

Employment Update

Nature of the legal relationship of platform couriers

12th June 2020

Regarding the Order of the Court of Justice of the European Union dated 22th April 2020

I.- Matter referred

In view of the controversial nature of the legal relationship between platform deliverers, the application at national level and the interpretation of Directive 2003/88/EC is a key issue for the Order of the Court of Justice of the European Union in the *Yodel Delivery Network* case (United Kingdom). **Article 2** of that directive, which regulates the minimum health and safety requirements for the organisation of working time - "*Definitions*" - deals with what is to be understood by "**working time**", a concept that is crucial in this order. In this regard, it states that it shall be considered as such:

"Any period during which the worker remains at work, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice".

In that regard, the transposition of Directive 2003/88 into the national legislation of the United Kingdom is affected by means of the 'Working Time Directive', Article 2 of which provides:

"Worker" means, individual who is subject to or works under

(a) an employment contract; or

(b) any other contract, whether express or implied and (if express) whether oral or written, by which the individual undertakes to perform or execute personally any work or service for another party to the contract, the condition of which does not arise from the contract with a client or from a client of any profession or business carried on by the individual; and any reference to a worker's contract shall be construed accordingly

The Watford Employment Court (United Kingdom), in response to the action brought by the applicant distribution company in respect of his declaration as an employed person under United Kingdom legislation and Directive 2003/88, referred to the Court of Justice for a **preliminary ruling** the core of which lay in the resolution of the following main questions:

- i.-** Given doubts about the compatibility of the transposition of Directive 2003/88 into English law and the meaning of its judicial interpretation in the UK - which presupposes that the 'employee' must personally perform the activity/service which is the subject of the contract of employment - does the directive prevent national legislation from requiring the employee to provide the services personally?
- ii.-** Would the possibility of the *courier* subcontracting the services be incompatible with the status of "worker" and/or could such incompatibility be limited to the time during which the service is subcontracted, if any?



iii.- Are any of the following conditions other than the main ones, which are set out below, relevant to the provision of services as judged by the Watford Court, considered to be a possible employment relationship?

iv.- Finally, if we choose the employment, what would be the form of calculation of working time, taking into account that the *courier* would be free to choose the time of performance of the services -with certain limitations- and would simultaneously provide identical services for commercial third parties, not related to Yodel?

Having said this, see below the specific features of the plaintiff's services.

II.- The main case studies

The essential characteristics of the legal relationship binding both parties in the Yodel case are summarized in:

a.- The plaintiff entered into a contract with Yodel for the provision of courier services, stipulating that it would provide its services as a "*self-employed independent contractor*";

b.- The *courier* was trained in the use of the manual electronic device provided by Yodel;

c.- The distributor provides his vehicle and mobile phone;

d.- The contract provides for the possibility that the agent does not make the deliveries personally and by himself but hires or subcontracts third parties for this purpose. Yodel could veto such hiring, if the person chosen by the applicant lacks a level of skills and/or qualification at least equivalent to that required to be directly hired by Yodel to provide these services.

The *courier* also assumes personal responsibility for any acts or omissions of the subcontractor;

e.- The distributor would not be subject to the exclusive provision of these services for Yodel, and could provide the same type of service for third parties (including direct competition from Yodel);

f.- Under the contract, the Company would not be obliged to use the services of the distributor, and at the same time the distributor would not be obliged to accept parcels for delivery, and the actor could set the maximum number of parcels it would be prepared to deliver.

g.- Regarding the "timetable"/hour of delivery and the time of work, the riders would receive the packages at their home, between Monday and Saturday of each week. The parcels would have to be delivered between 07:30 and 21:00, although the plaintiff would be free to decide the time of delivery, the order of delivery and the route that best suits his personal convenience, except in the case of deliveries at fixed times.

h.- The price is set for each package, with a fixed ratio depending on the place of delivery.

III.- 22nd April 2020 ECJ Judgment

In the light of the above, the European Court, in a preliminary manner, reasons that, although the concept of *worker* is not expressly defined in Directive 2003/88, it has been addressed by its own



judicial doctrine, which delimits the characteristics of the condition of worker, in addition to making use of the aforementioned concept of "working time".

To this end, the CJEU starts from the premise of subjection to the employer's power of direction as a typical factor inherent in the employment relationship and, after a brief case-law presentation in which it provides the basis for answering the questions concerned, goes on to examine the specific case formulated by the Watford Court:

- a.-** Thus, it examines (i) whether the independence of the worker is real or merely theoretical, as well as (ii) whether it is possible to effectively assess the existence of a relationship of subordination between the Company and the *courier*;
- b.-** In relation to the discretion of the actor to contract or subcontract the effective performance of the services commissioned, and even if Yodel had a right of veto, the CJEU understands that this is indicative of a limitation on the control exercised by the employer over its employees;
- c.-** In addition to the above, the Chamber considers as proven the discretion of the actor regarding the rejection of the tasks entrusted and even the possible delimitation of the number of tasks or services he would be willing to perform.
- d.-** In line with this, the CJEU highlights the autonomy of the applicant to provide services to third parties during the same period of time in which it provides services to Yodel;
- e.-** Finally, with regard to 'working' time, it is argued that although specific slots exist for the provision of these services, the fact remains that such a requirement is inherent in the very nature of the delivery service, as compliance with these slots appears essential to ensure the proper functioning of the service.

The European Court therefore considers, on the basis of this body of evidence, that the applicant's independence has been proven and that there is no evidence of a relationship of subordination between Yodel and the plaintiff, which is not therefore governed by the provisions of Directive 2003/88/EC.

Finally, the CJEU states that Directive 2003/88 must be interpreted as **excluding** the possibility that the provision of **services as an employed person**, of an occupational nature, and hence the status of 'worker', entails discretion with regard to:

- a.-** The recourse to subcontracting or substitution, to carry out the committed service;
- b.-** The acceptance or not of the various tasks offered by their supposed employer, or the unilateral fixing by the *courier* of the maximum number of tasks to be executed;
- c.-** The provision of the services to any third party, including direct competitors of the alleged employer, and;
- d.-** Setting their own "working" hours, within certain parameters, or adapting working time to their personal best convenience, rather than just the interests of the alleged employer.

In conclusion, the High Court considers that Directive 2003/88 does not apply to those workers that it would consider self-employed when it is established that the worker is not **(i)** subordinate to the company that contracts his services, and **(ii)** independent of it.



IV.- Conclusions

First.- As resolved by the CJEU, it is up to the national courts to determine the possible workforce, and an assessment must be made, in each specific factual case, of the overall nature of the concurrent circumstances.

Second.- The Order of the CJEU does not include a general disruptive reasoning with respect to the general doctrine of application, although it is true that descending to the specific indications analysed, issues such as the rejection or the determination of the number of orders to be made, have not been determinants of the exclusion of the employment nature of the legal relationship, for our courts -in global terms-, nor have they been understood as sufficient discretion, among others, the possibility of choosing routes.

Third.- Nevertheless, we are faced with an important resolution, which reinforces in legal terms certain indications that could play in this type of conflict, in favour of a commercial link, and the consequent condition of these distributors, who are autonomous: (i) the possibility of subcontracting *delivery* services; (ii) the possibility of the platform not to use the *courier's* services, and the power of the rider to reject orders or limit the deliveries to be made - the consequences of such rejection are not covered by the TJEU; (iii) the freedom to provide services simultaneously for other companies, including direct competition and, (iv) the determination - with limitations - of the delivery hours and the time for providing services.

You can see the [Judgement](#) of the CJEU for further information.

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