied on the concept of the substance of Article 11 of the ECHR to expand the material scope of freedom of association beyond those rights that have been expressly enumerated, for example finding the existence of a negative right *not* to join a trade union.[94] Of course, the concept of the essence of human rights is itself also absent from the text of the Convention, and it may well be that the ECtHR frequently refers to the essence of rights in no more than a "declaratory" sense (i.e. shorn of independent legal value) after having balanced competing rights and interests in light of the proportionality principle (a relative, rather than absolute approach).[95]

Furthermore, the right to bargain collectively, which is explicitly recognised in international social rights instruments, exhibits features of a *social*—as opposed solely to—a civil or political right, notably due to its connection to concepts of worker solidarity, and the counteracting of employers' bargaining power.[96] Article 6 of the European Social Charter, for example, requires States "to *promote*, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements [emphasis added]". To "promote" may not, however, be synonymous with "encouraging" collective bargaining, and in any case Article 6 of the European Social Charter has not yet been interpreted as requiring any particular result. As Filip Dorssemont notes, "no conclusion has been adopted that requires a statutory intervention to ensure that collective autonomy prevails

[92] *Matelly v France* App No 10609, 2 October 2014, [75–76]. See also *National Union of Rail, Maritime and Transport Workers v The United Kingdom* (2015) 60 EHRR 1085, [87] where the ECtHR contrasted "core" and "secondary" or "accessory" aspects of trade union activity. This case concerned restrictions on secondary strike action and stated at [57]: "[w]ith its outright prohibition on secondary action, the United Kingdom was part of a very small minority of European countries adopting such an extreme position. The approach adopted by the great majority of European States, notwithstanding the differences between them in the field of industrial relations generally, was a permissive one. This represented, so the applicant union submitted, the consensus in Europe on the issue".

[93] Maja Brkan, "The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to its Core" (2018) 14 *EuConst* 332.

[94] Sébastien Van Drooghenbroeck and Cecilia Rizcallah, "The ECHR and the Essence of Fundamental Rights" (n. 88), 914; *Young, James and Webster v United Kingdom* (1983) 5 EHRR 201, [52].

[95] Darren Harvey, "The Essence of EU Fundamental Rights" (n. 88), 445.

[96] See Antoine Jacobs, "Article 11: The Right to Bargain Collectively" (n. 75), 312. Some relevant international instruments are: European Social Charter, art 6; and EU Charter of Fundamental Rights, art 28.

over individual autonomy".[97] As also suggested here, the collective bargaining process is inherently connected to negotiations concerning terms and conditions of employment, with the concept of fair and just working conditions also constituting a fundamental social right, in addition to more specific provisions governing particular conditions of employment such a pay and annual leave.[98] The essence or substance of economic and social rights is usually framed in terms of their "minimum core", which imposes obligations on the State to ensure that this essential level of protection is respected.[99]

By way of contrast, the ECtHR uses the terms "essence" and "substance" rather loosely, at times equating those concepts with the mere "content" of Article 11 ECHR rights, as is evident from the Court's discussion of the "essence of a voluntary system of collective bargaining" in *Wilson and Palmer* or "[g]eneral principles concerning the substance of the right of association" in *Demir and Baykara.*[100] Indeed, it should be borne in mind that the restriction in the latter case involved the invalidation *ex tunc* of an already existing collective agreement, thereby constituting a particularly egregious violation of the right to bargain collectively.

There was, however, nothing inevitable about the ECtHR's finding that collective bargaining constituted an essential element of Article 11 of the ECHR, both given the Court's previous reluctance to recognise collective bargaining as an essential element of trade union freedoms, but also in the separation within international rights instruments between the right to form or join a trade union and the more particular right to bargain collectively. Both rights can, for example, be found within different ILO Conventions (Convention 87 governs the right to organise, while Convention 98 addresses collective bargaining). Similarly, the EU Charter of Fundamental Rights provides for the right to trade union organisation at Article 12, but a right to collective bargaining and collective action in Article 28. As Antoine Jacobs put it, "even when one may agree that the right to collective bargaining is included in the right to free trade union organisation, one has to remain humble and recognise that this is a nice outcome, but not an indispensable outcome or interpretation".[101] Of course, this may be to overlook the interconnectedness of those provisions and the mutual interpretative dependence that exists

[97] Filip Dorssemont, "The Right to Bargain Collectively" in Niklas Bruun and others (eds), *The European Social Charter and the Employment Relation* (Hart, 2017) 249, 259.
[98] International Covenant on Economic, Social and Cultural Rights, arts 6 and 7; EU Charter of Fundamental Rights, art 31; and European Social Charter, arts 2–4.
[99] For the concept of "minimum core" see Katherine G Young, "The Minimum Core of Economic and Social Rights: A Concept in Search of Content" (2008) 33 *Yale International Law Journal* 113.
[100] *Wilson and Palmer v United Kingdom* (2002) 35 EHRR 20, [46]; and *Demir and Baykara v Turkey* (2009) 48 EHRR 54, [139].
[101] Antoine Jacobs, "Article 11: The Right to Bargain Collectively" (n. 75), 313.

between them.[102] Indeed, freedom of association is an essential prerequisite to the right of trade unions to engage in collective bargaining.[103] In other words, without the right to join or form trade unions, there would be no entity with which employers could bargain collectively. In addition, given that a right to bargain collectively is a particularly interventionist form of worker "consultation", it is perhaps unsurprising that it warrants separate consideration as a distinct fundamental right.[104]

The ECtHR has also recognised that the right to bargain collectively could not be dissociated from the right to organise. In *Enerji Yapi-Yol Sen*, the Court found that a prohibition on public sector employees taking part in strike action in support of a right to collectively bargain was in violation of Article 11 of the ECHR.[105] Whether Article 11 of the ECHR thereby also encompasses a right to strike as an "essential element" remains ambiguous, although it has been suggested that the Court has implicitly recognised such a right in reliance on relevant ILO case law referring to the right to strike as an indissociable *corollary* of trade union association.[106] More broadly, the ECtHR in *Demir and Baykara*, failed to delineate the precise contours of this newly recognised right to collective bargaining as a component of the trade union rights found in Article 11 of the ECHR.

It has already been noted that there are perceived deficiencies in the UK's collective bargaining regime, which may in future be confronted with challenges based on the right to bargain collectively under the Convention, such as the legal status and effect of collectively agreed terms; the absence of an obligation to conclude a collective agreement; and more importantly for the present discussion, whether the Court's position on Article 11 of the ECHR

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[102] *Ibid.*
[103] Catherine Barnard, "Article 28 – Right of Collective Bargaining and Action" (n. 83), 806.
[104] *Ibid*.
[105] *Enerji Yapi-Yol Sen v Turkey* App No 68959/01, 21 April 2009. See Filip Dorssemont, "Article 12(1) Freedom of Assembly and of Association" in Steve Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (2nd edn, Hart 2021) 371, 375.
[106] Filip Dorssemont, "The Right to Take Collective Action under Article 11 ECHR" in Filip Dorssemont, Klaus Lörcher and Isabelle Schömann (eds), *The European Convention on Human Rights and the Employment Relation* (Hart, 2013) 333, 339; *Wilson, National Union of Journalists and others v the United Kingdom* Apps Nos 30668/96, 30671/96 and 30678/96, 2 July 2002; and *Enerji Yapi-Yol Sen v Turkey* No 68959/01, 21 April 2009. Cf *Metrobus Ltd v Unite the Union* [2009] IRLR 851, [35] where Maurice Kay LJ refused to follow *Enerji Yapi-Yol Sen* on the ground that it constituted a "more summary discussion" than that found in *Demir and Baykara v Turkey.* In *National Union of Rail, Maritime and Transport Workers v The United Kingdom* (2015) 60 EHRR 1085, [84], the ECtHR did not consider it necessary to determine whether "the taking of industrial action should now be accorded the status of an essential element of the Article 11 guarantee". See Paul Gragl, "The Right to Secondary Industrial Action under the ECHR and International Human Rights Law" (2014) 1 JICL 101, 106. The ILO has also recently referred a dispute concerning the right to strike within the context of Convention No 87 to the International Court of Justice. The question to be addressed essentially concerns whether the right to strike does indeed constitute a corollary of the freedom of association: ICJ Order 2023 16 November General List No. 191.

has evolved to the extent of imposing an obligation on States to introduce *mandatory* collective bargaining procedures. The ECtHR has thus far rejected an interpretation of Article 11 of the ECHR as encompassing a *right* to compel employers to conclude collective agreements within the context of collective bargaining processes.[107] Nor do the protections offered by Article 11 of the ECHR as yet extend to an obligation on States to provide for a mandatory statutory mechanism for collective bargaining.[108]

States enjoy a particularly wide margin of appreciation in this context, given the degree of divergence in the sensitive social and political issues involved and the related difficulties associated with navigating competing labour and employer interests.[109] In *Deliveroo*, the Supreme Court, despite its finding that the riders were not in an employment relationship for the purpose of trade union rights, nevertheless went on to find that Article 11 of the ECHR does not provide a right to compulsory collective bargaining.[110] The UKSC further noted that the enactment of the recognition procedures in Schedule A1 of TULRCA 1992 already goes beyond the requirements of the Convention, and with states again, enjoying a wider margin of appreciation in this context.[111] There was therefore no need to read down the domestic provisions governing worker status in order to ensure compliance with the ECHR.

Inevitably, there is a diversity of approaches among the parties to the ECHR in relation to domestic law conceptions and categorisations of employment status, with ILO Recommendation 198, which has a narrower purpose than the relevant ILO Conventions, merely providing *indicators* of employment status.[112] Nevertheless, various social rights supervisory and monitoring bodies have explicitly found that the self-employed should be included in the scope of collective bargaining rights.[113]

It is suggested here that in *Deliveroo*, the Supreme Court in essentially framing the substitution clause (among other indicators in ILO Recommendation 198) as a contra-indication of an employment relationship, overlooked not only the protective thrust of that

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[107] *National Union of Rail, Maritime and Transport Workers v The United Kingdom* (2015) 60 EHRR 1085, [85].
[108] *Unite the Union v the United Kingdom* (2016) 63 EHRR SE7, [65].
[109] *Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (NTF) v Norway* (2021) 73 EHRR 16, [97], [114].
[110] *Deliveroo* [2023] UKSC 43, [134].
[111] *Ibid.,* [130].
[112] Alan Bogg, "Taken for a Ride: Workers in the Gig Economy" (2019) 135 *LQR* 219, 220. The ILO Conventions deal with issue such as employment policy and promotion; equality of opportunity and treatment; and freedom of association, collective bargaining, and industrial relations.
[113] ILO, *Freedom of Association: Compilation of Decisions of the Committee on Freedom of Association (*6th edn 2018), 240; and European Committee of Social Rights in its Complaint No. 123/2016, *ICTU v Ireland*, [37], [38].

concept within the context of the Convention, but also the protective purpose of the worker concept within domestic legislation.[114] In so doing, the Court failed explicitly to recognise its own role in deciding on the relative weight to attribute to these indicative factors. At the same time, there is scant recognition in its judgment of the vulnerability of gig economy workers, due for example, to their limited bargaining power to resist unfair bargains, the very concern which had animated the Court's decision in *Uber*. There is no doubt that the small delivery sector represents an industry in which the need for sectoral collective bargaining is particularly pressing given both the precarious employment conditions which characterise that sector, but also the related absence of bargaining power of gig economy workers.[115] The Supreme Court's decision also runs against more recent international efforts at enhancing the legislative protection of such workers, for example through an EU law presumption of an employment relationship in the presence of particular "indicators", such as supervision of performance, and control over working conditions, although this proposal has itself encountered opposition from particular Member States, notably France.[116]

The decision in *Deliveroo* also arises at a time when the wider social rights context is indicating a move away from the binary divide between employment and self-employment altogether, including in relation to collective bargaining.[117] There have also been wider (though relatively modest) proposals to clarify the legal categories of employment status within domestic UK law, including the removal of the emphasis placed on "substitution" in favour of "control", and which partly represents a response to the innovation in forms of work provoked by the emergence of the gig economy.[118] Indeed, as things stand, it is doubtful whether UK law complies with paragraph 10 of ILO Recommendation 198, which provides that "Members should promote clear methods for guiding workers and employers as to the determination of the existence of an employment relationship". There is certainly nothing clear about the fact that same individual may either simultaneously or over time: be genuinely self-employed; have a contract personally to do work within domestic equality law; be a worker or an employee under domestic employment legislation; be a worker for the purposes of EU law or under the

[114] *Deliveroo* [2023] UKSC 43, [71]. The UKSC also highlighted at [72] the riders' ability to work elsewhere or to reject offers of work from Deliveroo.
[115] Keith Ewing and John Hendy, "New Perspectives on Collective Labour Law" (n. 54), 38.
[116] Proposal for a Directive of the European Parliament and of the Council on Improving Worker Conditions in Platform Work COM/2021/762 final.
[117] Mark Freedland and Nicola Kountouris, "Some Reflections on the 'Personal Scope'" (n. 13), 66. See ILO, "363rd Report of the Committee on Freedom of Association" (2012).
[118] Matthew Taylor and others, "Good Work: The Taylor Review of Modern Working Practices" 2017, 40. Other (modest) proposals include the renaming of the "worker" concept as the "dependent contractor". See Anirudh Mandagere, "Examining Worker Status in the Gig Economy" (2017) 4 JICL 389, 396.

EU-UK Withdrawal Agreement; or have an employment relationship for the purposes of accessing Convention rights. It is little wonder that courts are confused or that employers are able to exploit the changing boundaries between the various categories of employment status.

A restrictive approach to domestic categorisations of worker status, an approach which itself appears increasingly incongruous with wider reform proposals at both national and European level, as well as the UKSC's own case law concerning access to individual rights, remains an unstable foundation upon which to construct access to ostensibly fundamental rights such as the right to bargain collectively. Moreover, the Court's adherence to narrow contractual conceptions of worker status undoubtedly influences its approach to the interpretation of an employment relationship in the context of Article 11 of the ECHR, and which also has profound consequences for the ability of those in precarious employment to access domestic legislative rights granted to the worker, whether collective or individual. The Supreme Court's decision in *Deliveroo* therefore remains ripe for challenge before the ECtHR where it will join a by now substantial jurisprudence concerning the UK's compliance with the collective employment rights protected by Article 11 of the ECHR. Moreover, the underlying finding that Deliveroo Riders were not workers for the purposes of domestic law, but which was not at issue on appeal, may itself be decided differently in future in light of UKSC's decision in *Uber*.

## IV. Conclusion

There is a plausible argument to be made that collective fundamental rights, as with most legal rules, necessitate a precise personal scope in order to render such rights operational in practice. As Advocate General Sharpston noted within the context of EU citizenship rights, "[t]here must be a boundary to every rule granting an entitlement. If there is no such limit, the rule becomes undecipherable and no one can tell with certainty who will, and who will not, enjoy the benefit its confers".[119] It must, however, be questioned whether it is appropriate that access to fundamental social rights can hinge on seemingly mundane factors as the provision of equipment, the method of payment, or as in *Deliveroo*, the illusory possibility that a friend *might* be asked to cover a delivery or two. The Supreme Court's judgment in *Deliveroo* lacks genuine sensitivity to the inclusive thrust and purpose of the domestic worker concept, worker-protective legislation, international social rights instruments, and the concept of an employment relationship within the context of Article 11 of the ECHR. More generally, *Deliveroo* represents

[119] Opinion of AG Sharpston in Case C-34/09 *Ruiz Zambrano v Office National de l'emploi* ECLI:EU:C:2010:560, para 143.

a missed opportunity to recognise the unifying function of fundamental employment rights, underpinned as they are with notions of solidarity and universality.[120]

In other words, cases such as *Deliveroo* are not merely concerned with statutory rights, but rather with a wider fundamental (social) rights context. Neither the existing legislative regime, nor the legal reasoning of the UKSC are indicative of these fundamental rights underpinnings, thereby further demonstrating the deficiencies in domestic law from the perspective of access to, and enforcement of, collective labour rights. In accepting the ability of "employers" essentially to contract out of legislative protections in this way, the UKSC has weakened the protection both of domestic employment rights, but also fundamental labour rights. In so doing, the Court overlooks not only its own jurisprudence but also the purpose of the underlying legislative and fundamental rights regimes, including the requirements of international labour standards governing collective bargaining. While an employment relationship remains a pre-requisite for accessing those fundamental rights, it continues to be a free-standing concept that should be insulated from the narrow (contractual) approach adopted in domestic UK law, and which leaves access to fundamental rights dependent on the extent to which contractual substitution clauses remain unfettered.[121] One would certainly be forgiven for overlooking the fact that the UKSC's rather technical and fact-driven judgment, much of which appears to be obiter, had profound implications for the protection of fundamental labour rights, both collective and individual, and both within and beyond the context of the ever-expanding gig economy characterised by the proliferation of new forms of precarious work.

[120] Nicola Countouris and Valerio De Stefano, "The Labour Law Framework: Self-Employed and Their Right to Bargain Collectively" (2021) 109 Bulletin of Comparative Labour Relations 3.
[121] *Deliveroo* [2023] UKSC 43, [69].