The Central Arbitration Committee (CAC) has found that Deliveroo riders are not 'workers' as there was a genuine substitution right that could be used both before and after a rider accepted a particular job meaning the riders did not undertake to personally do any work or services for another party.

But last week the Employment Appeal Tribunal (EAT) upheld the tribunal's finding that Uber drivers were workers - see Uber's 'worker status' appeal rejected - further appeal highly likely - and earlier this year riders for City Sprint and Excel were also found by employment tribunals to be workers - so why the difference?

A 'cunning plan' gone wrong

Worker status for those working in today's gig economy has been in the spotlight with a number of high profile employment tribunal claims and a central issue in 'Good work: the Taylor review of modern working practices', published over the summer.

While most claims to establish worker status have been brought via the well-trodden traditional employment tribunal route, the Independent Worker's Union of Great Britain (IWGB), on behalf of Deliveroo riders, instead went down the union recognition route.

Under the Trade Union and Labour Relations (Consolidation) Act 1992, a trade union must
consist "wholly or mainly of workers". By seeking union recognition, the CAC would have to determine the issue of worker status. A potential "cunning plan" by the IWGB using a potentially quicker and (at the time) considerably cheaper route than the usual tribunal claim.

Unfortunately for the IWGB, the CAC has rejected its application for union recognition in relation to Deliveroo rider in the Camden Zone, but why?

Why are Deliveroo riders not considered to be "workers"?

To establish whether an individual is a 'worker':

1. the individual must be working under a contract (not necessarily a contract of employment);
2. under that contract, they must agree to personally provide work for the 'employer'; and
3. the 'employer' must not be a client or customer of the profession or business undertaking carried on by the individual.

For an individual to be a worker the tribunal must answer 'yes' to get over the hurdles posed by the first two questions and 'no' to the third. According to the CAC, the IWGB fell at question two. It failed to establish that the Deliveroo riders contractually agreed to 'personally provide work'.

The CAC accepted that it is well established that an employer simply inserting a substitution clause in the contract does not provide the answer. The reality of the situation must be considered with all relevant evidence examined. Back in 2007 in Kalwak v Consistent Group Ltd, Lord Justice Elias warned:

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

With the above in mind and having looked at all the evidence, the CAC concluded there was a genuine substitution clause that reflected the reality of the contractual relationship. Riders could and in some cases did utilise the right to use a substitute either before or after accepting a particular job. As such, the riders did not undertake to do personally any work or services for another party. As found by the CAC, if a rider accepts a particular delivery, their undertaking is to either do it themselves or get someone else to do it. They could even abandon the job part way having only to telephone the rider support team to let them know. A rider was not penalised for not personally doing the delivery, provided the substitute complied with the contractual terms
that applied to the rider.

The CAC acknowledged that the hands-off approach to control and supervision of substitutes and the non-delegable health, safety and food hygiene obligations created potential reputational and regulatory risks for Deliveroo, but that was a matter for them. The substitution provisions were not a sham.

It is the finding that the substitution clause was not a sham that is crucial in this case. The CAC state that the factual situation in the Deliveroo case was very different from that in Excel, CitySprint and for Uber private hire drivers. In the case of Dewhurst v CitySprint, the tribunal specifically found that the substitution clause in that case was a sham as the only real option was for a courier to swap jobs with another approved CitySprint courier. In particular, the insurance provisions in the documentation meant a freely chosen substitute could not be used.

**Is a genuine substitution clause top trump?**

This case appears to equate a substitution clause as meaning there cannot be an obligation to personally provide work. But how does that fit with the principle that no single factor will be determinative of employment status and a number of factors must be considered, including personal service, control, mutuality of obligation, integration into the business, business dependency and the degree of financial risk borne by the individual and the opportunity to profit? As the court stated back in Hall (Inspector of Taxes) v Lorimer [1974], when determining employment status, the process involves "paint[ing] a picture from the accumulation of detail".

Employment law commentators such as Darren Newman point out that "personally I've never understood why a mere right to substitute is taken to mean that there is no obligation to provide personal service. Not the same as a right to sub-contract."

A multi-factorial approach is taken by tribunals with no single factor being determinative where a substitution clause is seen as a sham. But where a substitution clause is found to be genuine, it appears the CAC consider this to be top trump.

As the Deliveroo decision is a determination by the CAC, there is no right of appeal. Technically it can be the subject of the judicial review but that appears unlikely. It should also be remembered that while CAC decisions may have persuasive value, they are not binding upon employment tribunals.

**And next…**

On the issue of worker status in the gig economy we await further expected Supreme Court
guidance. The Supreme Court is due to hear the appeal in the Pimlico Plumbers v Smith on 20 & 21 February 2018. A further appeal in the Uber case is also expected. As the Uber hearing concluded, Counsel for Uber suggested that the case might be suitable to be heard at the Supreme Court with the Pimlico Plumbers case in February, leapfrogging the Court of Appeal. It will be for the Supreme Court to grant permission if they agree.