ly, pursuant to Article 2(2), the Directive is to be without prejudice to national law as regards the definition of an employment contract or relationship. Accordingly, it is for the referring court to determine how to distribute the employment contract. It may consider the economic value of the lots, or the time that the worker actually devotes to each lot. Secondly, to the extent that one full-time contract could be split up into a number of part-time contracts, Article 2(2)(a) forbids that employment contracts are excluded from the Directive's scope solely because of the number of working hours performed. Further, such transfer to multiple employees can ensure a fair balance between the protection of interests of both workers and transferees, as the employee retains their rights and the transferee takes on no more rights than the part of the undertaking it takes on.

However, the referring court must take account of the practical implications. The Directive cannot be a basis for the working conditions to worsen. In that regard, Article 4(1) of the Directive does not preclude dismissals for economic, technical or organisational reasons. Pursuant to Article 4(2), an employment contract that is terminated because of a substantial change in working conditions to the detriment of the employee, the employer, in this case the transferee, is regarded as having been responsible, even if the termination has been initiated by the employee.

Judgment

Where there is a transfer of undertaking involving a number of transferees, Article 3(1) of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses must be interpreted as meaning that the rights and obligations arising from a contract of employment are transferred to each of the transferees, in proportion to the tasks performed by the worker concerned, provided that the division of the contract of employment as a result of the transfer is possible and neither causes a worsening of working conditions nor adversely affects the safeguarding of the rights of workers guaranteed by that Directive, which it is for the referring court to determine. If such a division were to be impossible to carry out or would adversely affect the rights of that worker, the transferee(s) would be regarded as being responsible for any consequent termination of the employment relationship, under Article 4 of that Directive, even if that termination were to be initiated by the worker.

ECJ 22 April 2020, case C-692/19 (Yodel Delivery Network), Working Time, Employment Status

B – v – Yodel Delivery Network Ltd, UK case

Summary

Directive 2003/88/EC precludes a self-employed independent contractor from being classified as a 'worker' under the Directive if they are afforded discretion on the use of subcontractors, acceptance of tasks, providing services to third parties and fixing their own hours of work, provided that the independence does not appear to be fictitious and no relationship of subordination between them and their putative employer can be established.

Legal background

Directive 2003/88 (the Working Time Directive) provides minimum safety and health requirements for the organisation of working time. This Directive sets minimum periods of daily and weekly rest as well as annual leave, breaks and maximum weekly working time.

Facts and initial proceedings

B was a neighbourhood parcel delivery courier for the undertaking Yodel Delivery Network Ltd (Yodel). He carried on his business activities exclusively for Yodel. He took training sessions to familiarise himself with the handheld delivery device provided by Yodel.

These neighbourhood parcel delivery couriers were hired as 'self-employed independent contractors'. They used their own vehicles for delivery and communicated with Yodel using their own mobile phones.

The courier service agreement entailed that couriers were not required to perform the delivery personally. They could appoint a subcontractor or a substitute for the whole or part of the service provided. Yodel could veto that substitution if the person chosen did not have a level of skills and qualification equal to the requirements of a courier engaged by Yodel. The courier would remain personally liable for acts or omissions of any appointed subcontractor or substitute.

In addition, the service agreement provided that couriers could work for third parties, even for competitors of Yodel. Yodel was not required to hire the couriers, while the couriers could choose not to accept any parcels

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for delivery. They could also fix the maximum number of parcels that they were willing to deliver.
As regards working times, the parcels had to be delivered between 07.30 and 21.00 from Monday to Saturday. Within these timeframes, the couriers were free to plan the appropriate route and timing of delivery, except for fixed-time delivery orders. Yodel paid a fixed rate per delivered parcel, varying with the place of delivery.
B brought an action before the referring court stating that he had the status of a 'worker' based on Directive 2003/88, although the service agreement classified neighbourhood couriers as 'self-employed independent contractors'.
In this light, the referring court held that the fact that the couriers with whom Yodel concluded a service agreement have the possibility of subcontracting the tasks entrusted to them precludes, under the laws of the United Kingdom, their classification as a 'worker'. Moreover, that the couriers with whom Yodel concluded a service agreement were not required to provide their services exclusively to that undertaking means that they must be classified, in accordance with the law of the United Kingdom, as 'self-employed independent contractors'.
However, the referring court had doubts regarding the compatibility of the provisions of UK law with Directive 2003/88 and asked preliminary questions.

Question

Must Directive 2003/88 be interpreted as precluding a person engaged by their putative employer under a services agreement which stipulates that they are 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 they have undertaken to provide;
- to accept or not accept the various tasks offered by their putative employer, or unilaterally set the maximum number of those tasks;
- to provide their services to any third party, including direct competitors of the putative employer; and
- to fix their own hours of 'work' within certain parameters and to tailor their time to suit their personal convenience rather than solely the interests of the putative employer.

Consideration

As a preliminary point, Directive 2003/88 does not define the concept of 'worker'. Nevertheless, that concept already has an autonomous meaning specific to EU law (*Sindicatul Familia Constanța and Others,* C-147/17, paragraph 41). Hence, the referring court must determine, in order to apply the concept of worker for the purposes of Directive 2003/88, to what extent a person carries on their activities under the direction of another based on objective criteria and make an overall assessment of all the circumstances of the case brought before it, having regard both to the nature of the activities concerned and the relationship of the parties involved (*Union syndicale Solidaires Isère*, C-428/09, paragraph 29; *Fenoll*, C-316/13, paragraph 29).
An employment relationship indicates a hierarchical relationship between the worker and their employer. That relationship must be assessed on the basis of all factors and circumstances characterising the relationship between the parties (*Holterman Ferho Exploitatie and Others*, C-47/14, paragraph 46; *Sindicatul Familia Constanța and Others*, C-147/17, paragraph 42). An 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 they receive remuneration (*Fenoll*, C-316/13, paragraph 27; *Matzak*, C-518/15, paragraph 28). In this light, classification as an 'independent contractor' under national law does not prevent that person being classified as an employee within the meaning of EU law, if their independence is merely notional, thereby disguising an employment relationship (*FNV Kunsten Informatie en Media*, C-413/13, paragraph 35 and the case law cited). The latter applies to a person who, although hired as an independent service provider under national law, for tax, administrative or organisational reasons acts under the direction of their employer as regards, in particular, their freedom to choose the time, place and content of their work, 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, so forming an economic unit with that undertaking (*FNV Kunsten Informatie en Media*, C-413/13, paragraph 36 and the case law cited). Alternatively, more leeway in terms of choice of 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 their own staff, are features which are typically associated with the functions of an independent service provider (*Haralambidis*, C-270/13, paragraph 33).
Given the latter, the referring court must ascertain whether a self-employed independent contractor, such as B, may be classified as a worker based on the mentioned case law, taking into account all circumstances at issue.
In this light, the following points should be made. First, it is essential to examine the consequences of the great deal of latitude that B appears to have in relation to his putative employer on his independence, and especially, whether, despite the discretion afforded to him, his independence is merely notional. Furthermore, it must be determined whether the existence of a subordinate relationship between B and Yodel could be established. Regarding the discretion to appoint subcontractors or substitutes to carry out the tasks at issue, it is common

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ground that the exercise of that discretion is subject only to the condition that the subcontractor or substitute concerned has basic skills and qualifications equal to the person with whom the putative employer has concluded a service agreement. Consequently, the putative employer can exercise only limited control over the choice of subcontractor or substitute by that person based on a purely objective criterion and cannot give precedence to any personal choices and preferences.
In addition, it is evident that, under the service agreement, B has an absolute right not to accept the tasks assigned to him. Moreover, he is able to set a maximum on the number of tasks which he is willing to perform.
Regarding the discretion to provide similar service to third parties, it seems that that discretion may be exercised for the benefit of any third party, including direct competitors of the putative employer.
Lastly, concerning working time, while it is true that a 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 time slots appears essential in order to ensure the proper performance of that service.
Hence, taking into account all the latter mentioned points to be considered, the independence of a courier, such as B, does not appear to be fictitious and there does not appear, *a priori*, to be a relationship of subordination between B and his putative employer.

Ruling

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 must be interpreted as precluding a person engaged by their putative employer under a services agreement which stipulates that they are 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 they have undertaken to provide;
- to accept or not accept the various tasks offered by their putative employer, or unilaterally set the maximum number of those tasks;
- to provide their services to any third party, including direct competitors of the putative employer; and
- to fix their own hours of 'work' within certain parameters and to tailor their time to suit their 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 their 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 they carry on, to classify that person's professional status under Directive 2003/88.

Other remarks

The Court applied Article 99 of its Rules of Procedure, meaning that it decided to rule by reasoned order, as the ruling may be clearly deduced from existing case law or the answer to the question referred admits of no reasonable doubt.

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