

# The ECJ gives a preliminary ruling on the issue of worker status in the case of *B v Yodel Delivery Network Ltd- case C-692/19*

---

By Sarah Clarke

3PB

## **Factual background**

B worked as a neighbourhood parcel delivery courier for Yodel from July 2017. Yodel neighbourhood couriers are engaged on the basis of a courier services agreement which stipulates that they are 'self-employed independent contractors'. They use their own vehicle to deliver the parcels and use their own mobile telephone. Under the courier services agreement, couriers are not required to perform the delivery personally, but may appoint a subcontractor or a substitute for the whole or part of the service. However, Yodel may veto the substitute if the person chosen as a substitute does not have a level of skills and qualification which is at least equivalent to that required of a courier engaged by Yodel. In any event, the courier remains personally liable for any acts or omissions of any appointed subcontractor or substitute.

1. The courier services agreement also provides that the courier is free to work for third parties concurrently to providing services on behalf of Yodel. Furthermore, Yodel is under no obligation to provide work for the couriers, nor are the couriers required to accept any parcel for delivery.
2. In relation to working hours, the parcels must be delivered between 7.30 and 21.00. However, it is a matter for the couriers as to when the parcels are delivered (bar fixed-time deliveries), the order of delivery and which route they take. A fixed rate, which varies according to the place of delivery, is set for each parcel.

3. B issued a claim in Watford Employment Tribunal under the Working Time Regulations 1998 ('WTR'), alleging that he had worker status. The tribunal considered that the right of substitution precluded worker status, as the status of 'worker' presupposes that the person concerned undertakes to do or perform personally any work or service. Furthermore, that status is incompatible with that person's right to provide services to several customers simultaneously. Nevertheless, the tribunal was concerned that in this respect UK law may be incompatible with the Working Time Directive. They therefore referred a number of questions to the ECJ (prior to the UK leaving the EU).

### ECJ Referral

4. The tribunal referred the following questions for a preliminary ruling:

- '1. *Does Directive [2003/88] [which was transposed into UK national law by the WTR] preclude provisions of national law which require an individual to undertake to do or perform all of the work or services required of him, "personally" in order to fall within the scope of the Directive?*
2. *In particular:*
  - 2.1. *Does the fact that an individual has the right to engage subcontractors or "substitutes" to perform all or any part of the work or services required of him mean that he is not to be regarded as a worker for the purposes of Directive [2003/88] either:*
    - 2.1.1. *at all (the right to substitute being inconsistent with the status of worker); or*
    - 2.1.2. *only in respect of any period of time when exercising such right of substitution (so that he is to be regarded as a worker in relation to periods of time actually spent performing work or services)?*
  - 2.2. *Is it material to a determination of worker status for the purposes of Directive [2003/88] that the particular claimant has not in fact availed himself of the right to subcontract or use a substitute, where others engaged on materially the same terms have done so?*
  - 2.3. *Is it material to a determination of worker status for the purposes of Directive [2003/88] that other entities including limited companies and*

*limited liability partnerships are engaged on materially the same terms as the particular claimant?*

3. *Is it material to a determination of worker status for the purposes of Directive [2003/88] that the putative employer is not obliged to offer work to the individual claimant i.e. that it is offered on a “when needed” basis; and/or that the individual claimant is not obliged to accept it i.e. it is “subject always to the courier’s absolute right not to accept any work offered”?*
4. *Is it material to a determination of worker status for the purposes of Directive [2003/88] that the individual claimant is not obliged to work exclusively for the putative employer but may concurrently perform similar services for any third party, including direct competitors of the putative employer?*
5. *Is it material to a determination of worker status for the purposes of Directive [2003/88] that the particular claimant has not in fact availed himself of the right to perform similar services for third parties, where others engaged on materially the same terms have done so?*
6. *For the purposes of [Article 2(1)] of Directive [2003/88] how is a worker’s working time to be calculated in circumstances where the individual claimant is not required to work fixed hours but is free to determine his own working hours within certain parameters e.g. between the hours of 7.30 and 21.00? In particular how is working time to be calculated when:*
  - 6.1. *The individual is not required to work exclusively for the putative employer during those hours and/or that certain activities performed during those hours (e.g. driving) may benefit both the putative employer and a third party;*
  - 6.2. *The worker is afforded a great deal of latitude as to the mode of delivery of work, such that he may tailor his time to suit his personal convenience rather than solely the interests of the putative employer.’*

## **Ruling**

5. Instead of giving a judgment, the ECJ decided to make a reasoned order under Article 99 of its Rules of Procedure. This provides for an order to be made where, among other things, the answer to a question referred may be clearly deduced from existing case law or admits of no reasonable doubt. Art. 99 provides:

*‘Where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, the Court may at any time, on*

*a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.'*

6. The ECJ noted that whilst the Directive did not define the concept of 'worker', there had been previous rulings on its meaning. Case law had indicated that the essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration. Further, the classification of one as an 'independent contractor' under national law does not prevent that person being classified as an employee, within the meaning of EU law, if his independence is merely notional, thereby disguising an employment relationship.
7. On the one hand there are cases in which one is hired as an independent service provider for tax, administrative or organisational reasons, yet acts under the direction of his employer as regards, in particular, his freedom to choose the time, place and content of his work and who does not share in the employer's commercial risks and, for the duration of that relationship, forms an integral part of that employer's undertaking. This person would classify as a worker. On the other hand, there are situations in which one has more leeway in terms of choice of the type of work and tasks to be executed, of the manner in which that work or those tasks are to be performed, and of the time and place of work, and more freedom in the recruitment of his own staff, all of which are the features which are typically associated with the functions of an independent service provider.
8. In the present case, the ECJ found that B appeared to have a great deal of latitude and it was therefore necessary to consider whether this apparent independence was merely notional. It was concluded that the following factors pointed towards the fact that B's independence was not merely notional:
  - The discretion to appoint a substitute, over which Yodel only had limited control to interfere on purely objective criterion;
  - B had an absolute right not to accept the tasks assigned to him;

- The discretion to provide similar services to third parties may be exercised for the benefit of any third party, including for the benefit of direct competitors of Yodel;
- While it is true that the service must be provided during specific time slots, the fact remains that such a requirement is inherent to the very nature of that service, since compliance with those times slots appears essential in order to ensure the proper performance of that service.

## Conclusion

9. As to the more general issue as to the definition of ‘worker’, the ECJ concluded that:

*It follows from all the foregoing considerations that Directive 2003/88 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. However, it is for the referring court, taking account of all the relevant factors relating to that person and to the economic*

*activity he carries on, to classify that person's professional status under Directive 2003/88.*

10. Thus the ECJ have confirmed that the lack of mutuality of obligation, the right to substitute and the freedom of an individual to fix their own hours of work are inconsistent with an individual being classified as a 'worker' under the WTR.



**Sarah Clarke**

*Barrister*

*3PB*

[3pb.co.uk](http://3pb.co.uk)