



**Michaelmas Term**

**[2023] UKSC 43**

*On appeal from: [2021] EWCA Civ 952*

## **JUDGMENT**

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

before

**Lord Lloyd-Jones**

**Lord Briggs**

**Lord Stephens**

**Lady Rose**

**Lord Richards**

**JUDGMENT GIVEN ON**

**21 November 2023**

**Heard on 25 and 26 April 2023**

*Appellant*  
Lord Hendy KC  
Katharine Newton KC  
Madeline Stanley  
(Instructed by Harrison Grant Ring)

*2<sup>nd</sup> Respondent*  
Christopher Jeans KC  
Tom Cross  
Raphael Hogarth  
(Instructed by Lewis Silkin LLP)

*Intervener – Secretary of State for Business and Trade*  
Daniel Stilitz KC  
Stephen Kosmin  
(Instructed by Government Legal Department)

**Respondents**

- (1) Central Arbitration Committee
- (2) Rooffoods Ltd, trading as Deliveroo

**LORD LLOYD-JONES AND LADY ROSE (with whom Lord Briggs, Lord Stephens and Lord Richards agree):**

**(1) Introduction**

1. Deliveroo riders have become a familiar sight in our streets as they journey on their bikes or motor-scooters from restaurants to the homes and offices where people have ordered a take-away meal using the Deliveroo online app. A substantial number of those riders who work in a particular zone in London have joined the Appellant, the Independent Workers Union of Great Britain, which is an independent trade union (“the Union”). They want the Union to negotiate on their behalf with Deliveroo to improve the conditions under which they perform their services. Deliveroo has refused to enter into collective bargaining negotiations with the Union.

2. Where an employer does not agree to recognise and bargain with a union seeking to represent workers employed by that employer, a union may invoke the apparatus set up in Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992 (“TULRCA”). That procedure does not oblige the employer actually to conclude a collective agreement with a recognised union, but it may ultimately result in a method for collective bargaining being imposed on the employer.

3. On 7 November 2016, the Union made a formal request to Deliveroo to recognise it for collective bargaining in respect of riders in the Camden and Kentish Town area (“CKT”) of North London (“the Riders”). Deliveroo rejected this request on 21 November and on 28 November 2016 the Union made an application to the Central Arbitration Committee (“the CAC”). The CAC is the quasi-judicial body which, under Schedule A1, has power to order an employer to recognise a union and engage in collective bargaining if the conditions set out in that Schedule are met.

4. One of those conditions is that the people in respect of whom the union wishes to be recognised are “workers” within the meaning of section 296 TULRCA, set out below. Deliveroo contended that the Riders did not fall within that definition and the CAC agreed in its decision dated 14 November 2017. The CAC rejected the Union’s alternative argument that a refusal to recognise the Union for collective bargaining based on the definition of “worker” in the domestic legislation would constitute a breach of article 11 of the European Convention on Human Rights (“the ECHR”) because they are workers for the purposes of that article.

5. The Union sought permission to challenge the CAC’s decision by way of judicial review. The respondent to that challenge was the CAC itself but it has played no part in the proceedings. The substantive respondent was Deliveroo as Interested Party and it

was represented at the oral hearing of the application for judicial review held before Simler J.

6. In their application, the Union relied on a number of grounds which Simler J held were unarguable. She gave permission for judicial review only on the article 11 ground [2018] EWHC 1939 (Admin).

7. Article 11 of the ECHR (as set out in Schedule 1 to the Human Rights Act 1998) states:

“Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

8. The Union’s challenge therefore proceeded on the basis that the Riders do not fall within the domestic definition of “worker” under section 296 TULRCA but that there is an issue as to whether they fall within the class of people with rights concerning trade union membership under article 11. In order to comply with the Riders’ rights under article 11, the Union argued that the definition in section 296 must be read down pursuant to section 3 of the Human Rights Act 1998 so that it includes them. The Union did not seek a declaration of incompatibility of the statutory provision with article 11 in its judicial review challenge in the event that the court found that there was an infringement of the Riders’ rights but that it was not possible to read down the legislation to comply with article 11.

9. The Union’s judicial review challenge was dismissed by Supperstone J in a judgment handed down on 5 December 2018 [2018] EWHC 3342 (Admin). That

judgment was upheld by the Court of Appeal (Underhill, Coulson and Phillips LJJ) [2021] EWCA Civ 952, [2022] ICR 84.

10. The issues that arise from the appeal before this court are as follows:

(i) Issue 1: Do the Riders fall within the scope of article 11 such that the rights conferred by that article to join and be represented by a trade union are conferred on them?

(ii) Issue 2: If the Riders do have rights under article 11, do those rights include the right that the United Kingdom legislate to require Deliveroo as their employer to engage in collective bargaining with the Union either in all circumstances or, alternatively, where the United Kingdom has chosen to confer such a right under Schedule A1 on some, but not all workers, within the scope of article 11?

(iii) Issue 3: If the Riders have such a right to require Deliveroo to bargain with the Union, is their exclusion from the apparatus of Schedule A1 because of the restrictive definition of “worker” in section 296 a violation of that right or is it justified under article 11(2) as being necessary in a democratic society etc?

(iv) Issue 4: If there has been a violation of the Riders’ rights under article 11 because they are not covered by the definition of “workers”, can that definition be read down so as to include them?

11. Before this court the Secretary of State was granted permission to intervene. The Union was represented at the hearing by Lord Hendy KC, Katharine Newton KC and Madeline Stanley who were all acting pro bono. Counsel for Deliveroo were Christopher Jeans KC, Tom Cross and Raphael Hogarth and Counsel for the Secretary of State were Daniel Stilitz KC and Stephen Kosmin. We are grateful to counsel for their written and oral submissions.

## **(2) The relevant domestic provisions**

12. Since the appeal proceeds on the basis that the Riders are not workers within the meaning of the domestic legislation, we can deal briefly with what the relevant domestic provisions say.

13. Schedule A1 to TULRCA was introduced by the Employment Relations Act 1999. It opens with the statement that a trade union seeking recognition to be entitled to conduct collective bargaining on behalf of the group of workers may make a request in accordance with Part 1 of the Schedule. Paragraph 3(3) states that references to collective bargaining are “to negotiations relating to pay, hours and holidays”, subject to the parties being able to agree that it will cover other matters, under paragraph 3(4). The first step is for the union to make a request for recognition to the employer. There are various pre-conditions to the making of a valid request including that the union is independent, that the employer employs at least 21 workers and that the request complies with any requirements specified in an order made by the Secretary of State under paragraph 9. The request must also identify the bargaining unit, that is to say the group of workers on whose behalf the union wishes to be recognised.

14. One of the conditions of admissibility of the request which, although not relevant to the present appeal, is important in several of the cases we discuss later, is paragraph 35 of Schedule A1. This provides that an application is not admissible if the CAC is satisfied that there is a collective agreement already in force under which a union is (or unions are) recognised as entitled to conduct collective bargaining on behalf of any workers falling within the relevant bargaining unit. If the union recognised by the employer to conduct collective bargaining is not an independent union, then a worker can apply to the CAC to have the bargaining arrangement ended: paragraph 137 of Schedule A1.

15. If the employer does not accept the union’s request for recognition, the union may apply to the CAC under paragraph 11 of Schedule A1 to decide whether the proposed bargaining unit is appropriate and whether the union has the support of the majority of the workers constituting the appropriate bargaining unit. The CAC is a body established under sections 259 to 265 TULRCA and is made up of people experienced in industrial relations, some as representatives of employers and some as representatives of workers.

16. If the CAC accepts the union’s application, it must try to help the parties reach an agreement as to what the appropriate bargaining unit is. If that fails then according to paragraph 19 the CAC must decide whether the proposed bargaining unit is appropriate. If it decides that the proposed bargaining unit is not, the CAC must go on to determine a bargaining unit which is appropriate. Once the appropriate bargaining unit has been established, then if the CAC is satisfied that a majority of the workers constituting the bargaining unit are members of the union, it must issue a declaration that the union is recognised as entitled to conduct collective bargaining on behalf of the workers constituting the bargaining unit: paragraph 22. Paragraph 30 then provides that the parties may negotiate “with a view to agreeing the method by which they will conduct collective bargaining”: paragraph 30(2).

17. If they cannot agree, either party can apply to the CAC for assistance. If no agreement is reached, the CAC must specify to the parties the method by which they are to conduct collective bargaining.

18. A more detailed description of the procedure under Schedule A1, often cited in later case law, is that in paras 1 to 21 of the judgment of Elias J in *R (Kwik-Fit (GB) Ltd) v Central Arbitration Committee* [2002] EWHC Admin 277. Although his decision was reversed by the Court of Appeal, the description was described by Buxton LJ, [2002] ICR 1212, para 1, as setting out the relevant parts of the legislation in “lucid detail” and those paragraphs were attached as an Annex to Buxton LJ’s judgment: see p 1220 of the report.

19. Whether a union and its members can benefit from the apparatus in Schedule A1 depends, therefore, on whether the members are “workers” within the meaning of section 296 TULRCA. Section 296 provides:

**“296.— Meaning of ‘worker’ and related expressions.**

(1) In this Act ‘worker’ means an individual who works, or normally works or seeks to work -

(a) under a contract of employment, or

(b) under any other contract 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, or

(c) in employment under or for the purposes of a government department (otherwise than as a member of the naval, military or air forces of the Crown) in so far as such employment does not fall within paragraph (a) or (b) above.

(2) In this Act ‘employer’, in relation to a worker, means a person for whom one or more workers work, or have worked or normally work or seek to work.”

20. Before the CAC, the Union accepted that the Riders are not workers within the meaning of section 296(1)(a) (“limb (a)”) because they are not employed by Deliveroo under a contract of employment. But they argued that the Riders are performing services

personally for Deliveroo and so fall within section 296(1)(b) (“limb (b)”). The CAC decided that issue against them and, as we have said, permission for judicial review was not granted in respect of that aspect of the CAC’s decision. The Union’s appeal therefore stands or falls on whether the Riders have rights under article 11, to which issue we now turn.

### **(3) Are the Riders within the scope of article 11 union rights?**

#### *(a) The facts found by the CAC*

21. The decision of the CAC was principally concerned with the question whether the Riders fell within limb (b) of section 296. Nevertheless, the decision contains useful findings as to the work carried out by the Riders and the terms and conditions of their relationship with Deliveroo.

22. Deliveroo was founded in 2013 in London and at the time of the CAC had operations in approximately 150 cities worldwide. Its business involves the delivery of food and drink items from restaurants and others, to whom it refers as partners, to customers’ homes or to other premises such as offices. Deliveroo enters into commercial agreements with the restaurants and other partners by which it agrees to deliver food and drink items supplied by them to customers. It enters into what it describes as “supplier agreements” to arrange the delivery of the food and drink items with individuals who mostly use bicycles, scooters and motorcycles (paras 34-35).

23. Shortly before the first hearing before the CAC, Deliveroo introduced new contracts for its Riders in its CKT zone. In its decision the CAC noted that some of the earlier contracts were still in force but Deliveroo was encouraging Riders on the earlier contract to change to the new contract and newly recruited Riders were required to sign the new contract. The parties before the CAC agreed that it should consider the question of worker status by reference to the new contract and not the earlier contract. The CAC, therefore, at the request of the parties, considered the position as at May 2017 and ongoing under the new contract and the position in practice. It noted that both the contractual terms and the position in practice under the earlier contract were markedly different from the new contract. The earlier contract involved much more control and direction by Deliveroo, including strict uniform requirements, a different attitude to substitutes and in other significant respects. It found, however, that both the written contractual terms and how the parties conducted themselves had changed with the introduction of the new contract. The CAC appears to have accepted Deliveroo’s submission that the new terms were permissible even if they had been introduced by Deliveroo to defeat this claim and to prevent the Riders from being classified as workers: see para 99. The CAC considered that what had happened previously was of



historical interest only and of little assistance in understanding the current situation (para 86).

24. The terms of both the earlier and new contracts, and indeed all contracts with riders generally that have been issued at any time by Deliveroo, are set by Deliveroo and there is no scope for individual negotiation. Deliveroo issued the new contracts to existing Riders on 11 May 2017 with a covering letter which specifically drew attention to the substitution clause:

“You will see that this agreement means you still have the ability to appoint another person to work on your behalf with Deliveroo at any time. A substitute working for you can log in using your phone or rider app details. But we request that you never ‘swap orders’ with another app user as this can prevent the customer from receiving accurate GPS data to track where their order is.”

The covering letter also informed Riders that they could work for other companies including competitors and that there would be “no requirement to wear Deliveroo branded kit while you work with us”. Previous restrictions on wearing competitor clothing and an obligation to wear at least one piece of Deliveroo branded equipment were not included in the new contract.

25. The principal terms of the new contract relevant to the issues on this appeal included the following:

(1) Clause 2.2 of the new contract defined “services” as “the collection by you of hot/cold food and/or drinks (‘Order Items’) from such restaurants or other partners ... as are notified to you through the Deliveroo rider app (‘App’), and the delivery of such Order Items by bicycle, car, motorbike or scooter to Deliveroo’s customers at such locations as are notified to you through the App”.

(2) The new contract stated that the Rider is “not obliged to do any work for Deliveroo, nor is Deliveroo obliged to make available any work to you. Throughout the term of this Agreement you are free to work for any other party including competitors of Deliveroo”.

“ ... 2.4 It is entirely up to you whether, when and where you log in to perform deliveries, save that it must be in an area in which Deliveroo operates and at a time when that area is open for deliveries.

2.5 While logged into the App, you can decide whether to accept or reject any order offered to you and if you do not wish to receive offers of work at any time, you can use the 'unavailable' status.

2.6 When you choose to provide Services you should:

2.6.1 When you have accepted an order, go to the Partner to collect the order items. You should then deliver the Order Items to the customer. In both instances, you should complete the Services within a reasonable time period, using any route you determine to be safe and efficient.

2.6.2 Be professional in your dealings with Deliveroo staff, other riders, restaurant personnel and members of the public while providing the Services, and provide the Services with due care, skill and ability.”

(3) Clause 3 required Riders to provide the equipment necessary to provide the Services “including your own phone; and bicycle, car, motorbike or scooter” which were to be maintained in roadworthy condition while providing Services. Riders were required to use food transportation equipment which meets Deliveroo’s safety standards.

(4) Riders were paid on a fee per delivery basis. Clause 4 set out that payment was for each completed delivery. Deliveroo was to prepare a draft invoice on a fortnightly basis in respect of the services in the previous fortnight provided by the Rider or their substitute. Riders were free to create and submit their own invoices. Riders were free to keep any gratuities paid directly to them. The new contract stated that “as a self-employed supplier you are responsible for accounting for and paying any tax and national insurance due in respect of sums payable to you under or in connection with this Agreement.”

(5) Riders were required by clause 5 to provide warranties including the right to residency and work in the United Kingdom, the absence of unspent convictions and compliance with all legal conditions.

(6) Riders were responsible for obtaining third party liability insurance for themselves. The new contract provided that “any substitute appointed by you need not have their own insurance as long as they are covered under your insurance.”

- (7) Clause 8 provided in relation to the right to appoint a substitute:

“8.1 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 therefore 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. This can include provision of the Services by others who are employed or engaged directly by you; however, it may not include an individual who has previously had their Supplier Agreement terminated by Deliveroo for a serious or material breach of contract or who (while acting as a substitute, whether for you or a third party) has engaged in conduct which would have provided grounds for such termination had they been a direct party to a Supplier Agreement. If your substitute uses a different vehicle type to you, you must notify Deliveroo in advance.

8.2 It is your responsibility to ensure your substitute(s) have the requisite skills and training, and to procure that they provide the warranties at clause 5 above to you for your benefit and for Deliveroo’s benefit. In such event you acknowledge that this will be a private arrangement between you and that individual and you will continue to bear full responsibility for ensuring that all obligations under this Agreement are met. All acts and omissions of the substitute shall be treated as though those acts and/or omissions were your own. You shall be wholly responsible for the payment to or remuneration of any substitute at such rate and under such terms as you may agree with that substitute, subject only to the obligations set out in this Agreement, and the normal invoicing arrangements as set out in this Agreement between you and Deliveroo will continue to apply.”

- (8) The Rider may terminate the new contract at any time for any reason on giving Deliveroo immediate notice in writing and Deliveroo is required to give a Rider one week’s written notice of termination for any reason, and with immediate effect “in the event of any serious or material breach of any obligation owed by you (including ... where such breach is the responsibility of any substitute engaged by you).”: (Clause 10).

(9) Clause 13.2 provided that the Agreement contained the whole agreement between the Rider and Deliveroo.

(10) Clause 13.3 provided that the Agreement was personal to the Rider and may not be assigned to a third party without Deliveroo's express written agreement and stated "for the avoidance of doubt, this includes any substitute engaged by you in the provision of the Services".

(11) Deliveroo does not provide a pension or other benefits such as life assurance and permanent health insurance to Riders.

26. The CAC made findings concerning how the parties conducted themselves in practice.

(1) Within zones such as CKT, there was no expectation or requirement that Riders would indicate in advance when they intended to work. Such Riders were not subject to any form of schedule. They operated exclusively on a "free log-in basis", subject to a requirement that they perform at least once every three months.

(2) Riders with a CKT Ops Code were paid on a fee per delivery basis ("FPD"). They were normally paid £3.75 per delivery but this varied to some degree depending on demand.

(3) Riders could make themselves unavailable at any time unless they had already accepted an order which had not been delivered.

(4) When Riders marked themselves as available, the Deliveroo algorithm might start to offer them work if an order had been requested in the vicinity. If the Rider rejected an offer or did not respond within three minutes, the job would be offered to another Rider.

(5) When a Rider accepted an order, he or she would be told the details of the Partner where the food or drink was to be collected. Only on collection did they find out what the order consisted of and where it was to be delivered. The Deliveroo App would suggest a route for them, but they were not obliged to follow it. They were required to confirm that delivery had been made.

27. The CAC made findings as to how substitution operated in practice. It noted that there was no policing by Deliveroo of a Rider's use of a substitute. Deliveroo simply relied on the contractual terms with the Rider. It found that in practice substitution is rare because there was no need for a Rider to engage a substitute. If the Rider did not want to accept a job or be available for work they did not need to log on to the App, or if they were logged on they did not need to make themselves available. If they were logged on and marked themselves as available they were not under any obligation to accept any jobs offered. While Deliveroo had a right of termination on one week's notice for any reason, it did not terminate FPD contracts for not accepting a certain percentage of orders or for Riders not making themselves sufficiently available (although the position was different for hourly paid Riders). FPD Riders were, however, vulnerable to having their contracts terminated on one week's notice if their, or their substitute's, delivery times over a sustained period were considered too slow.

28. The CAC found that "a few, if that, Riders use substitutes". Most Riders did not use a substitute as they did not need to do so. A Rider might allow a friend to use their App by providing the password. The confidentiality clause in the new agreement provided for the substitute to be told the password, but the Rider was responsible for the substitute maintaining confidence. The Rider was paid for any deliveries made by the substitute. Deliveroo was not aware of the identity of the substitute or the fact that one had been used on any particular occasion. The Rider was entirely responsible for the substitute, including insuring them. Remuneration of the substitute was a matter between the Rider and the substitute (paras 78-79).

29. While most Riders did not use a substitute, a few did. One who gave evidence explained that he regularly engaged a substitute, taking 15-20% of the fee he received from Deliveroo and passing on the balance to his substitute. Deliveroo did not object to this practice. The CAC also found one instance of substitution after the job had been accepted and before collection of the Order from the restaurant (paras 80-81). Deliveroo was planning to change the system to enable a Rider to cancel via the App after accepting (para 82).

30. The CAC found that some Riders were also signed up with other food delivery organisations. Deliveroo did not object to this. The covering letter accompanying the new contract stated:

"We know that the vast majority of riders work with other companies as well as Deliveroo, including our competitors. That is fine with us: as an independent contractor you are free to work with whoever you choose."

The Union did not accept that it was a vast majority, but accepted that a goodly proportion may work with other companies (para 83). The CAC found that some Riders could and did have several apps open at once, taking jobs as and when offered and maximising the chance of work. In practice, however, it would be tricky and risky to undertake simultaneous deliveries for different food delivery companies. Since delivery times were monitored and persistent slow deliveries were a cause of termination, there was a disincentive in doubling up orders for different companies (para 84).

*(b) The analysis and conclusions of the CAC on limb (b)*

31. The analysis of the CAC proceeded on the basis of limb (b) of section 296(1).

32. The CAC began by expressing its puzzlement on one issue. Given that Deliveroo stressed the total flexibility of its Riders' ability to log in, as and when they wished, and to decline offers of a delivery, even when logged on, and even to abandon a delivery midway, why would the question of substitution ever arise? Furthermore, why would Deliveroo spend so much time, money and energy in selecting and training Riders when the Riders could then sub-contract the right to use the App as they chose? On behalf of the Union it had been submitted that there was, in reality, no substitution right. The "bland" response on behalf of Deliveroo had been that it was a matter for Deliveroo if it was willing to invest in training for its Riders, knowing that they could sub-contract whenever they chose. The CAC noted that one solution to the substitution conundrum was subcontracting for profit (para 99).

33. The CAC considered that "the central and insuperable difficulty for the Union" was that it had found the substitution right to be genuine in the sense that Deliveroo had decided that under the new contract Riders should have a right to substitute themselves at will both before and after they had accepted a particular job and that that had operated in practice (para 100). In light of its central finding on substitution, it could not be said that the Riders undertook to perform personally any work or services for another party for the purposes of section 296(1)(b) TULRCA (set out at para 19 above). That was fatal to the Union's claim. A Rider would not be penalised by Deliveroo for not personally making the delivery herself or himself, provided the substitute complied with the contractual terms that applied to the Rider. The CAC noted that a high level of trust in the substitute was required in the Rider, because the substitute had to have the Rider's phone or password to download the Rider's App and because of the contractual obligations of the Rider in respect of the substitute. This limited the attractiveness of sub-contracting but did not make the substitution provisions a sham (paras 101-102).

34. In these circumstances, the CAC considered that it was unnecessary to dissect the other features of the contractual relationship between Deliveroo and its Riders; they were insufficient to compensate in the Union's favour in light of the substitution

finding. It concluded that the Riders were not workers within the statutory definition of either section 296 TULRCA or section 230(3)(b) of the Employment Rights Act 1996 (para 103).

35. It was only at this point that the CAC turned to consider the first issue which arises for consideration on this appeal. It simply stated:

“104. Mr Hendy made a secondary submission pursuant to article 11 ECHR and section 3 of the Human Rights Act [1998]. However, on the specific facts of this case and the unfettered and genuine right of substitution that operates both in the written contract and in practice, the argument does not succeed. In a less clear cut case the position might have been different.”

36. The CAC therefore rejected the Union’s application as the Riders were not workers within section 296 TULRCA.

*(c) Article 11 ECHR and the case law of the Strasbourg Court*

37. Article 11(1) confers a number of different freedoms. In addition to a general freedom of peaceful assembly and a general freedom of association with others, article 11(1) confers a trade union freedom which applies in more limited circumstances. As a result, the trade union freedom may be regarded as a specific sub-set of the general freedom of association. Furthermore, the content of the trade union freedom has not remained a constant but has been expanded by interpretation by the Strasbourg court. Of particular significance in the present case is *Demir v Turkey* [2009] IRLR 766, where the Strasbourg court acknowledged for the first time that the trade union freedom includes a right to bargain collectively. This is discussed further below.

38. It is necessary therefore to ascertain the class of people who enjoy whatever rights fall within the scope of the trade union freedom and the right to bargain collectively. Initially, Lord Hendy KC on behalf of the appellant, submitted that these were conferred on everyone because article 11(1) expressly states that everyone enjoys the rights it confers. However, he later resiled from this submission and maintained that the right to bargain collectively is enjoyed by every individual with an occupational interest to protect. He submitted that if the objective is to improve by collective bargaining working terms and conditions, that involves the exercise of trade union rights. In particular, he denied that an employment relationship is a pre-condition to the enjoyment of trade union rights under article 11.

39. The Strasbourg Court considered the scope of the class of people who have trade union rights under article 11 in the leading case of *Sindicatul "Păstorul Cel Bun" v Romania* [2014] IRLR 49 ("*The Good Shepherd*"). Orthodox priests and lay employees of the Archdiocese of Craiova in Romania formed a trade union called "The Good Shepherd". Its elected president applied to a court for the union to be granted legal personality and entered in the register of trade unions. This was opposed by the Archdiocese. At first instance the application succeeded but the decision was reversed and the trade union's registration was revoked. The union then brought proceedings against Romania before the Strasbourg Court alleging that the refusal of its application for registration as a trade union had infringed its members' right to form a trade union under article 11 ECHR. A chamber of the Third Section of the Court found a violation of article 11. At a further hearing before a Grand Chamber the Archdiocese argued that the emergence of such a body would imperil the freedom of religious denominations to organise themselves in accordance with their own traditions and would undermine the church's traditional structure. It submitted that it was therefore necessary to limit the freedom to form and participate in a trade union. The Grand Chamber held that members of the clergy, notwithstanding their special circumstances, fulfilled their mission in the context of an employment relationship falling within the scope of article 11. It further held, however, that the Romanian court's refusal to register the union was justified: there had been no violation of its members' rights to form a trade union under article 11 because the interference had been prescribed by law, pursued legitimate aims and was necessary in a democratic society.

40. The particular significance of the decision for present purposes is the acceptance by the Grand Chamber that the right under article 11 to form a trade union could only arise where there was an employment relationship. In considering whether article 11 was applicable to the members of the union, the Court rejected the submission of Romania that members of the clergy must be excluded from the protection afforded by article 11 because they perform their duties under the authority of the bishop and therefore outside the scope of the domestic rules of labour law.

"It is not the Court's task to settle the dispute between the union's members and the Church hierarchy regarding the precise nature of the duties they perform. The only question arising here is whether such duties, notwithstanding any special features they may entail, amount to an employment relationship rendering applicable the right to form a trade union within the meaning of Article 11." (para 141)

41. It is particularly significant that the Grand Chamber stated (at para 142) that in addressing this question it would apply the criteria laid down in the relevant international instruments including International Labour Organization ("ILO"), Employment Relationship Recommendation, 2006 (No 198) ("ILO Recommendation No 198"). That Recommendation makes the point that the determination of such a



relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterised in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties. The Grand Chamber observed that the duties performed by the members of the trade union in question entailed many of the characteristic features of an employment relationship. It acknowledged that a particular feature of the work of members of the clergy was that it also pursued a spiritual purpose and was carried out within a church enjoying a certain degree of autonomy, and that members of the clergy were bound by a heightened personal duty of loyalty. It identified the question to be determined as whether such special features were sufficient to remove the relationship between members of the clergy and their church from the ambit of article 11. It concluded (at para 148):

“Having regard to all the above factors, the Court considers that, notwithstanding their special circumstances, members of the clergy fulfil their mission in the context of an employment relationship falling within the scope of Article 11 of the Convention. Article 11 is therefore applicable to the facts of the case.”

42. Two further decisions of the Strasbourg Court on which the appellant initially relied are now accepted by Lord Henty as not taking this issue any further. *Sigurjónsson v Iceland* (1993) 16 EHRR 462 concerned the refusal of a taxi driver to join an automobile association which, inter alia, protected taxi drivers' rights. The decision of the Court that there had been a violation of his right under article 11 not to be forced to join the association does not cast any light on the present issue as it was not necessary to decide whether the association could be regarded as a trade union within article 11. The case was decided on the basis that it fell within the wider right to freedom of association. Similarly, *Ólafsson v Iceland* (2010) 56 EHRR 21, where a master builder complained of a statutory levy payable to an association of which he was not a member which was required to use it for the promotion of industrial development, was decided on the basis of a violation of his right to freedom of association under article 11. Neither case lends any support for the proposition that the article 11 right to join or to refuse to join a trade union extends to persons who are outside an employment relationship.

43. At first sight the judgment of the Strasbourg court in *Manole v Romania* (Application No 46551/06) (unreported) 16 June 2015 is inconsistent with the proposition that an employment relationship is a pre-condition to enjoyment of trade union rights under article 11. The claimants decided to form an association named “Agricultural trade union Romanian Farmers Direct” and applied for its registration with a view to conferring legal personality on it. Its main purpose was to defend the interests of its members, namely farmers and persons providing services for farmers, including transport facilities, to move on from subsistence farming to agriculture which

was more directed to the market. To that end it aimed to organise local centres with a view to providing legal information, accountancy advice and judicial assistance to individual farmers. The application for registration was rejected on the ground that only employees holding a contract of employment and civil servants could set up trade unions, to the exclusion of farmers and other self-employed persons who could only join pre-existing trade unions.

44. In its judgment, the Third Section of the Strasbourg court reiterated that under its case-law trade union freedom is not an independent right but a specific aspect of freedom of association as recognised by article 11. Although the ECHR did not precisely define the concept of a trade union beyond a general indication that it is an association formed for the purpose of defending the interests of its members, most of the cases had concerned employees and, more broadly, persons in an employment relationship. Nevertheless, the Contracting States enjoyed a wide margin of appreciation as to how the freedom of trade unions to protect the occupational interests of their members may be secured (paras 59, 60). The Court held that the refusal of “the right to be registered as a trade union-type association” was an interference by Romania with the exercise of the rights guaranteed by article 11 (para 62). The Court went on, however, to conclude that the interference was justified under article 11(2) (para 65).

45. The appellant is, therefore, able to point to *Manole* as a case where the trade union right was held to apply to an association of self-employed persons. There are, however, several unusual features to this decision. First, the association in question does not appear to have had the attributes of a trade union as opposed to that of a trade association. Its purposes, described above, seem to have been those of a trade association. The Court (at para 62) described it as “a trade union-type association”. Secondly, the decision is entirely explicable as an application of the more general freedom of association conferred by article 11. Thirdly, the reasoning of the Court in concluding that there had been no violation of article 11 might equally have been presented in support of the proposition that the trade union right was not in play here because it does not extend to such bodies. The Court referred (at para 71) to various observations of the ILO but “discerns no sufficient reasons to deduce from those general observations that the exclusion of self-employed farmers from the right to form trade unions amounts to a breach of Article 11 of the Convention”. It noted that the relevant Romanian legislation in no way restricted the applicants’ right to set up trade associations (para 72) and concluded (at para 73):

“The Court infers that domestic legislation grants agricultural trade organisations the requisite rights for defending their members’ interests before the public authorities without any need to establish such organisations in the form of trade unions, which are now reserved for employees and members of cooperatives, in agriculture just as in all the other economic sectors.”

46. We consider, therefore, that *Manole* does not detract from the clear authority of *The Good Shepherd*, a decision of a Grand Chamber, to the effect that the trade union right under article 11 arises only in the context of an employment relationship. (See also, in this regard, the discussion of *The Good Shepherd* and *Manole* in *National Union of Professional Foster Carers v Certification Officer* [2020] ICR 607, paras 57-62.)

*(d) Analogous case law from the domestic courts and the CJEU*

47. Mr Jeans sought to draw an analogy with the case law of the Court of Justice of the European Union (“CJEU”). In particular he drew the court’s attention to *B v Yodel Delivery Network Ltd* (Case C-692/19) [2020] IRLR 550 which concerned the Working Time Directive (Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p9)). B, who was a parcel delivery courier engaged exclusively for Yodel under a services agreement which stated that he was a self-employed independent contractor, claimed he was a “worker” within the Directive. The Watford Employment Tribunal made a preliminary reference to the CJEU which made a ruling under article 99 of its Rules of Procedure.

48. The CJEU noted that “worker” was not defined in the Directive but that it had an autonomous meaning specific to EU law. The national court was required to base its classification on objective criteria and make an overall assessment of all the circumstances of the case, having regard to the nature of the activities concerned and the relationship of the parties (para 27). The essential feature of an employment relationship was that for a certain period of time a person performed services for and under the direction of another person in return for which he received remuneration (para 29, citing *Fenoll v Centre D’Aide par le Travail “La Jouvène”* (Case C-316/13) [2016] IRLR 67). It noted that B appeared to have a great deal of latitude in relation to his putative employer. It was therefore necessary for the referring court to consider whether that independence was merely notional and whether there existed a subordinate relationship (paras 35-37). The classification was a matter for the referring court. However, the CJEU expressed its conclusion as follows:

“[The Working Time Directive] must be interpreted as precluding a person engaged by his putative employer under a services agreement which stipulates that he is a self-employed independent contractor from being classified as a ‘worker’ for the purposes of that directive, where that person is afforded discretion:

- to use subcontractors or substitutes to perform the service which he has undertaken to provide;
- to accept or not accept the various tasks offered by his putative employer, or unilaterally set the maximum number of those tasks;
- to provide his services to any third party, including direct competitors of the putative employer, and
- to fix his own hours of ‘work’ within certain parameters and to tailor his time to suit his personal convenience rather than solely the interests of the putative employer,

provided that, first, the independence of that person does not appear to be fictitious and, second, it is not possible to establish the existence of a relationship of subordination between that person and his putative employer.”

49. While it is understandable that Mr Jeans should seek to rely on similarities between the role of B and that of the Deliveroo Riders in the present appeal, *B v Yodel Delivery Network Ltd* is a decision in a different context on an entirely different instrument. Moreover, contrary to the submission of Mr Jeans, we do not consider that there is any scope here for the application of the *Bosphorus* principle (see *Bosphorus Hava Yollari Turizm ve Ticaret AS v Ireland* (2005) 42 EHRR 1): this is not a case where a member of the Council of Europe is required by a conflicting international instrument to act in a way which infringes Convention rights. Nevertheless, we note the emphasis placed by the Luxembourg court on an examination of the substance of the case as the basis for classification. Furthermore, it is significant that the four features identified by the CJEU as inconsistent with the status of a “worker” are all present in the present case.

50. While the present appeal is limited to the article 11 issue, the approach in domestic law within the United Kingdom to the classification of such working relationships is nevertheless instructive. In *Autoclenz Ltd v Belcher* [2011] UKSC 41; [2011] ICR 1157 the claimants, who as “valeters” performed car cleaning services which Autoclenz had contracted to provide to third parties, brought proceedings claiming that they were “workers” for the purposes of the legislation conferring the rights to be paid the national minimum wage and to receive statutory paid leave (National Minimum Wage Regulations 1999 (SI 1999/584); Working Time Regulations 1998 (SI 1998/1833)). The employment tribunal held that the claimants came within

both limbs of the relevant definition of a “worker” and appeals by Autoclenz were dismissed at every level including the Supreme Court. In the Supreme Court Lord Clarke, with whose judgment the other Justices agreed, drew (at paras 20, 21) a distinction between certain principles “which apply to ordinary contracts and, in particular, to commercial contracts”, and “a body of case law in the context of employment contracts in which a different approach has been taken”. The question whether a contract is a “worker’s contract” within the meaning of the legislation designed to protect employees and other “workers” is not to be determined by applying ordinary principles of contract law such as the parole evidence rule, the signature rule and the principles that govern the rectification of contractual documents on grounds of mistake.

51. In *Autoclenz* Lord Clarke of Stone-cum-Ebony (at paras 26, 29) expressly approved the approach of Elias J, President of the Employment Appeal Tribunal, in *Consistent Group Ltd v Kalwak* [2007] IRLR 560 where Elias J observed (at para 57):

“The concern to which tribunals must be alive is that armies of lawyers will simply place substitution clauses, or clauses denying any obligation to accept or provide work, in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship.”

Elias J emphasised (at paras 58-59) that in this area of the law the court should be alert to look at the reality of any obligations:

“In other words, if the reality of the situation is that no one seriously expects that a worker will seek to provide a substitute, or refuse the work offered, the fact that the contract expressly provides for these unrealistic possibilities will not alter the true nature of the relationship. But if these clauses genuinely reflect what might realistically be expected to occur, the fact that the rights conferred have not in fact been exercised will not render the right meaningless.

...Tribunals should take a sensible and robust view of these matters in order to prevent form undermining substance ...”

52. In *Pimlico Plumbers Ltd v Smith* [2018] ICR 1511 one of the issues was whether the claimant, Mr Smith, who carried out plumbing work for the appellant company, was a “worker” within section 230(3)(b) of the Employment Rights Act 1996. Section 230(3) defined a “worker” as including not only, at (a), an employee under a contract of service but also, at (b), an individual who has entered into or works under “any other

contract ... whereby the individual undertakes to ... 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 ...". The employment tribunal found that terms and conditions contained in the company's manual obliged the claimant to work a normal week of 40 hours, that there was no unfettered right to substitute at will, although the company's operatives could swap jobs, and that there was a high degree of restriction on Mr Smith's ability to work in a competitive situation. The tribunal held that Mr Smith had not been an employee of Pimlico under a contract of service but that he had been a "worker" of Pimlico within section 230(3)(b) of the 1996 Act. The latter ruling was upheld on appeal to the Employment Appeal Tribunal, the Court of Appeal and the Supreme Court.

53. The particular significance of *Pimlico Plumbers* for present purposes is what was said about a power of substitution. Lord Wilson observed (at paras 32- 33) that, while the sole test was one of personal performance, the case was one in which it was helpful to assess the significance of Mr Smith's right to substitute another Pimlico operative by reference to whether the dominant feature of the contract remained personal performance on his part. On the facts of the case, he considered that the right to substitute had been regarded as so insignificant as not to be worthy of recognition in the terms deployed in 2009. Furthermore, Pimlico had accepted that it would not be usual for an operative to take responsibility for performing a job by estimating for it and then to substitute another operative to effect performance. He concluded (at para 34):

"The tribunal was clearly entitled to hold, albeit in different words, that the dominant feature of Mr Smith's contracts with Pimlico was an obligation of personal performance. To the extent that his facility to appoint a substitute was the product of a contractual right, the limitation of it was significant: the substitute had to come from the ranks of Pimlico operatives, in other words from those bound to Pimlico by an identical suite of heavy obligations. It was the converse of a situation in which the other party is uninterested in the identity of the substitute, provided only that the work gets done."

54. In *Uber BV v Aslam* [2021] UKSC 5, [2021] ICR 657 ("*Uber*") the Supreme Court provided further explanation of *Autoclenz*. In *Uber* the claimants worked as private hire vehicle drivers, providing transportation services to passengers in London through a smartphone app operated by the appellant companies. The claimants successfully claimed that they were "workers" within the legislation which entitled them to the minimum wage and annual leave (the Employment Rights Act 1996, the Working Time Regulations 1998 and the National Minimum Wage Regulations 2015 (SI 2015/621)). (The relevant statutory definitions were substantially similar to that in section 296(1) of TULRCA.) The Supreme Court rejected Uber's submission, founded on the terms of the standard-form contracts which the drivers were obliged to sign, that

the drivers provided their services to and under contracts with the passengers. It held that the drivers provided their services to and under contracts with Uber and it disregarded contractual provisions to the contrary.

55. Lord Leggatt, with whose judgment the other members of the Supreme Court agreed, noted that Lord Clarke in *Autoclenz* had made it clear that whether a contract is a “worker’s contract” within the meaning of legislation designed to protect employees and other “workers” was not to be determined by applying ordinary principles of contract law. Lord Leggatt added that what was not, however, fully spelt out in *Autoclenz* was the theoretical justification for this approach. While it had been emphasised in *Autoclenz* that in an employment context the parties were frequently of very unequal bargaining power, this was not in general a reason for disapplying or disregarding ordinary principles of contract law, save where Parliament had so provided. Lord Leggatt continued (at paras 69-70):

“Critical to understanding the *Autoclenz* case, as I see it, is that the rights asserted by the claimants were not contractual rights but were created by legislation. Thus, the task for the tribunals and the courts was not, unless the legislation required it, to identify whether, under the terms of their contracts, *Autoclenz* had agreed that the claimants should be paid at least the national minimum wage or receive paid annual leave. It was to determine whether the claimants fell within the definition of a “worker” in the relevant statutory provisions so as to qualify for these rights irrespective of what had been contractually agreed. In short, the primary question was one of statutory interpretation, not contractual interpretation.

The modern approach to statutory interpretation is to have regard to the purpose of a particular provision and to interpret its language, so far as possible, in the way which best gives effect to that purpose.”

56. These decisions were made in different legal contexts from the article 11 issue which arises for consideration on this appeal. (Lord Hendy has correctly acknowledged that he could not rely on *Uber* to attempt to re-open the refusal of permission to appeal on the domestic law issues.) Nevertheless, they are instructive because they emphasise the need to focus on the reality of the situation. In particular, the label that the parties put on a relationship will not be determinative. Furthermore, the normal rules of contractual interpretation do not apply in that the courts can and must look at how the contract operates in practice. It is necessary to ascertain whether particular freedoms conferred by the agreement on which the putative employer relies to negate the

existence of an employment relationship are not only genuine (in the sense of not being a sham disguising the fact that the worker is effectively bound not to take advantage of that freedom) but also actually affect the way in which services are performed.

(e) *ILO Recommendation No 198*

57. It is necessary to say something further concerning ILO Recommendation No 198 which was considered by the Strasbourg court in *The Good Shepherd*.

58. The preamble to the Recommendation refers to “the difficulties of establishing whether or not an employment relationship exists in situations where the respective rights and obligations of the parties concerned are not clear, where there has been an attempt to disguise the employment relationship, or where inadequacies or limitations exist in the legal framework, or in its interpretation or application”.

59. Part II is entitled “Determination of the Existence of an Employment Relationship” and includes the following provisions:

“9. For the purposes of the national policy of protection for workers in an employment relationship, the determination of the existence of such a relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties.

10. Members should promote clear methods for guiding workers and employers as to the determination of the existence of an employment relationship.

...

13. Members should consider the possibility of defining in their laws and regulations, or by other means, specific indicators of the existence of an employment relationship. Those indicators might include:



(a) the fact that the work: is carried out according to the instructions and under the control of another party; involves the integration of the worker in the organization of the enterprise; is performed solely or mainly for the benefit of another person; must be carried out personally by the worker; is carried out within specific working hours or at a workplace specified or agreed by the party requesting the work; is of a particular duration and has a certain continuity; requires the worker's availability; or involves the provision of tools, materials and machinery by the party requesting the work;

(b) periodic payment of remuneration to the worker; the fact that such remuneration constitutes the worker's sole or principal source of income; provision of payment in kind, such as food, lodging or transport; recognition of entitlements such as weekly rest and annual holidays; payment by the party requesting the work for travel undertaken by the worker in order to carry out the work; or absence of financial risk for the worker.”

60. We gratefully adopt the following summary by Underhill LJ in the Court of Appeal in the present proceedings (at para 62) as to the effect of these provisions:

“Overall, the approach taken in [ILO Recommendation No 198] to identifying an employment relationship broadly parallels that taken in domestic law in identifying the characteristics not only of a contract of service, but also of a ‘worker contract’. It recognises an underlying concept of ‘subordination’; it identifies a number of familiar indicators of the existence of such a relationship; and it enjoins a focus on the realities of the relationship and being alert to attempts to disguise it.”

*(f) The principles for determining whether an employment relationship exists*

61. From all these materials we derive the following principles:

(1) The category of persons who benefit from the right to form and join a trade union under article 11 is a smaller sub-class of those – described as “everyone” in the opening of article 11(1) – who enjoy the right to freedom of peaceful assembly and to freedom of association with others conferred under that article. Although Lord Hendy initially argued on this appeal, as he had argued in

the courts below, that the right to form and join a trade union was enjoyed by everyone, he did not pursue this submission and accepted that the rights on which the Union is seeking to rely are conferred on persons in the context of an employment relationship. This concession was, in our view, correctly made and compelled by the Strasbourg authorities considered above. We will refer to the class of people on whom article 11 trade union rights are conferred as “article 11 workers”.

(2) The concept of an employment relationship within article 11 is an autonomous concept that must apply across all the members of the Council of Europe and does not depend on the definitions of workers or employees used in domestic law.

(3) In determining whether there is an employment relationship within article 11, the court should consider, inter alia, the factors set out in ILO Recommendation No 198 as referred to in *The Good Shepherd* (at paras 57 and 142). (See paras 41, 57 to 59 above.) This approach is not inconsistent with the strictures in *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2022] AC 223 (at paras 2(7)(i), 74-96) against reliance on the provisions of international treaties and instruments which have not been implemented into domestic law. Although the ILO made recommendations to Member States in relation to the identification of an employment relationship in any particular case, in *The Good Shepherd* the Strasbourg court expressly adopted and applied the criteria. They are, as a result, incorporated into the Convention test for the identification of an employment relationship under article 11.

(4) The correct approach requires the application of a multifactorial test, focusing on the practicalities of the relationship and how it operates in reality.

62. Lord Hendy argued that the court should adopt a purposive construction of article 11. In his submission, the key feature of the relationship was that the putative workers were in a subordinate position with unequal bargaining power as regards the setting of their occupational interests. People in such a position, he submitted, needed collective bargaining so as to be able to establish fair working conditions. They should, therefore, be included within the scope of those on whom article 11 trade union rights are conferred. Lord Hendy sought to draw support for this approach from the observation of Underhill LJ in the Court of Appeal that it might at first sight seem counter-intuitive that the Riders were not able to insist that Deliveroo negotiate with the Union:

“It is easy to see that riders might benefit from organising collectively to represent their interests as against Deliveroo, and it might seem to follow that they should have the right “to

join and form a trade union for the protection of [those] interests.” (at para 86)

In this regard Lord Hendy also drew our attention to the decision of the European Committee of Social Rights in *Irish Congress of Trade Unions (ICTU) v Ireland* (2018) 68 EHRR SE6.

63. While we agree that a purposive approach should be adopted to the issue of interpretation (see *Uber* per Lord Leggatt at para 70), we disagree with Lord Hendy’s proposed approach. There is in our view no support for it in the case law. There are many situations in which persons are in a position of unequal bargaining power and are offered contractual terms on a take it or leave it basis. However, that does not mean that they are entitled to band together and require the counterparty to negotiate with them collectively.

64. On behalf of the second respondent, Mr Jeans agreed that the test for an employment relationship under article 11 is a multifactorial test. In his submission, however, an employment relationship within article 11 exists in cases falling within section 296(1)(a) of TULRCA (“limb (a)”) but not in cases falling within section 296(1)(b) (“limb (b)”) because limb (b) is simply an extension in domestic law conferring rights on a class of persons who do not benefit from article 11 trade union rights. He argued that most European countries recognise a bifurcation between true employees on the one hand and self-employed persons on the other and that workers’ rights are generally limited to the former. In this regard he submitted that the United Kingdom is unusual in recognising an intermediate category. (See *Bates van Winkelhof v Clyde & Co LLP* [2014] UKSC 32, [2014] ICR 730, per Baroness Hale of Richmond DPSC at para 25.)

65. We are unable to accept this submission. The concept of an employment relationship under article 11 is an autonomous concept that applies equally to all members of the Council of Europe and does not depend on the definitions of workers or employees used in domestic law. There is no reason why it should reflect the distinction drawn between limb (a) and limb (b) in our domestic law. On the contrary, the authorities show that the class of persons falling within the concept of an employment relationship under article 11 is wider than limb (a) but does not necessarily extend to include all cases within limb (b).

*(g) The application of the principles to the facts of this case*

66. Although the issue was only touched on briefly by the CAC, it is necessary for us to decide on this appeal whether the relationship between Deliveroo and the Riders is an employment relationship within the autonomous concept under article 11. This was the

sole issue on which Simler J granted permission to bring proceedings for judicial review. The submission before the CAC, expressly described as “secondary”, was that in order to comply with article 11 it was necessary to construe the requirement of personal service in section 296(1) so that it was fulfilled “(a) by the performance of services, for and under the direction of [the other party] and in return for which the worker receives remuneration; or (b) by the performance of those services which the putative worker in fact executes personally”.

67. The substantive judicial review application was heard by Supperstone J [2018] EWHC 3342 (Admin). Mr Hendy had submitted that the power of substitution was not fatal where, as here, Deliveroo was plainly interested in the attributes of substitutes, nor was absence of an obligation to work. However, Supperstone J concluded that the Strasbourg case law did not support the submission that the Riders were workers in the particular circumstances found by the CAC to exist. They were not under the new contract in an employment relationship with Deliveroo: (para 33). The judge was not persuaded that any of the authorities referred to extended the right to bargain collectively beyond an employment relationship: (para 36). He did not consider that, on the findings made by the CAC, the Riders had the right for which the Union contended under article 11. Neither domestic nor Strasbourg case law supported this contention. As a result article 11 was not engaged in this case: (para 39).

68. On appeal to the Court of Appeal, Underhill LJ (with whom Coulson and Phillips LJJ agreed) [2022] ICR 84 came to the same conclusion.

(1) Underhill LJ noted that the reasoning of the CAC on this issue, at para 104, was extremely summary. The article 11 point had only been taken in written closing submissions and the short appendix which was said to address the relevant law on article 11 did not refer to materials of central importance, namely the decisions of the Strasbourg court in *The Good Shepherd* or *Manole* or to ILO Recommendation No 198 (para 75).

(2) The CAC had, nevertheless, concluded that the Riders were not in an employment relationship with Deliveroo for the purposes of article 11, that being the only issue to which its reference to “the unfettered and genuine right of substitution that operates both in the written contract and in practice” was material (para 76).

(3) That was a conclusion to which the CAC was entitled to come. The particular feature on which it had relied was its finding that Riders were genuinely not under an obligation to provide their services personally and had a virtually unlimited right of substitution. This, Underhill LJ considered, was on any view a material factor in the decision. Paragraph 13 of ILO Recommendation

No 198 referred to the fact that the work “must be carried out personally by the worker” as an indicator of an employment relationship and it followed that the absence of such an obligation must be a contra-indicator of worker status. However, in the opinion of Underhill LJ, the CAC was entitled to regard this as decisive. The position taken by English law that (subject to limited exceptions acknowledged in *Pimlico Plumbers*) an obligation of personal service was an indispensable feature of the relationship of employer and worker was not a parochial peculiarity but was a central feature of such a relationship as ordinarily understood. There was no reason why its importance should be any the less in the context of article 11 (para 77).

(4) A submission which relied on the CAC’s finding that the Riders only rarely took advantage of the right of substitution was rejected. While that might be relevant to the question whether the right was genuine, the challenge was concerned with legal relationships and any test other than what the parties’ genuine rights and obligations were would be unacceptably uncertain. The right to use a substitute would carry no weight if it disguised the reality of the situation, but the CAC had addressed that and the Union had no permission to challenge its conclusion (paras 78-79).

(5) There were other features of the relationship between Deliveroo and the Riders which might reinforce the conclusion that they were not in an employment relationship for the purposes of article 11. However, Underhill LJ was reluctant to decide the case on that basis, even by way of alternative, in circumstances where there had been no such assessment by the CAC (para 83).

69. In our view, the analysis by the courts below and by the CAC of the relationship between Deliveroo and the Riders has correctly focussed on the power to appoint a substitute. The power conferred on Riders under the new contract to appoint a substitute is virtually unfettered and, unlike the position in *Pimlico Plumbers*, is not limited to other Deliveroo Riders. As the CAC emphasised, it applies both before and after a Rider has agreed to make a delivery. Such a broad power of substitution is, on its face, totally inconsistent with the existence of an obligation to provide personal service which is essential to the existence of an employment relationship within article 11. (See ILO Recommendation No 198, as adopted into the Strasbourg jurisprudence by *The Good Shepherd*.)

70. Nevertheless, in characterising the relationship it is necessary to have regard to its reality. In the present case, we are satisfied that the CAC rigorously scrutinised the substance of the relationship between Deliveroo and the Riders. Its anxiety to do so was understandable in light of the introduction of the new contract shortly before the hearing in the CAC. Its detailed examination of how the new contract, and in particular the substitution provisions, operated in practice closely scrutinised whether the contractual

provisions genuinely reflected the true relationship. Particularly significant, in this regard, were the following findings of the CAC. It found that there was no policing by Deliveroo of a Rider's use of a substitute and Riders would not be criticised or sanctioned for using a substitute despite the purported freedom to do so. It found that, despite Deliveroo's right of termination on one week's notice for any reason, it did not terminate FPD contracts for a Rider's failure to accept a certain percentage of orders or failure to make themselves sufficiently available. It found that Deliveroo did not object to the practice of substitution by a Rider for profit or to Riders working simultaneously for competitors of Deliveroo. In all the circumstances, the CAC was entitled to conclude that the contractual provisions genuinely reflected the true relationship.

71. This, of itself, is sufficient to determine Issue 1. However, there are present in the relationship between Deliveroo and the Riders further indicators, as identified in ILO Recommendation No 198, which, taken in conjunction with the right of substitution, provide further strong support for this conclusion. The following were identified by Mr Jeans on behalf of Deliveroo and we agree that these are relevant factors.

- (1) Riders do not have to carry out any deliveries at all.
- (2) Riders do not work within specific working hours. They operate if and when they choose.
- (3) Their place of work is not specified or agreed. They operate where they choose within the CKT zone.
- (4) Their activity is not of a particular duration, nor does it have a certain continuity. Riders start and stop when they choose.
- (5) They are not required to be available.
- (6) As regards tools, materials and machinery, all equipment is at the Riders' expense. Riders use their own cycles and mobile phones.
- (7) There is no periodic payment. Remuneration depends on whether Riders choose to make deliveries and how many they make.
- (8) Deliveries are not necessarily or typically their sole or principal source of income. Even where they are, a goodly proportion may earn from Deliveroo's

direct competitors, potentially by undertaking the competitor's work in preference.

(9) There is no payment in kind such as food, lodging and transport.

(10) There is no entitlement to weekly rest and annual holidays.

(11) There is no reimbursement for the cost of travel.

(12) There is no protection from financial risk for Riders, whether in the form of insurance, guaranteed earnings or otherwise.

72. Riders are thus free to reject offers of work, to make themselves unavailable and to undertake work for competitors. Once again, these features are fundamentally inconsistent with any notion of an employment relationship.

73. We conclude, therefore, that the Riders do not fall within the scope of an employment relationship within article 11. The rights conferred by that article to join and to be represented by a trade union are not conferred on the Riders.

#### **(4) Collective bargaining and article 11 trade union rights**

74. Our conclusion that the Riders are not in an employment relationship for the purpose of the trade union rights conferred by article 11 is sufficient to dispose of the appeal in Deliveroo's favour. But as the second issue was fully argued and as there is some lack of clarity in the case law, we will also address the question of the scope of the rights that article 11 workers currently enjoy as regards collective bargaining between their union and their employer.

75. Clearly there is nothing in the UK legislation to stop the Riders from forming their own union or joining the Union as they have done. There is also nothing to prevent Deliveroo from engaging in collective bargaining with the Union to seek to agree the terms and conditions applied to the Riders if they so choose. If Deliveroo voluntarily negotiates with the Union and concludes a collective agreement, the terms of that agreement may be incorporated into the individual contracts between the Rider and the employer. The principles according to which the provisions of a collective agreement with the trade union are incorporated into the individual employee's contract of employment were set out by Hobhouse J in *Alexander v Standard Telephones & Cables*

*Ltd (No 2)* [1991] IRLR 286, para 31 and approved by the Court of Appeal in *Kaur v MG Rover Group Ltd* [2005] ICR 625, at para 9.

76. The issue is whether article 11 requires the United Kingdom to go beyond that current position and to enact legislation conferring on article 11 workers the right to require their reluctant employer to recognise and negotiate with the union of their choice.

*(a) Is the bargaining established under Schedule A1 really compulsory?*

77. Lord Hendy raised a preliminary point about whether Schedule A1 TULRCA can properly be described as legislating for compulsory collective bargaining.

78. The most relevant aspect of the procedure for our purposes is the steps which follow on from the CAC issuing a declaration that a union is recognised as entitled to conduct collective bargaining on behalf of a bargaining unit:

(1) There is a period of at least 30 days in which the parties negotiate with a view to agreeing a method by which they will conduct collective bargaining: paragraph 30(2) and (4).

(2) If the parties fail to agree, the employer or the union may apply to the CAC for assistance: paragraph 30(3).

(3) If asked for assistance, the CAC must try for at least 20 working days to help the parties to agree a method by which they will conduct collective bargaining: paragraph 31(2) and (8).

(4) If by the end of that assistance period, the parties have not agreed, the CAC must specify to the parties the method by which they are to conduct collective bargaining: paragraph 31(3).

(5) Unless the parties agree otherwise, any method specified under para 31(3) “is to have effect as if it were contained in a legally enforceable contract made by the parties”: paragraph 31(4).

(6) Specific performance is the only remedy available for breach of anything that is a legally enforceable contract by virtue of para 31: paragraph 31(6).



(7) If the parties do manage to agree a method by which they will conduct collective bargaining (that is to say if the CAC is not called upon to specify a method under para 31), then if one or more of the parties fails to carry out the agreement, they can apply to the CAC for assistance: paragraph 32(2).

(8) In that event, para 31 applies to require the CAC to specify a method of collective bargaining which then becomes legally enforceable.

(9) Part II of Schedule A1 sets out corresponding provisions which apply where the employer voluntarily recognises the union but the parties cannot agree on a method for collective bargaining: see paragraphs 58, 59 and 63. Paragraph 63(2) corresponds to paragraph 31(3) and provides that if the parties fail to reach an agreement, the CAC must specify the method by which the parties are to conduct collective bargaining. Where the CAC does so, that method is to have effect as if it were contained in a legally enforceable contract, with specific performance being the only remedy for breach: paragraph 63(3) and (5).

79. Paragraph 168(1) of Schedule A1 provides that the Secretary of State may by order specify for the purposes of paragraph 31(3) and paragraph 63(2) a method by which collective bargaining might be conducted. If such an order is made, the CAC must take it into account when specifying to the parties the method by which they are to bargain but may depart from the method specified in the order “to such extent as the CAC thinks it is appropriate to do so in the circumstances”: see paragraph 168(2).

80. The Secretary of State exercised that power in May 2000 by making the Trade Union Recognition (Method of Collective Bargaining) Order 2000 (SI 2000/1300) (“the Method Order”). The specified method set out in the Schedule to that Order is that:

(1) The employer and union shall establish a Joint Negotiating Body (“JNB”) comprising three employer representatives and three union representatives.

(2) They must then meet to discuss and negotiate the pay, hours and holidays of the workers in the bargaining unit; the meetings must last at least half a day.

(3) Six steps to be followed are provided for, starting with the union setting out its claim with reasons and supporting evidence; the parties then meeting to discuss the claim; the employer responding within fifteen working days with further meetings if necessary, drafting in additional people. If no agreement is reached, the parties must consider whether to consult ACAS “[to help] them find a settlement of their differences through conciliation”: paragraph 15.

(4) If the parties do conclude a collective agreement, it must be set down in writing and signed by the chairs of the employer side and the union side. The JNB can be reconvened at the request of either party if they consider there has been a failure to implement the agreement: paragraph 20.

81. The Union points out that although an application for recognition, even if ultimately successful, obliges the employer to bargain collectively over pay, hours and holidays, there is no legal sanction if it refuses to do so. It can have imposed on it the method of collective bargaining set out in the Method Order but it is not appropriate to term it “compulsory”. The legislation does not oblige either party to reach agreement as to the terms and conditions of the relevant workers or, indeed, on anything else.

82. It is undoubtedly true that Schedule A1 and the Method Order both stop short of enabling the CAC or ACAS to step in to fix the pay, hours and holidays for the workers in the bargaining unit, if one side or the other continues to dig in its heels. That does not, in our judgment, prevent the procedure from being compulsory at each stage short of that. The compulsory nature of the procedure is apparent from at least the following features. First, at the recognition stage, recognition of the union as entitled to bargain collectively on behalf of the workers can be imposed on the employer if the conditions for an application under paragraph 11 of Schedule A1 are met. Even if the bargaining unit proposed by the union is unsatisfactory, that does not enable the employer to avoid recognising the union since the CAC must identify a bargaining unit which is appropriate: paragraph 19(3). Similarly, if there is uncertainty about whether a significant number of workers in the unit want the union to conduct collective bargaining on their behalf or if the CAC is not satisfied that a majority of the workers in the unit are members of the union, there are elaborate provisions in the Schedule for the holding of a ballot by the CAC: see paragraphs 22 onwards.

83. Secondly, once the recognition stage has been overcome, the employer can be brought to the negotiating table either by the “assistance” of the CAC or by the imposition of a method of collective bargaining such as that set out in the Method Order. The specified method is legally enforceable by the grant of an order for specific performance. Thirdly, at each stage of the process, there are strict deadlines set for the employer to respond to applications and offers from the union, with the CAC able to step in to break any foot-dragging by the employer either before or after the method of collective bargaining has been established. For example, the employer cannot simply resile from the bargaining process on the grounds that it no longer believes that the unit is appropriate: paragraph 66 of Schedule A1. One can see that the drafter of the Method Order has tried to anticipate all obstructive tactics that an employer might try to use. Paragraphs 24 and 25 of the Schedule to the Method Order provides that the employer must make available to the union side of the JNB “such typing, copying and word-processing facilities as it needs to conduct its business in private” and must set aside a room for the exclusive use of the union side of the JNB complete with a secure cabinet and a telephone.

84. We have no hesitation therefore in deciding that the process set out in Schedule A1 amounts to compulsory collective bargaining. The question therefore arises whether workers have a right under article 11 to call upon the UK to legislate in the terms that are in fact set out in Schedule A1 such that, if the Riders were workers within the meaning of article 11, their exclusion from the protection of Schedule A1 by the limited definition in section 296 would be a breach of that right.

*(b) A brief history of collective bargaining*

85. The Union helpfully set out a brief history of collective bargaining in its written case before the court. The term, “collective bargaining” was first coined by Beatrice Webb in 1891 although the Union says that the process is recorded as far back as Ancient Egypt. From the end of the nineteenth century until the 1980s it was the policy of all governments to promote collective bargaining. The Conciliation Act 1896 (following a Royal Commission in 1891) aimed to promote negotiated settlement of industrial disputes which occurred when collective bargaining failed to reach agreement. The Trade Boards Act 1909 imposed mandatory collective bargaining in specified industries. The sectors covered by these bodies, subsequently called Wages Councils, were progressively extended, particularly after the First World War, culminating in the Wages Councils Act 1976. Policy changed following the election of a Conservative government in 1979 and in 2013 the last of the Wages Councils, the Agricultural Wages Board, was abolished. That abolition prompted one of the important cases in Strasbourg to which we refer below.

86. In addition to this compulsory collective bargaining, voluntary collective bargaining was supported by government policy following the reports of JH Whitley in 1918-19 as part of the post-war reconstruction. It promoted collective bargaining through Joint Industrial Councils (or, simply, “Whitley Councils”) on a sector-wide basis. Other mechanisms stimulated collective bargaining such as the Fair Wages Resolutions of the House of Commons, and the extension of collective agreements to non-parties under the Industrial Disputes Order 1951 (SI 1951/1305) re-enacted in later legislation. Obligations were placed on nationalised industries to bargain collectively in the legislation establishing those industries. By 1975, some 85% of the UK workforce had one or more terms and conditions set by collective agreement. Changes in government policy and other factors have reduced that coverage to about 26% in 2021.

87. The Trade Union Act 1871 made trade unions lawful organisations and defined them by requiring that their principal purposes include “regulating the relations between workmen and masters”: (section 23 of the 1871 Act). That constitutional requirement is still part of the definition in section 1 TULRCA: “the regulation of relations between workers ... and employers or employers’ associations”. The 1871 Act also protected trade unions from the doctrine of restraint of trade, a protection now expressed in section 11 TULRCA.

*(c) The Strasbourg Court and the right to collective bargaining*

88. The right to form and join a trade union is expressly mentioned in article 11 as a protected instance of the right to freedom of assembly. The case law as to the content of that right has, however, evolved considerably over the decades. In the early case of *Swedish Engine Drivers' Union v Sweden* (1976) 1 EHRR 617 (“*Swedish Engine Drivers*”), a complaint was referred to the Court by the Human Rights Commission, the majority of which expressed the opinion that “included amongst the elements of the right protected by article 11(1) of the Convention are the right for trade unions to engage in collective bargaining and the legal capacity to conclude collective agreements in the interest of their members”. The Court disagreed, holding (para 39):

“... that while article 11(1) presents trade union freedom as one form or a special aspect of freedom of association, [article 11] does not secure any particular treatment of trade unions, or their members, by the State, such as the right that the State should conclude any given collective agreement with them. Not only is this latter right not mentioned in article 11(1), but neither can it be said that all the Contracting States incorporate it in their national law or practice, or that it is indispensable for the effective enjoyment of trade union freedom. It is thus not an element necessarily inherent in a right guaranteed by the Convention.”

89. That did not mean that the phrase “for the protection of his interests” in article 11 was redundant. It conferred on workers, the Court held, “a right, in order to protect their interests, that the trade union should be heard”. But article 11 left each State a free choice of the means to be used towards this end: “While the concluding of collective agreements is one of these means, there are others”: (para 40).

90. This right of workers that the union to which they belong “should be heard” is the vehicle through which the law has developed. Employer conduct aimed at undermining collective bargaining was considered by the Strasbourg court in *Wilson v United Kingdom* [2002] IRLR 568 (“*Wilson*”). The employer in that case had de-recognised the union and, as the Court put it at para 47, sought “to pre-empt any protest on the part of the unions or their members against the imposition of limits on voluntary collective bargaining, by offering those employees who acquiesced in the termination of collective bargaining substantial pay rises, which were not provided to those who refused to sign contracts accepting the end of union representation.” The House of Lords had held that under the anti-discrimination legislation then in force, domestic law did not prohibit the employer from offering an inducement to employees who relinquished the right to union representation. That was the case, even if the aim and outcome of the exercise was to bring an end to collective bargaining and thus

substantially to reduce the authority of the union, as long as the employer did not act with the purpose of preventing or deterring the individual employee simply from being a member of a trade union. Did the failure of the UK to prohibit this conduct amount to a breach of the article 11 rights of the workers?

91. The Strasbourg Court held in *Wilson* that it did. The Court noted first that the case did not involve any direct intervention by the State. But “[t]he responsibility of the United Kingdom would, however, be engaged if these matters resulted from a failure on its part to secure to the applicants under domestic law the rights set forth in Article 11 of the Convention”: para 41. The Court recognised at para 44 that:

“ ... The Court has not yet been prepared to hold that the freedom of a trade union to make its voice heard extends to imposing on an employer an obligation to recognise a trade union. The union and its members must however be free, in one way or another, to seek to persuade the employer to listen to what it has to say on behalf of its members.”

92. The Court reiterated the wide margin of appreciation that Contracting States enjoy as to how trade union freedom may be secured. But the effect of the UK law was that it was possible for an employer effectively to undermine or frustrate a trade union’s ability to strive for the protection of its members’ interests by permitting employers to use financial incentives to induce employees to surrender important union rights. The UK had thereby failed in its positive obligation to secure the enjoyment of the rights under article 11. This failure amounted to a violation of article 11, as regards both the applicant trade union and the individual applicants. This defect in the domestic legislation was put right by the insertion of section 145B TULRCA with effect from 1 October 2004. That section now confers on a worker who is a member of a recognised independent trade union a right not to be offered terms where the employer’s sole or main purpose in offering those terms would result in any of the worker’s terms of employment no longer being determined by collective agreement.

93. An egregious set of facts prompted the Court to expand the scope of this “right to have the union heard” in *Demir v Turkey* [2009] IRLR 766 (“*Demir*”). In *Demir* the employer, a municipal council, had concluded a collective agreement with the civil service union of which Mr Demir was a member. The agreement covered all aspects of the working conditions of the council’s employees. When the council failed to fulfil its financial obligations under the agreement, the President of the union brought civil proceedings against it. The Court of Cassation held that although there was no legal bar preventing civil servants from forming a trade union, any union so formed had no authority to enter into a collective agreement, having regard to the special relationship between civil servants and the public administration. Despite this ruling, a lower court subsequently held, relying in part on the direct applicability of international instruments

ratified by Turkey, that the collective agreement was a valid legal instrument with binding effects for the parties.

94. This ruling was quashed by the Court of Cassation. It held that the legislation in force at the time the trade union was founded did not permit civil servants to form trade unions. The union had not acquired legal personality when it was created and did not, therefore, have the capacity to take or defend legal proceedings. The Turkish Audit Court then held that the council's accountants who had authorised the higher payments implementing the collective agreement were liable to reimburse the state for those monies. The accountants in turn sued the civil servants who had benefited from the additional payments paid pursuant to the defunct collective agreement. The applicants complained of two breaches of article 11, first that the domestic courts had denied them the right to form trade unions and secondly that they had been denied the right to engage in collective bargaining and enter into collective agreements.

95. The Grand Chamber approached the issue of the scope of article 11 rights by considering first the practice of interpreting Convention provisions in the light of other international texts and instruments (paras 65 onwards). It said: (para 67)

“the Court has never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein. On the contrary, it must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties.”

96. The Court referred to the “living” nature of the Convention which must be interpreted in the light of present-day conditions. It noted that it has taken account of evolving norms of national and international law in its interpretation of Convention provisions. Those evolving norms include the general principles of law recognised by civilised nations as well as norms emanating from other Council of Europe organs. The Court observed at para 78 that in searching for common ground among the norms of international law, it has never distinguished between sources of law according to whether or not they have been signed or ratified by the respondent State.

97. Turning to the Turkish state's non-recognition of Mr Demir's union, the Court said at para 110 that the essential object of article 11 is to protect the individual against arbitrary interference by public authorities with the exercise of the rights protected. However, there may in addition be positive obligations on the State to secure the effective enjoyment of such rights. The Court of Cassation's judgment rendering null and void *ab initio* all the union's activities could be regarded as a breach of either the negative or positive obligation: para 116. In either event, it was not justified under

article 11(2) and there had therefore been a violation of article 11 on account of the failure to recognise the right of the municipal civil servants to form a trade union: para 127.

98. The Court then considered the further complaint that the annulment by the Turkish Court of Cassation of the collective agreement reached between the municipality and the union was a separate breach of article 11. The parties agreed that this raised different legal questions from those raised by the applicant's right to form a trade union. The Turkish Government argued that trade union rights could be implemented in a number of different ways and they argued that the State was free to select those that were to be used by trade unions — it was not for the Court to impose any particular form on Contracting States for the purposes of article 11. They contended, moreover, that it was impossible to establish a common European practice as regards the right of civil servants to enter into collective agreements (paras 135 and 136).

99. The Court reviewed its case law concerning the constituent elements of the right of association. Article 11 affords union members a right “that the trade union should be heard”. Although each State has a free choice of the means to be used towards this end, unions must be enabled “to strive for the protection of their members’ interests” (para 141). The Court summarised where the law stood thus far (citations omitted):

“145. From the Court’s case-law as it stands, the following essential elements of the right of association can be established: the right to form and join a trade union (...), the prohibition of closed-shop agreements (...) and the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its members ([citing *Wilson* para 44]).”

100. The Court recognised that it had initially considered that article 11 did not require a right for unions to enter into collective agreements. It referred to *Swedish Engine Drivers*, para 39, as authority for that proposition. However, the Court went on that in *Wilson* at para 44, it had stated that even if collective bargaining was not indispensable for the effective enjoyment of trade union freedom, it might be one of the ways by which trade unions could be enabled to protect their members’ interests. The union had to be free, in one way or another, to seek to persuade the employer to listen to what it had to say on behalf of its members.

101. Now, however, the Court in *Demir* concluded that there had been a “perceptible evolution” in such matters in both international law and domestic legal systems. That case law should therefore be reconsidered because the interests of legal certainty should not prevent the Court from taking a dynamic and evolutive approach or operate as a bar

to reform or improvement: para 153. In taking this step, the Court referred to ILO Conventions No 98 of 1949 concerning the Right to Organise and to Bargain Collectively and No 151 of 1978 concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service, to the European Social Charter, the European Union Charter of Fundamental Rights and the practice in the vast majority of European States (para 151). The Court therefore stated at para 154:

“154. Consequently, the Court considers 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, it being understood that States remain free to organise their system so as, if appropriate, to grant special status to representative trade unions. Like other workers, civil servants, except in very specific cases, should enjoy such rights, but without prejudice to the effects of any ‘lawful restrictions’ that may have to be imposed on ‘members of the administration of the State’ within the meaning of Article 11(2) – a category to which the applicants in the present case do not, however, belong ...”

102. The Court went on to hold that the *de facto* annulment of the collective agreement by the Turkish court constituted an interference with the applicants’ trade union freedoms as protected by article 11 and that it was not justified under article 11(2).

103. It is clear that in *Demir and Wilson* the Strasbourg Court was not prepared to hold that article 11 rights include the right to compulsory collective bargaining. The breach in *Demir* was that the State in effect prohibited the implementation of a collective agreement that had been voluntarily entered into between the council and Mr Demir’s union. The question raised by this appeal is whether the Court did take that further step in *Unite the Union v United Kingdom* [2017] IRLR 438 (“*Unite the Union*”).

*(d) Unite the Union*

104. This case arose from the abolition in 2013 of the Agricultural Wages Board (“AWB”) which had set minimum wages and conditions in the agricultural industry



from 1917. Unite the Union lodged a complaint with the Strasbourg Court that it was being denied the effective right to collective bargaining which, it asserted, was an essential element of article 11. It relied on *Demir*, pointing out that the agricultural sector was characterised by thousands of employers who each employed very few employees. The statutory mechanism in Schedule A1 TULRCA was in effect inaccessible in the agricultural sector given that the workers were dispersed across numerous small employers. Further, even where the Schedule did apply, there was no real regulation of the process of collective bargaining itself and collective bargaining remained free and voluntary: see para 48. The abolition of the AWB had, the union asserted, made the right to collective bargaining devoid of substance in the agricultural sector.

105. The Court rejected the application as manifestly ill-founded. But did it do so on the basis that the right was not engaged or on the basis that the right was engaged but the interference was justified?

106. The Court first reiterated, at para 54, that the right of association has a number of essential elements. Citing *Demir* paras 145 and 154 (set out above), the Court said these elements include “in principle, the right to bargain collectively with the employer”. As regards that right, the States “remain free to organise their systems so as to grant special status to representative trade unions if appropriate”. The Court went on: (para 55, citations omitted)

“55 In view of the sensitive character of the social and political issues involved in achieving a proper balance between the respective interests of labour and management, and given the high degree of divergence between the domestic systems in this field, the starting point is that Contracting States enjoy a wide margin of appreciation as to how trade-union freedom and protection of the occupational interests of union members are secured (...). However, in some circumstances, that margin may be reduced (...). The Court has recently explained that the breadth of the margin of appreciation depends on, among other things, the nature and extent of the restriction of the trade union right at issue, the object pursued by the contested restriction, the competing rights and interests of other individuals in society who are liable to suffer as a result of the unrestricted exercise of that right and the degree of common ground between member States of the Council of Europe or any international consensus reflected in the apposite international instruments (...). As to the latter factor, it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case

concerned; it is sufficient that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies (...).

56. Although the essential object of Article 11 is to protect the individual against arbitrary interference by public authorities with the exercise of the rights it protects, there may in addition be positive obligations on the State to secure the effective enjoyment of such rights. The boundaries between the State's positive and negative obligations do not lend themselves to precise definition but the applicable principles are similar. In both contexts regard must be had to the fair balance to be struck between the competing interests of the individual and of the community as a whole (...)."

107. The Court was prepared to treat the abolition of the AWB as the abolition of a statutory and mandatory mechanism for collective bargaining although that was not strictly accurate: para 58. That paragraph concluded with a sentence (which we have underlined below) which has given rise to uncertainty as to what the case decided:

"The applicant's complaint can therefore be treated as concerning the abolition of a statutory and mandatory mechanism of collective bargaining. Such a complaint may be said to fall within the scope of Article 11 of the Convention."

108. The Court, however, held that the union could not rely on *Demir* to establish that there had been a breach of article 11. The point in *Demir* had been, the Court held, that the Turkish court had annulled a collective agreement which had been voluntarily entered into. By contrast, in the UK there was no restriction on employers and unions entering into voluntary collective agreements and those agreement were enforceable either if they expressly stated that they were intended to be binding (pursuant to section 179(1) of TULRCA) or by incorporating the terms agreed into the employment contract. "Thus" the Court said "the applicant is not prevented from exercising its right to engage in collective bargaining and the facts of the case are far removed from those at issue in *Demir*": para 59.

109. The Court's view, at para 60, was that the applicant's complaint "should be viewed from the perspective of the respondent State's positive obligations, and in particular whether the respondent State is obliged to have in place a mandatory,

statutory forum for collective bargaining in the agricultural sector in order to comply with its Article 11 obligations.” *Demir* had not gone that far: in *Demir* the Court was examining a very far-reaching interference with freedom of association:

“60. ... In the present case, by contrast, the question concerns the extent of the State’s positive obligation in the area of collective bargaining. As the Court has already noted (see para 55), the social and political issues involved in achieving a proper balance between the interests of labour and management are of a sensitive nature. The starting point is, therefore, that the United Kingdom enjoys a wide margin of appreciation in determining whether a fair balance has been struck between the protection of the public interest in the abolition of the AWB and the applicant’s competing rights under Article 11 of the Convention.”

110. The Court regarded it as significant that Unite was not prevented from engaging in collective bargaining. Even accepting that voluntary collective bargaining in the agricultural sector was virtually non-existent and impractical “this is not sufficient to lead to the conclusion that a mandatory mechanism should be recognised as a positive obligation”. The Court referred to the mandatory mechanism for collective bargaining in TULRCA as “a measure intended to encourage and promote collective bargaining across industry in general”. It was true that the applicability restrictions in TULRCA meant that it was of little use in the agricultural sector but, the Court said: (para 65)

“In the absence of any information in the case-file as to the reasons for the applicability restrictions in the 1992 Act, it cannot be assumed that they are unjustified or otherwise unsuitable. Finally, even accepting the applicant’s submission that voluntary collective bargaining in the agricultural sector is virtually non-existent and impractical, this is not sufficient to lead to the conclusion that a mandatory mechanism should be recognised as a positive obligation. The applicant remains free to take steps to protect the operational interests of its members by collective action, including collective bargaining, by engaging in negotiations to seek to persuade employers and employees to reach collective agreements and it has the right to be heard. As noted above (see paras 61-63), the European and international instruments to which the applicant referred, as they currently stand, do not support its view that a State’s positive obligations under Article 11 extend to providing for a mandatory statutory mechanism for collective bargaining in the agricultural sector.” (emphasis added)

111. The Court concluded:

“66. Bearing in mind the wide margin of appreciation in this area, the Court is not satisfied that, in deciding to abolish the AWB, the respondent Government failed to observe the positive obligations incumbent on them under Article 11 of the Convention. It cannot be said that the United Kingdom Parliament lacked relevant and sufficient reasons for enacting the contested legislation or that the abolition of the AWB failed to strike a fair balance between the competing interests at stake. No violation of Article 11 is disclosed and the application must be declared inadmissible as manifestly ill-founded pursuant to Article 35 §§ 3 (a) and 4 of the Convention.” (emphasis added)

(e) *Domestic cases after Unite the Union*

112. Lord Hendy relies on how *Unite the Union* has been interpreted in the domestic case law not only by the Court of Appeal in the present case but also in a series of decisions referred to by Underhill LJ in his judgment below. It is necessary therefore to consider what those domestic cases say and whether their reading of *Unite the Union* is right.

113. The first case is *R (Boots Management Services Ltd) v Central Arbitration Committee* [2017] EWCA Civ 66, [2017] IRLR 355 a judgment of 10 February 2017 (“*Boots*”). The respondent in *Boots* was the company within the Boots group which employed the staff. The appellant, the Pharmacists’ Defence Association Union (“PDAU”), was an independent trade union representing pharmacists. It had requested recognition for collective bargaining under Schedule A1 TULRCA. Boots had entered into collective bargaining with a non-independent trade union, the Boots Pharmacists Association. By the time the case reached the Court of Appeal, it was common ground that the effect of that recognition was to prevent the PDAU being able to take advantage of the statutory mechanism to seek compulsory recognition. This was because para 35 of Schedule A1 provides that an application to the CAC was not admissible if the CAC was satisfied that there was already in place a collective agreement recognising a union as entitled to conduct collective bargaining on behalf of any of the workers in the bargaining unit.

114. The PDAU contended that that state of affairs meant that the statutory scheme for recognition failed to comply with article 11. Underhill LJ (with whom Sales LJ and Sir James Munby agreed) discussed the pre-*Demir* authorities at para 29 onwards. He noted that in *Demir*, the Grand Chamber avowedly modified the position stated in the earlier

authorities such as *Swedish Engine Drivers* and *Wilson* but that the nature and extent of that modification was in issue before them. He noted also that the issue in *Demir* was very different from the issue in the case before him because the applicant's complaint in *Demir* was that the state had annulled the collective agreement which the parties themselves had freely made whereas the PDAU's goal was to force Boots to recognise it: para 37. But the reasoning in *Demir* went wider than the facts of the particular case: para 38. The key development in *Demir* was, he considered, the recognition of "the right to bargain collectively with the employer" as being an "essential element" of the rights protected by article 11. That meant that it is a right of the same status as the more unspecific rights recognised in the earlier cases and that in turn meant that the state may not simply be prohibited from itself interfering with it but may in principle have positive obligations to secure the effective enjoyment of those rights.

115. In considering the extent of those positive obligations, he regarded paras 65 and 66 of *Unite the Union* as the dispositive reasoning of the Court. Although he recognised, at para 46, that some of the language used by the Court read like a re-affirmation of the earlier case law and supported a reading of *Demir* which limited its effects to cases of positive interference by the state with voluntary collective bargaining arrangements, he did not think that was correct:

"If that had been the Court's understanding, the multi-factorial approach taken in para 65 would have been unnecessary: ... There would have been no need for a reference to the UK's margin of appreciation nor to the striking of a fair balance. Nor would there have been any need, in relation to the second factor, to raise the question whether the restrictions which prevented the union being able to access the statutory machinery in the agricultural sector were justifiable. Indeed arguably the conclusion at the end of para. 58 that the complaint 'may be said to fall within the scope of article 11', which is the gateway to the remainder of the Court's reasoning, would be falsified. It is necessary to note the three final words of the conclusion in para 66 – 'for agricultural workers': given the broader context to which I have referred, I think they must be read as equivalent to 'in the circumstances of the present case'.

47. In my view, therefore, the reasoning in the *Unite* case acknowledges the possibility that the absence or inadequacy of a statutory mechanism for compulsory collective bargaining might in particular circumstances give rise to a breach of article 11. Such a reading is consistent with the logic of the reasoning in *Demir* itself, as discussed at para. 38 above. It is fair to say that various observations by the Court,

and indeed the outcome of the case itself, tend to suggest that complaints based on the denial of a right to compel an employer to engage in collective bargaining may face an uphill struggle; but the point at this stage is simply that the attempt is not excluded *in limine*.”

116. Ultimately the Court of Appeal held that the PDAU had not made it to the top of that hill. The recognition of the right, as they saw it, in *Demir* did not mean that article 11 conferred a universal right on any trade union to be recognised in all circumstances: para 54. In a passage that was cited in the later cases, Underhill LJ said:

“54. My conclusions on this issue are largely determined by what I have already said about the effect of the Strasbourg authorities. It follows from the recognition by the court in *Demir* that ‘the right to bargain collectively with the employer’ is an ‘essential element’ of the rights protected by article 11 that a complaint that domestic law does not accord such a right in a particular case will fall within the scope of article 11. But, at the risk of spelling out the obvious, it does not follow from that that article 11 confers a universal right on any trade union to be recognised in all circumstances. It is self-evident that any right to be recognised conferred by domestic law will have to be defined by rules which identify which unions should be recognised by which employers in respect of which workers and for what purposes. To the extent that the rules of any such scheme constrain access to collective bargaining for a particular union (or its members) the constraints will have to be justified by – to use the language of the *Unite* decision (see para 66, quoted at para 44 above) – ‘relevant and sufficient reasons’ and should ‘strike a fair balance between the competing interests at stake’. But the decision also makes clear that in assessing any such justification the state should be accorded a wide margin of appreciation.”

117. The PDAU had not shown that the inhibition imposed by para 35 of Schedule A1 was unjustified.

118. A few months after the decision in *Boots*, the Court of Appeal (Sir Terence Etherton MR, Beatson and Underhill LJJ) returned to the issue in *Wandsworth London Borough Council v Vining* [2017] EWCA Civ 1092, [2018] ICR 499 (“*Vining*”). That appeal concerned the dismissal by way of collective redundancy of parks constables who policed the borough’s parks and open spaces. One issue in the case was whether

they were employed in the “police service” and hence excluded from the protections afforded to employees by sections 188 – 192 TULRCA. Those provisions impose a duty on an employer in certain circumstances to consult an appropriate representative; confer a right on a trade union to bring proceedings for breach of that duty; and provide for the making of a “protective award” to employees in respect of whom the union had been entitled to be consulted. The claimants argued that such exclusion would be in breach of their article 11 rights. The Court noted at para 60 that the Secretary of State had not offered any justification for the exclusion of parks police from the scope of the provisions but had put his case squarely on there being no interference with article 11 rights which would require justification. The Court said:

“61. As to that, the starting point is that since the decision of the European Court of Human Rights in *Demir v Turkey* 48 EHRR 54 it has been established that ‘the right to bargain collectively with the employer has, in principle, become one of the essential elements’ of the rights afforded by article 11, and that those rights are enjoyed by employees of public authorities as well as by employees in the private sector (subject to article 11.2, as to which see para 64 below): see para 154 of the judgment of the Grand Chamber.”

119. The Court went on to hold that the right to be consulted about redundancies fell squarely within the ‘essential elements’ protected by article 11. Whether or not that consultation amounted to collective bargaining, the rights were collective in character and were “plainly to be treated as “essential elements” of the rights protected by article 11”: para 63. If the rights fell within article 11 then the legislative scheme in place must strike a fair balance between competing interests and any provision of that scheme which restricted its availability to particular classes of workers had to be justified, albeit that the state was recognised to have a wide margin of appreciation. At para 64 the Court of Appeal said:

“If, accordingly, the rights in question fall within the scope of article 11, the United Kingdom is under a positive obligation to secure the effective enjoyment of those rights. That does not mean that it is under an obligation to ensure that they are available to all employees in all circumstances, but it does mean that where a legislative scheme is in place it must strike a fair balance between the competing interests and any provision of that scheme which restricts its availability to particular classes of workers requires to be justified, albeit that the state is recognised to have a wide margin of appreciation. The relevant principles are discussed at paras 33—47 and 54—55 in the judgment of Underhill LJ in *R (Boots Management Services Ltd) v Central Arbitration Committee*

[2017] IRLR 355, on the basis of *Demir* 48 EHRR 54 and the later European Court of Human Rights decision in *Unite the Union v United Kingdom* [2017] IRLR 438.”

120. As no justification had been put forward for excluding the parks police, the Court held there had been a breach of article 11.

121. More recently in *R (Independent Workers Union of Great Britain) v Central Arbitration Committee* [2021] EWCA Civ 260, [2021] ICR 729 (“*IWUGB v CAC*”), the union had applied to the CAC to be recognised for collective bargaining purposes for a bargaining unit made up of people performing a variety of tasks at the employer university. The claim was rejected by the CAC because there was already a union recognised for those workers and para 35 of Schedule A1 precluded an application in those circumstances. The union sought judicial review of that decision, asserting that this was a breach of the workers’ rights under article 11 and sought a declaration of incompatibility under section 4 of the Human Rights Act 1998. The CAC in its decision had stated that it recognised that “article 11 includes the right to engage in collective bargaining” but Supperstone J at first instance held at [2019] IRLR 530, para 52 that the right to bargain collectively under article 11 was complied with because the union was free to seek voluntary collective bargaining.

122. When, however, *IWUGB v CAC* reached the Court of Appeal, Bean LJ (with whom Phillips and Underhill LJ agreed) referred to *Boots* and Underhill LJ’s description of para 35 of Schedule A1 as imposing an “inhibition” on what would otherwise be the union’s right to seek compulsory collective bargaining under Schedule A1. The case before the court differed from the *Boots* case because the union already recognised by the university was an independent one so there was no provision in the Schedule by which the union could apply for it to be derecognised, even though the recognised union no longer represented the majority of workers in the bargaining unit.

123. Bean LJ described *Demir* as the high point of the union’s case (para 44) and said that if the trade union movement in the UK or other member states had high hopes raised by para 154 of *Demir*, the subsequent Strasbourg case law must have disappointed them (para 57). The wide margin of appreciation afforded to member states was, he said, “a recurrent theme in the Strasbourg case law” (para 58). Later cases had emphasised the remarkably drastic infringement of rights involved in the *Demir* case and he described *Unite the Union* as “a still more dramatic retreat from para 154 of *Demir*” (para 61). He concluded at para 62 that, in line with *Boots* and *Vining*:

“... to the extent that the rules of any statutory scheme constrain access to collective bargaining for a particular trade union or its members the constraints will have to be justified



by relevant and sufficient reasons, and must strike a fair balance between the competing interests at stake; but that in assessing that justification the choice made by Parliament should be given a wide margin of appreciation. I also consider that the case law indicates that Underhill LJ was right to say in *Boots* that complaints based on the denial of a right to compel an employer to engage in collective bargaining face an uphill struggle, but are not excluded altogether.”

124. Bean LJ dismissed the appeal saying that there was nothing in the Strasbourg case law to indicate that para 35 of Schedule A1 should be classified as a restriction which strikes at the very core of trade union activity, on the facts of the case before him. Even if that was wrong, the wide margin of appreciation given to Parliament meant that a fair balance had been struck between competing interests.

125. Finally, a few months after the ruling in *IWUGB v CAC*, Underhill LJ had occasion to consider the point again in *National Union of Professional Foster Carers v Certification Officer* [2021] EWCA Civ 548, [2021] ICR 1397 (“*Foster Carers*”). This case raised the issue of whether foster carers engaged by foster service providers were “workers” and hence whether the applicant union was a “trade union” entitled to be entered on the list of trade unions under section 3 TULRCA. The Court of Appeal held that they were and that the Certification Officer’s refusal to list the union had wrongfully deprived it of the right to invoke the Schedule A1 process. This was a significant interference with its article 11 rights. Section 296 was therefore read down to include the foster carers for this purpose. Underhill LJ (with whom Bean and Green LJJ agreed) discussed whether the inability of an unlisted union to invoke the procedure for compulsory recognition was an interference with an article 11 right. He noted at para 103 that “[t]here remains some uncertainty about how far the right recognised [by the ECtHR] in *Demir* goes in practice” but referred then to *Boots* (particularly what he had said at para 54) and *Vining* where the Court of Appeal had approved para 54 of *Boots*. He then described the “true effect” of the decisions in *Boots* and *Vining*: (para 109)

“It is correct to say that those decisions do not support the stark proposition that “there is a right under article 11 to seek compulsory recognition”: ... But they are authority for the more modest proposition that, where a statutory scheme of recognition is in place, the exclusion of a trade union from access to that scheme may in certain circumstances be a breach of article 11. It is in such a case no answer to say that the trade union has the right to seek collective bargaining on a voluntary basis.”

126. He then turned to the question of whether the restriction was justified under article 11(2) and held that it was not. Bean LJ gave a concurring judgment agreeing with the reasons of Underhill LJ and Green LJ agreed with both judgments.

*(f) What did *Unite the Union* decide?*

127. Lord Hendy submits that in *Unite the Union*, the case law of the Strasbourg Court did finally evolve so as to expand the scope of article 11 to include a positive obligation on the United Kingdom to confer on workers a right to require the employer to bargain collectively with their union. The right, long recognised, to ensure, in order to protect their interests, that the trade union “should be heard” does now, he said, encompass a right to compulsory collective bargaining. He points to the three passages in the *Unite the Union* judgment we have underlined above; the final sentence of para 58 which states that the complaint “may be said to fall within the scope” of article 11; the Strasbourg Court’s reference in para 65 to whether the applicability restrictions imposed on the mandatory mechanism in TULRCA are “unjustified or otherwise unsuitable”; and the reference in para 66 to the legislation striking “a fair balance between the competing interests at stake”. That wording in paras 65 and 66 has a definite flavour of a determination under article 11(2) and would not be necessary if article 11(1) was not engaged at all. That is the way the domestic courts interpreted it and, Lord Hendy submits, that interpretation is correct.

128. We do not accept that interpretation of the *Unite the Union* decision. If the Strasbourg Court had intended to take the major step forward of recognising a right to compulsory collective bargaining, one would have expected to see the judgment describing how the international labour norms on which the Court has often relied had recently evolved to justify a corresponding evolution in the scope of article 11. There is no such evolution described. On the contrary, where the Court describes (paras 32 to 38) the scope of Article 6 of the European Social Charter 1961 (ratified by the UK) and how it has been interpreted in successive reports of the European Committee of Social Rights, it notes that this has always fallen short of interpreting it as requiring compulsory collective bargaining. The Court also refers to para 28 of the EU Charter of Fundamental Rights (para 39) and the ILO Right to Organise and Collective Bargaining Convention No 98 of 1949 and to the ILO Collective Bargaining Convention No 154 of 1981 (see paras 40 to 43). In its later discussion of these international norms at paras 61 to 63, the Court confirms that all the international instruments still stopped short of this step. There is, the Court held, no consensus or common ground established which supported the existence of such a right.

129. The Court reiterated at para 55 of *Unite the Union* that in view of the sensitive character of the social and political issues involved in achieving a proper balance between the respective interests of labour and management and, given the high degree of divergence between the domestic systems in this field, the starting point is that

Contracting States enjoy a wide margin of appreciation as to how trade-union freedom and protection of the occupational interests of union members are secured. By stating at para 63 that “the margin of appreciation to be applied is accordingly a wide one”, the Court was affirming that nothing had changed. It was certainly not taking the step forward on which the Union relies in this appeal.

130. This court has recently confirmed in *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56, [2023] AC 559, that where the Strasbourg Court applies the margin of appreciation doctrine so as to conclude that there has been no violation of the Convention, “it does so by adopting a correspondingly restrained interpretation of the relevant article of the Convention”: see para 78. Of course, it remains open to Contracting States to go beyond the limits of the Convention rights in the exercise of their sovereign power, as indeed the UK has done by enacting Schedule A1. But in enacting such a right, it is not giving effect to a right conferred by the Convention. The fact that the decision whether or not to legislate for compulsory collective bargaining lies within the states’ margin of appreciation in applying article 11 means that it is not a breach of article 11 if a state declines to do so.

131. The final sentence of para 58 of *Unite the Union* on which the Union relies does not bear the weight they seek to place on it. That sentence is immediately followed at the start of para 59 by the Court’s rejection of Unite’s argument that the abolition of the AWB amounted to an interference with its right to engage in collective bargaining. The Court explained that Unite’s case was “far removed” from *Demir* because the UK does not restrict employers and trade unions from entering into voluntary collective agreements. Having concluded that *Demir* did not assist Unite, the Court then addressed as a matter of principle whether the state’s positive obligation in the area of collective bargaining went that far. The Court held clearly that it did not.

132. We recognise that paras 64, 65 and 66 of the judgment contain a mixture of comments referring to the UK Government’s reasons for the abolition of the AWB, a general evaluation of the regime put in place by TULRCA and a conclusion that the UK did not lack relevant and sufficient reasons for abolishing the AWB. It would not be the first time that a court comments on other aspects of the arguments presented to it, despite having ruled in a way which means that those aspects do not arise for determination. That brief discussion of justification and reasonableness does not, in our judgment, undermine the force of the primary reason for the Court’s rejection of the application as manifestly ill-founded, namely that there is, as yet, no positive obligation on a State to confer a right on workers to have their union bargain with their employer.

133. Further, the Court accepted that the opportunity for voluntary collective bargaining in the agricultural sector was “virtually non-existent and impractical”. If the Court had really decided that compulsory collective bargaining was now a right conferred by article 11 on those agricultural workers, it would have addressed the

application of article 11(2) more thoroughly than merely concluding that “it cannot be said that the United Kingdom Parliament lacked relevant and sufficient reasons” for abolishing the AWB. One can contrast this cursory treatment with the detailed discussion in *Demir* of the four elements which need to be present in order to satisfy article 11(2): see paras 159 to 170 of *Demir*.

134. In our judgement, therefore, the Court in *Unite the Union* did not develop the law beyond what had been decided in *Demir* and *Wilson* and did not decide that article 11 now includes a right to compulsory collective bargaining. In so far as the domestic case law has interpreted the Strasbourg authorities to the contrary, those decisions should not be followed.

*(g) The Union’s alternative argument*

135. At the hearing, Lord Henty adopted an alternative argument in the event that we found that there was no free standing right for article 11 workers to require their employer to bargain with their union. He argued that where, as in the UK, the State has conferred that right on some article 11 workers, then it must confer it on all such workers, unless the State can justify the exclusion of certain workers under article 11(2). Here, he argued that section 296 and Schedule A1 confers on those article 11 workers who also fall within the domestic definition of workers, the right to compulsory collective bargaining to the extent established by that Schedule. If the UK wished to exclude the Deliveroo Riders from that entitlement then it would have to justify doing so under article 11(2) and no such justification had been put forward. This argument, of course, assumes that contrary to our finding under Issue 1, the Riders are indeed article 11 workers.

136. Lord Henty drew an analogy with article 14 ECHR and discrimination law. A local authority is not obliged to construct a swimming pool for the benefit of the local residents. But if it does so, then it cannot discriminate against certain groups of people as to the terms on which it grants access to the pool unless it can justify that discrimination: see for example *James v Eastleigh Borough Council* [1990] 2 AC 751, a case under domestic anti-discrimination legislation rather than under the Convention.

137. We do not accept that the analogy with discrimination law assists the Riders. Where a claim relies on article 14 in conjunction with a different article of the Convention, for example, article 8, the claimant does not have to show that there has been a breach of article 8 in order to establish that there has been a violation of their rights under article 14. All he or she has to show, in this regard, is that the discriminatory conduct falls within the scope or ambit of article 8. Thus, in *Carson v United Kingdom* (2010) 51 EHRR 13 the Strasbourg Court explained the position as follows:

“63. The Court recalls that Article 14 complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to “the enjoyment of the rights and freedoms” safeguarded by those provisions. The application of Article 14 does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention. The prohibition of discrimination in Article 14 thus extends beyond the enjoyment of the rights and freedoms which the Convention and Protocols require each State to guarantee. It applies also to those additional rights, falling within the general scope of any Article of the Convention, for which the State has voluntarily decided to provide. It is necessary but it is also sufficient for the facts of the case to fall ‘within the ambit’ of one or more of the Convention Articles [see *Stec v United Kingdom* (2006) 43 EHRR 47, para 39; *Andrejeva v Latvia* (Application No 55707/00) February 18, 2009, para 74].

64. The Chamber found that although there was no obligation on a State under Article 1 of Protocol No 1 to create a welfare or pension scheme, if a State did decide to enact legislation providing for the payment as of right of a welfare benefit or pension – whether conditional or not on the prior payment of contributions – that legislation had to be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements [see *Stec*, para 54]. In the present case, therefore, the facts fell within the scope of Article 1 of Protocol No 1.

65. The Grand Chamber agrees with this finding, which is not, moreover, disputed by the Government.”

138. By contrast here, it is not enough for the Riders to show that compulsory collective bargaining falls within the ambit of article 11, they must show that there has been a breach of article 11, not merely that they are entitled to enjoy rights within the ambit of article 11 without discrimination. Certainly, if the legislation purported to limit Schedule A1 to trade unions the majority of whose members belonged to a certain national or ethnic group, an article 11 worker from an excluded group could well argue that the rights concerned fell within the ambit of article 11 so that article 14 was engaged. But there is no argument in this case based on article 14 and it is difficult to see how one could be mounted. In particular, it is not enough to establish a claim for discrimination to show that the claimant falls on the wrong side of a line drawn in

legislation – here the definition of “worker” in section 296 – and another person falls on the right side.

*(h) Conclusion on Issue 2*

139. We therefore reject the Riders’ case on Issue 2. In our judgment there is, on the current state of the Strasbourg Court’s jurisprudence, no right conferred by article 11 to compulsory collective bargaining. Even if the Riders were article 11 workers, it would not be a breach of their article 11 trade union rights to define those who benefit from Schedule A1 in a way which excludes them.

**(5) Issue 3 (justification) and Issue 4 (reading down)**

140. In the light of our conclusions on Issues 1 and 2, we do not need to consider the question of whether the exclusion of people in the position of the Riders from Schedule A1 would be a restriction necessary in a democratic society for the protection of the rights and freedoms of Deliveroo and so justified under article 11(2).

141. We also do not need to consider whether it would have been possible to read down the definition of worker in section 296 so as to include the Riders.

**(6) Conclusion**

142. We would therefore dismiss the appeal.