ORDER OF THE COURT (Eighth Chamber)

22 April 2020 (*)

(Reference for a preliminary ruling — Article 99 of the Rules of Procedure of the Court — Directive 2003/88/EC — Organisation of working time — Concept of 'worker' — Parcel delivery undertaking — Classification of couriers engaged under a services agreement — Possibility for a courier to engage subcontractors and to perform similar services concurrently for third parties)

In Case C-692/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Watford Employment Tribunal (United Kingdom), made by decision of 18 September 2019, received at the Court on 19 September 2019, in the proceedings

B

v

Yodel Delivery Network Ltd,

THE COURT (Eighth Chamber),

composed of L.S. Rossi, President of the Chamber, J. Malenovský (Rapporteur) and F. Biltgen, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having decided, after hearing the Advocate General, to give a decision by reasoned order, in accordance with Article 99 of the Rules of Procedure of the Court,

makes the following

Order

1 This request for a preliminary ruling concerns the interpretation of the provisions of 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, p. 9).

2 The request has been made in proceedings between B and Yodel Delivery Network Ltd ('Yodel') concerning the classification of B's professional status in his employment relationship with that undertaking.

Legal context

EU law

3 Article 2 of Directive 2003/88 provides:

'For the purpose of this Directive, the following definitions shall apply:

1. “working time” means any period during which the worker is working, at the employer’s disposal and carrying out his activity or duties, in accordance with national laws and/or practice;

…’

United Kingdom law

4 Directive 2003/88 was transposed into national law by the Working Time Regulations 1998, Regulation 2 of which provides:

‘In these Regulations

…

“worker” means an individual who has entered into or works under …:

(a) a contract of employment; or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or 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;

and any reference to a worker’s contract shall be construed accordingly;

…’

The dispute in the main proceedings and the questions referred for a preliminary ruling

5 B is a neighbourhood parcel delivery courier. He carries on his business exclusively for the undertaking Yodel, a parcel delivery undertaking, since July 2017.

6 In order to carry on his activity, B had to undergo training in order to familiarise himself with the use of the handheld delivery device provided by Yodel.

7 Neighbourhood couriers who carry on their activity for the benefit of that undertaking are engaged on the basis of a courier services agreement which stipulates that they are ‘self-employed independent contractors’.

8 They use their own vehicle to deliver the parcels handled by Yodel and use their own mobile telephone to communicate with that undertaking.

9 Under that 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 provided, whose substitution Yodel may veto if the person chosen 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.

10 That courier services agreement also provides that the courier is free to deliver parcels for the benefit of third parties concurrently to providing services on behalf of Yodel.

11 Under that agreement, Yodel is not required to use the services of the couriers with whom it has concluded a services agreement, just as those couriers are not required to accept any parcel for delivery. In addition, those couriers may fix a maximum number of parcels which they are willing to deliver.

12 As regards working hours, the couriers with whom Yodel has concluded a services agreement receive the parcels to be delivered at their home between Monday and Saturday of each week. The parcels must be delivered between 7.30 and 21.00, however those couriers remain free to decide, except for fixed-time deliveries, the time of delivery and the appropriate order and route to suit their personal convenience.

13 As for remuneration, a fixed rate, which varies according to the place of delivery, is set for each parcel.

14 Although the services agreement concluded between Yodel and the couriers classifies those couriers as 'self-employed independent contractors', B claims that his status is that of a 'worker' for the purposes of Directive 2003/88. He considers that, although he is self-employed for tax purposes and accounts for his own business expenses, he is an employee of Yodel.

15 The referring court, before which B brought an action, states that neighbourhood couriers engaged on the same terms as B carry on their delivery activity as legal persons by engaging their own staff.

16 That court adds that, under national legislation, as applied by the United Kingdom courts, 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.

17 Thus, according to the referring court, first, the fact that the couriers with whom Yodel concluded a services agreement have the possibility of subcontracting the tasks entrusted to them precludes, under the law of the United Kingdom, their classification as a 'worker'.

18 The referring court notes, second, that the fact that the couriers with whom Yodel concluded a services agreement are 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'.

19 The referring court has doubts as to the compatibility of the provisions of that law, as interpreted by the courts of the United Kingdom, with EU law. Furthermore, in the event that B were to be classified as a 'worker' for the purposes of Directive 2003/88, it wishes to obtain guidance as to the methods for calculating the working time of the couriers with whom Yodel concluded a services agreement, since they may, during the time they devote to the delivery of parcels on behalf of that undertaking, provide their services simultaneously to other undertakings, and organise their activities with a great deal of latitude.

20 In those circumstances, the Watford Employment Tribunal (United Kingdom) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Does Directive [2003/88] 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.'

Consideration of the questions referred

21 Under Article 99 of its Rules of Procedure, where, inter alia, the reply to a question referred to the Court for a preliminary ruling may be clearly deduced from existing case-law or where the answer to the question referred 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.

22 It is appropriate to apply that provision in the present case.

23 By its questions, which it is appropriate to consider together, the referring court asks, in essence, whether Directive 2003/88 must be interpreted as precluding a person, engaged by his putative employer under a services agreement stipulating 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.

24 As a preliminary point, it should be noted that Directive 2003/88 does not define the concept of ‘worker’.

25 However, the Court has already ruled on that concept.

26 It has thus held, inter alia, that that concept has an autonomous meaning specific to EU law (judgment of 20 November 2018, *Sindicatul Familia Constanţa and Others*, C-147/17, EU:C:2018:926, paragraph 41).

27 In that regard, it is for the national court to apply that concept of a ‘worker’ for the purposes of Directive 2003/88, and the national court must, in order to determine to what extent a person carries on his activities under the direction of another, base that classification 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 (see, to that effect, judgments of 14 October 2010, *Union syndicale Solidaires Isère*, C-428/09, EU:C:2010:612, paragraph 29, and of 26 March 2015, *Fenoll*, C-316/13, EU:C:2015:200, paragraph 29).

28 Since an employment relationship implies the existence of a hierarchical relationship between the worker and his employer, the issue whether such a relationship exists must, in each particular case, be assessed on the basis of all the factors and circumstances characterising the relationship between the parties (judgments of 10 September 2015, *Holterman Ferho Exploitatie and Others*, C-47/14, EU:C:2015:574, paragraph 46, and of 20 November 2018, *Sindicatul Familia Constanţa and Others*, C-147/17, EU:C:2018:926, paragraph 42).

29 Thus, 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 (judgments of 26 March 2015, *Fenoll*, C-316/13, EU:C:2015:200, paragraph 27, and of 21 February 2018, *Matzak*, C-518/15, EU:C:2018:82, paragraph 28).

30 More specifically, the Court has held that the classification of 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 (judgment of 4 December 2014, *FNV Kunsten Informatie en Media*, C-413/13, EU:C:2014:2411, paragraph 35 and the case-law cited).

31 That is the case of a person who, although hired as an independent service provider under national law, for tax, administrative or organisational reasons, acts under the direction of his employer as regards, in particular, his freedom to choose the time, place and content of his 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 (judgment of 4 December 2014, *FNV Kunsten Informatie en Media*, C-413/13, EU:C:2014:2411, paragraph 36 and the case-law cited).

32 On the other hand, 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 are the features which are typically associated with the functions of an independent service provider (judgment of 10 September 2014, *Haralambidis*, C-270/13, EU:C:2014:2185, paragraph 33).

33 It is for the referring court to ascertain, in the light of the case-law referred to in paragraphs 27 to 32 of the present judgment, whether a self-employed independent contractor, such as B, may be classified as a

‘worker’ for the purposes of that case-law, taking account of the circumstances at issue in the main proceedings.

34 That being so, in order to give a useful answer to the referring court, the following points should be made.

35 It follows from the specific features of the file submitted to the Court that a person, such as B, appears to have a great deal of latitude in relation to his putative employer.

36 In those circumstances, it is necessary to examine the consequences of that great deal of latitude on the independence of such a person and, in particular, whether, despite the discretion, referred to by the referring court, afforded to that person, his independence is merely notional.

37 In addition, it must be ascertained whether it is possible to establish, in the circumstances specific to the case in the main proceedings, the existence of a subordinate relationship between B and Yodel.

38 In that regard, concerning, first, the discretion of a person, such as B, to appoint subcontractors or substitutes to carry out the tasks at issue, it is common ground that the exercise of that discretion is subject only to the condition that the subcontractor or substitute concerned has basic skills and qualifications equivalent to the person with whom the putative employer has concluded a services agreement, such as the person at issue in the main proceedings.

39 Thus, the putative employer can exercise only limited control over the choice of subcontractor or substitute by that person, on the basis of a purely objective criterion, and cannot give precedence to any personal choices and preferences.

40 Second, it is apparent from the file submitted to the Court that, under the services agreement at issue in the main proceedings, B has an absolute right not to accept the tasks assigned to him. In addition, he may himself set a binding limit on the number of tasks which he is prepared to perform.

41 Third, as regards the discretion of a person, such as B, to provide similar services to third parties, it appears that that discretion may be exercised for the benefit of any third party, including for the benefit of direct competitors of his putative employer, it being understood that that discretion may be exercised in parallel and simultaneously for the benefit of a number of third parties.

42 Fourth, as regards ‘working’ time, while it is true that a service, such as that at issue in the main proceedings, 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.

43 In the light of all those factors, first, the independence of a courier, such as that at issue in the main proceedings, does not appear to be fictitious and, second, there does not appear, a priori, to be a relationship of subordination between him and his putative employer.

44 That being so, it is for the referring court, taking account of all the relevant factors relating to B and to the economic activity which he carries on, to classify his professional status in accordance with Directive 2003/88, in the light of the criteria laid down in the case-law set out in paragraphs 27 to 32 of the present order.

45 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.

Costs

46 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds, the Court (Eighth Chamber) hereby orders:

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 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.

Luxembourg, 22 April 2020.

A. Calot Escobar L.S. Rossi

Registrar

President of the Eighth Chamber

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* Language of the case: English.