Employment

Substitution and worker status

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Introduction

2017 has seen a series of cases concerning limb (b) worker status in the 'gig economy.' Individuals have claimed entitlements to be paid the minimum wage, holiday pay and so on, on the basis that they meet the definition of a 'limb (b)' worker, viz. a person working under a contract "whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual". This is the definition in the Employment Rights Act 1996 s 230(3). Similar definitions appear in the Working Time Regulations 1998, the National Minimum Wage Act 1998, the Employment Relations Act 1999 and the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000.)

In many of the gig economy cases, it has been conceded that the contract was one for personal services (for example *Aslam v Uber BV*; *Gascoigne v Addison Lee Ltd*), or the tribunal has made a finding to this effect with little discussion (for example *Lange v Addison Lee Ltd*). However, in two recent cases, tribunals have examined the issue of substitution and personal service in some detail, but taken differing approaches.

The cases

Both cases concern cycle couriers. In *Dewhurst v CitySprint UK Ltd* the Employment Tribunal (ET) heard a claim by a courier who claimed that she was a limb (b) worker and was therefore entitled to two days holiday pay in respect of leave taken but not paid for. In *IWGB v RooFoods Ltd (t/a Deliveroo)* the Central Arbitration Committee (CAC) determined an application by a union for recognition for collective bargaining purposes. Deliveroo maintained that its bicycle deliverymen were neither employees nor limb (b) workers, so there could be no compulsory recognition.

The contracts

Both contracts dealt with substitution, but the manner in which they were treated differed significantly. First, the contract in *CitySprint* provided "The Contractor may at his own cost provide a substitute to perform any particular Job."

However, the substitute had to satisfy a variety of criteria such that CitySprint would have been willing to enter into a contract with him. The courier was also required to give notice in writing in advance.

In *Deliveroo*, the contract provided "Deliveroo recognises that there may be circumstances in which you may wish to engage others to provide the Services. Deliveroo is not prescriptive about this and you there have 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."

In contrast to the CitySprint contract, the Deliveroo contract merely provided that the substitute could not be somebody

with whom Deliveroo had previously terminated an agreement. Responsibility for ensuring that the substitute was adequately trained remained with the original courier.

Differences in outcome

In construing the contracts, both tribunals referred to *Autoclenz Ltd v Belcher* but came to different conclusions about how the substitution clauses operated in reality.

In *CitySprint*, the ET found that, due to the manner in which courier jobs were allocated and accepted, the possibility of substituting could only arise once the courier was on circuit and available to accept jobs. There was therefore an internally contradictory aspect to the substitution clause, as there was no realistic opportunity to arrange a substitute. While couriers did not have an unfettered right to cancel jobs once accepted, it made no practical sense for a courier to attempt to arrange a substitute, rather than contact the controller and ask to return the job. The reality of the situation was such that couriers could not substitute.

In *Deliveroo*, the CAC perceived a different reality, which led them to find that there was a genuine right to substitute, but also to emphasise different points in its analysis. A significant feature of the reality of the courier's experience was that they could refuse to accept jobs and could cancel jobs once accepted, without incurring any penalty. For that reason, there was no practical reason why they would ever wish to substitute (the ET called this the 'substitution conundrum'). Nevertheless, the CAC found that the right was a real one, for which there was evidence of at least one genuine substitution. The fact that practicalities rendered the right superfluous did not render the right a sham.

The significant difference between the cases seems to be that, although the right was impractical to exercise in both, in *Deliveroo*, there was at least some convincing evidential foundation for the use of the right.

A further difference

There is a further intriguing aspect to *Deliveroo*, dealt with only briefly in the decision of the CAC. The CAC stated that the fact that Deliveroo, by permitting substitution, might be opening itself to prosecution for failure to comply with food hygiene legislation, did not alter the reality of the right to substitute. Regulatory requirements were not relevant to the construction of a contractual right.

Contrast this with the finding of the Employment Appeal Tribunal in *Aslam v Uber BV* that legislative regulatory requirements which, in effect, required personal service by cab drivers, were not irrelevant to the construction of the contractual relationship between the parties.

Regrettably, the CAC only dealt with this issue in passing, and resolution of the possible conflict between these two decisions will have to wait for a future occasion.

A previous version of this blog was published on 11th December 2017 by Practical Law Company. This can be viewed here.

Colm Kelly is developing a strong practice in employment law, spanning a wide variety of matters, including unfair dismissal, discrimination and harassment, unlawful deductions from wages, redundancy and TUPE transfers. Colm has written talks on limb (b) worker status.