

# Making labour law fit for all those who labour

NICOLA COUNTOURIS, MARK FREEDLAND and VALERIO DE STEFANO 17th January 2023

EU anti-discrimination law applies to all 'personal work'—not just employment contracts—the Court of Justice has ruled.



A contracted self-employed person enjoys the same protection against discrimination as an employee, the ruling confirms (AnnaStills/shutterstock.com)

In December 2017, 'JK' and his partner published on their YouTube channel a Christmas music video aimed at promoting tolerance towards same-sex couples. Two days later, JK received an email from his employer in Poland, the government-owned broadcaster *Telewizja Polska*, effectively terminating his contract with immediate effect.

JK had been employed by TP as an independent contractor for some seven years, on a succession of short-term contracts for the production of edited materials for trailers. The last of those contracts (for a month) had been signed, following successful vetting and evaluation, just two weeks earlier.

JK sued TP, claiming unlawful direct discrimination on account of his sexual orientation. Unfortunately for him, Polish anti-discrimination legislation has however been understood by domestic courts as exclusively protecting employees with normal contracts of employment—not self-employed contractors.

Fortunately for JK though, the Polish court made a reference to the Court of Justice of the European Union. This was to ascertain whether the Polish legislation was in line with articles 3(1)(a) and (c) of the EU framework equality directive (2000/78), which make its provisions applicable to 'all persons .... in relation to ... conditions for access to employment, to self-employment or to occupation'.

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Despite this rather explicit wording, Poland had been one of a few countries taking the view that the self-employed fell outside the scope of equality law, their terms of engagement left to the whim of freedom-of-contract doctrines. Even legal systems which usually take human-rights and equality law seriously can exclude self-employed contractors from anti-discrimination protections—take the 2011 judgment by the Supreme Court of the United Kingdom in *Jivraj v Hashwani*—in spite of sustained criticism from academic circles.

## Self-employed included

Last Thursday, the Court of Justice of the EU reached the conclusion that self-employed workers such as JK were indeed **covered** by EU anti-discrimination legislation. The court clarified that the framework directive was 'intended to cover a wide range of occupational activities, including those carried out by self-employed workers in order to earn their livelihood'; and could only be understood as excluding activities 'consisting of the mere provision of goods or services to one or more recipients and which do not fall within that scope'. It concluded:

Since ... the activity pursued by the applicant constitutes a genuine and effective occupational activity, pursued on a personal and regular basis for the same recipient, enabling the applicant to earn his livelihood, in whole or in part, the question whether the conditions for access to such an activity fall within Article 3(1)(a) of Directive 2000/78 does not depend on the classification of that activity as 'employment' or 'self-employment'.

In reaching these conclusions, the court **followed** the Opinion of its Advocate General (as it tends to do). The AG had been just as explicit in stressing that the directive had to be interpreted 'as precluding national legislation which allows a refusal to conclude a civil-law contract for services under which personal work is to be carried out by a self-employed worker, where the refusal is motivated by the sexual orientation of that person'.

## Landmark decision

This important, **even landmark**, decision clarifies that EU anti-discrimination legislation applies to all those who, regardless of type of contract, perform personal work for another party. The concept of 'personal work' (whose genesis is discussed at length in the **AG's opinion**) has been developed precisely to extend the personal scope of application of employment and equality law beyond the narrow definition of the contract of employment—something ever more **urgent** given the **increasing recourse** to non-standard forms of employment and (bogus) self-employment.

The concept has already been deployed—albeit selectively and piecemeal—by the European Commission, including in recent legislative proposals. We have **advocated** it to address the strictures of the personal scope of application of national and supranational labour legislation. But the *JK v TP* judgment is, as far as we know, the first time 'personal work' has received some recognition from the CJEU.

This is a significant legal development. Not only does it demonstrate the cogency and utility of the idea of 'personal work'. Perhaps more importantly, it begins to expand the scope of application of all other EU equality instruments **phrased similarly** to directive 2000/78. It thus opens an avenue towards reforms finally allowing EU labour law to transcend the confines of the contract of employment—reaching *au-delà de l'emploi*, to use an expression **coined** by Alain Supiot and his colleagues in 1999.



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