Workers' Rights - a Public Health Issue: *R (on the application of The Independent Workers' Union of Great Britain) v The Secretary of the State for Work and Pensions*

1. INTRODCUTION

R (on the application of The Independent Workers' Union of Great Britain) v The Secretary of the State for Work and Pensions and the Secretary of State for Business, Energy and Industrial Strategy[1] is a significant decision of the High Court in a judicial review claiming health and safety protection for workers in compliance with European Union (EU) Directives. The changing nature of the labour market has led to an increased awareness of the precarity of working conditions, with many workers excluded from employment protection laws. *IWUGB* is an important judgment in a growing body of authorities extending employment rights to gig workers. Although it is a first instance decision, the failure of the Government to appeal has led to drafting of provisions extending health and safety protection to workers. This is a welcome development in a pandemic that exposes workers to increased risk at work and makes workers' rights a public health issue.

Complex domestic and EU employment provisions were considered in *IWUGB*. The claim of the trade union claimant and counter arguments of the defendants, the Secretary of State for Work and Pensions and the Secretary of State for Business, Energy and Industrial Strategy, are examined in Part 2 of this case note. The definition of 'worker' within the EU Directives was crucial in deciding whether United Kingdom (UK) law complied with the Directives in limiting certain health and safety to employees and the approach of the High Court is examined in Part 3. With the High Court finding that a purposive and broad definition should be given to the definition of worker, the decision of the court that the UK failed to properly implement relevant EU Directives is considered in Part 4. The case note finally explores the wider issues raised by this case, including employment rights outside of the EU, the role of trade unions and the Health and Safety Executive, as well as proposals for legislative reform that may impact future employment proceedings.

2. CLAIM in *IWUGB*

The judicial review proceedings in *IWUGB* were brought to the Administrative Court of the High Court by the Independent Workers Union of Great Britain (IWGB), a trade union formed in 2012 whose 5,000 members are predominantly low-paid, migrant workers and workers in the gig economy. In its claim, the trade union sought declarations that the UK had failed to properly transpose two EU Directives into domestic law. The first was a Directive[2] to introduce measures to encourage improvements in the health and safety of workers at work (Framework

[1] *R (on the application of The Independent Workers' Union of Great Britain) v The Secretary of the State for Work and Pensions and the Secretary of State for Business, Energy and Industrial Strategy* [2020] EWHC 3050 (Admin) ('*IWUGB*').

[2] Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work.

Directive)[3]. The second Directive,[4] made under powers conferred by Framework Directive,[5] sets out minimum health and safety requirements for the use by workers of personal protective equipment in the workplace (the PPE Directive).

The central complaint of the IWGB, on behalf of its members, was that the Directives required Member States to confer health and safety protection on 'workers', but the domestic legislation enacted to transpose the Directives only protected 'employees'. The statutory definition of an 'employee', as discussed below, is narrowly drawn with strict criteria requiring a 'contract of employment'. Those without an employment contract may be workers, but not employees. The result of this was that workers within the meaning of the Directives, but not employees as defined in domestic law, were left without the protection guaranteed by the EU law. Although the gap in protection had existed since the deadline of 31 December 1992 for transposing the Directives, the IWGB argued that the Covid-19 pandemic gave it 'particular salience and significance'.[6] The workers the IWGB represents includes taxi and private hire drivers and chauffeurs, bus and coach drivers, and van drivers, many of whom may struggle to meet the statutory employment threshold of a contract of employment. As recognised by Chamberlain J, all these occupations have experienced higher than average death rates from Covid-19 and the IWGB submitted this demonstrated a particular need for the health and safety measures required by the Directives.

The Defendants, the Secretaries of State responsible for health and safety at work, and the Health and Safety Executive (HSE) as an Interested Party, made two responses to this claim. First, they argued that the Framework Directive contains a bespoke definition of 'worker', which only extends to those 'employed by an employer'; and that domestic law properly transposed this concept into obligations protecting 'employees'. Further they contended that, even if this was incorrect, the domestic law protections conferred on workers who were not employees, though not identical to those afforded to employees, were sufficient to meet the minimum standards required by the Directives. The argument of the Defendants is interesting in that they first claim the Directives do not require workers to be protected, but if they did then they were so protected by domestic legislation.

3. DEFINITION OF WORKER

The first response of the Defendants to the claim of the IWGB, that the Framework Directive provided a bespoke definition of worker that only requires the protection of employees,

[3] Article 1 of the Framework Directive sets out the objective 'to introduce measures to encourage improvements in the health and safety of workers at work'. Article 2 provides that the scope of the Directive is to apply to all sectors of activity.

[4] Council Directive 89/656/EEC of 30 November 1989 on the minimum health and safety requirements for use by workers of personal protective equipment at the workplace (third individual directive within the meaning of Article 16(1) of Directive 89/391/EEC).

[5] Article 16 of the Framework Directive requires Member States to adopt individual Directives in areas listed in its Annex and includes PPE. The PPE Directive was made under Article 16(1) of the Framework Directive and its sometimes called the 'daughter Directive'. Article 1(1) of the PPE Directive sets down minimum requirements for PPE 'used by workers at work'.

[6] *IWUGB'*, n. 1 above, at [2].

highlights the binary distinction between employee and worker in UK law.[7] Employment status determines the legal rights and the health and safety protection an individual enjoys at work. There are three main types of employment status: employee, worker and self-employed with this legal status determining access to employment rights.

A definition of worker is provided in section 230(3) of the Employment Rights Act 1996 (ERA 1996):

> '… worker means an individual who has entered into or works under …
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> (a) a contract of employment, or
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> (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.'

This inclusion of individuals under section 230(3)(b) is known as limb (b) status and is the same definition of worker provided in the Working Time Regulations 1998 and National Minimum Wage Act 1998. An employee working under a contract of employment within the definition of section 230 of the ERA 1996 is entitled to employment rights such as unfair dismissal and redundancy, as well as additional protection regarding health and safety issues. If an individual is classified as a limb (b) worker under section 230(3)(b), then they are entitled to limited employment rights, such as the national minimum wage and paid holiday, as well as protection in respect of whistleblowing and part-time work.

The differential treatment of an 'employee' and 'worker' is at the heart of the issue of the protection offered to individuals at work with regard to PPE and safety when working during the Covid-19 pandemic. Both the Framework Directive and the PPE Directive use the term 'worker', and so its interpretation of the definition within the Directives was significant in establishing whether the Directives had been properly implemented into UK law. The first issue addressed by the Administrative Court was whether the definition of worker in the Framework Directive and PPE Directive required domestic legislation to protect workers, or just employees.

The Framework Directive provides two definitions that Chamberlain J stated to be 'critical to the argument' in the case.[8] A worker is defined in Article 3 as 'any person employed by an employer, including trainees and apprentices but excluding domestic servants' and an employer as 'any natural or legal person who has an employment relationship with the worker and has responsibility for the undertaking and/or establishment'. There was much discussion as to the definition of worker in this case and a divergence as to the correct approach to be taken to the definition in the Directives. The Claimant argued for a purposive approach to the interpretation of the Directives and that Article 3 of the Framework Directive supported a broad construction of the term 'worker', and noted the definition only expressly excludes domestic servants. It was further observed by the Claimant that the term 'employee' or 'contract of employment' is

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[7] See Colins. H. 'The Vanishing Freedom to Choose a Contractual Partner', (2013) *76 Law & Contemporary Problems* 71.

[8] *IWUGB*, n. 1 above, at [21].

absent from the Directive. The IWGB further argued that the definition of 'worker' should be read with the broad definition of 'employer' in the Framework Directive to cover anyone in an 'employment relationship' with the worker and who has responsibility for the undertaking and/or establishment. It was also argued that the phrase 'employment relationship' is itself broad. The Claimant relied on the decision of the Court of Appeal in Governing Body of *Clifton Middle School v Askew*,[9] in which Gibson LJ commented that 'employment relationship' must be wider than the phrase 'contract of employment'.

A purposive approach favours a reading of 'worker' that encompasses all those who fall within the 'autonomous meaning of that term' according to the Court of Justice of the European Union (CJEU) case law, one of two approaches Counsel for the Claimant submitted that EU labour law Directives adopt to the definition of 'worker'. This approach, without reference to national law, provides a uniform meaning across Member States broadly in line with the meaning of 'worker' in treaty provisions on free movement. Reliance for this approach was found in argument advanced by Professor Kountouris.[10] The alternative approach was to confine the scope of the term 'worker' as classified by national law to workers or those with an employment contract. However, even in this second approach, the Claimant argued that a Member State's discretion is not unfettered and should not be arbitrary. It was claimed that authorities such as *O'Brien v Ministry of Justice*,[11] show that 'there is a progressive convergence of approach in the use of the autonomous EU law definition of worker, even in cases where the legislation contains express reference to 'national law''.[12] Further argument was made relying on Article 31 of the EU Charter of Fundamental Rights (EU Charter) which uses a broad and undefined term of 'every worker'. Article 31(1) states that 'every worker has the right to working conditions which respect his or her health, safety and dignity'.[13] The final argument made was that even if the definition of 'worker' allows Member States some discretion in the implementation of legislation, CJEU case law demonstrates that this discretion is limited and national legislation cannot employ arbitrary distinctions. Whether a distinction is arbitrary should be considered with regard to the aims of a particular Directive. Counsel for this Claimant argued that in this case the distinction in domestic law between employees and limb (b) workers was arbitrary in light of the aims of the Framework Directive.[14]

Counsel for the Defendants argued there are not two, but three approaches to the definition of a worker. Two were as advanced by the Claimant. First, that there is the context in which 'worker' has an autonomous EU law meaning; second, there are contexts to which the scope of protection depends on national law (provided this does not rely on arbitrary distinctions or render any protection ineffective). The third approach, presented by the Defendants, claimed that there were cases such as the Framework Directive where worker has a 'bespoke, express

[9] [1999] EWCA Civ 1892; [1999] IRLR 708; [2000] ICR 286.
[10] Reference is made in the judgment to Kountouris, N. 'The Concept of 'Worker' in European Law; Fragmentation, Autonomy and Scope' (2018) 47 *Industrial Law Journal* 192. The judgment uses a 'C' with regard to the name of Professor Kountouris in its reference.
[11] *IWUGB*, cites judgment of CJEU [2012] ICR 955 on reference of questions by the Supreme Court in *O'Brien v Ministry of Defence* [2013] UKSC 6.
[12] *IWUGB*, n. 1 above, at [59].
[13] The use of the term 'every worker' is repeated in Article 31(2) which provides the right to limitation of maximum working hours daily, and weekly rest periods and annual paid leave.
[14] *IWUGB*, n. 1 above, at [62].

definition'.[15] This bespoke definition of worker in the Framework Directive ensured duties are only imposed on employers in respect of workers 'employed' by them and only when they have responsibility for the undertaking in question. The Defendants argued that the transposition of obligations into national law using the concept of a contract of employment addresses both limbs of the definition in the Directive: an employer, defined by UK law, has sufficient control over an employee to meet the test in the Directive of 'responsibility' for the undertaking and/or establishment. In response to argument that the distinction between employees and limb (b) workers was arbitrary in the context of the objectives of the Framework Directive, Counsel for the Defendants stated the distinction was 'grounded in objective fact, reason and principle'.[16]

In his analysis of relevant law as to the meaning of 'worker' in the Directives, Chamberlain J came to a number of conclusions concerning the language of Article 3 of the Framework Directive, and the other EU provisions and case law.[17] Chamberlain J stated that there was no single definition of worker in EU law and that there 'was no magic' in the use of the words 'employed', 'employer' and 'employment relationship' in Article 3 of the Framework Directive, and that the term 'employment relationship' can be used in contexts where the autonomous EU law meaning of worker is intended.[18] He noted that for the same reason, the use of the word 'employees' in the declaration relating to Article 118a of the Treaty Establishing the European Economic Community does not indicate that this only covers those whom UK law would regard as employees.[19] Chamberlain J considered it 'significant' that Article 3 of the Framework Directive lacks any reference to definitions derived from national law and practice, finding that this suggested 'worker' in the article 'was intended to have a single meaning applicable in all Member States allowing a more straightforward interpretation of the Directive.[20] The judge further commented that if there was no single meaning of the term 'worker', this would leave Member States free to 'cut down the category of persons' that benefitted the protection of the Directive, resulting in 'different levels of safety and health protection' in different Member States and 'competition at the expense of health and safety', which was 'precisely the unsatisfactory situation' the Directive addressed.[21] Chamberlain J stated that the objectives of the Framework Directive 'suggest a scope fixed by reference to a single EU-wide meaning'.[22] In the absence of any reference to national law and/or practice in the Directive, the judge found 'worker' to include anyone falling within the autonomous EU law definition,[23] which he noted had been established by CJEU jurisprudence to apply to a variety of contexts.[24]

Chamberlain J concluded his observations by commenting that a broad reading is supported by Article 31 of the EU Charter. Article 31(1) also makes no reference to definitions of 'worker'

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[15] Ibid., at [63].
[16] Ibid., at [72].
[17] Ibid., at [82].
[18] Ibid., at [82 (e)].
[19] Ibid., at [82 (f)].
[20] Ibid., at [82 (h)].
[21] Ibid., at [82 (i)].
[22] Ibid., at [82 (i)].
[23] Ibid., at [82(l)].
[24] Including Treaty provisions on free movement (Lawrie-Blum v Land-Württemberg (C-66/85; [1987] ICR 483; equal pay (*Allonby v Accringtosn & Rossendale College* (C-256/01); [2004] ICR 1328), the Working Time Directive (*Union Syndicale Solidaires Isère v Premier Minsitre* (C-428/09); [2011] IRLR 84 and the Temporary Agency Directive (*Betriebsrat der Ruhrlandklinik gGmbH v Ruhrlandklinik gGmbH* (C-216/15); [2017] IRLR 194).

derived from national law or practice. The judge accepted that the Charter was only an interpretative aid, but noted its drafters had drawn on the Framework Directive to confer the right to 'working conditions which respect his or her health, safety and dignity' on 'every worker', supporting 'as broad an interpretation as possible' of the term worker in the Framework Directive.[25] On the basis of his detailed observations, Chamberlain J rejected the submission of the Defendants' Counsel that the obligations in the Framework Directive and PPE Directive are properly transposed by domestic legislation conferring protection on employees only. He held that:

> 'In my judgment, the 'workers' protected by the Directives include all who fall within the autonomous EU law definition applicable for the purposed of the treaty provisions on free movement and equal pay, with the exception of domestic workers. 'Employers' are those for whom and under whose direction workers perform services and who have responsibility for the undertaking and/or establishment.'[26]

This ruling, that a purposive and broad definition should be given to the term 'worker', established that the Framework Directive and PPE Directive required protection to be afforded to workers in domestic law. It was therefore necessary for Chamberlain J to consider the second and alternative response of the Defendants to the claim of the IWGB, whether UK domestic law conferred sufficient equivalent protection to workers to implement the two EU Directives.

4. DECISION: Equivalent health and safety protection required for workers

The IWGB claimed that the provisions of the Framework Directive and the PPE Directive had not been properly implemented with respect to limb (b) workers, denying its members sufficient equivalent protection, on three grounds:

1. The general obligations in Articles 5(1) and 6(1) of the Framework Directive;
2. Article 8(4) and (5) of the Framework Directive; and
3. Article 3 of the PPE Directive.

This claim succeeded in part with the Claimant establishing the second and third grounds.

Ground 1: the general obligations in Articles 5(1) and 6(1) of the Framework Directive

Article 5(1) of the Framework Directive places an obligation on employers 'to ensure the safety and health of workers in every aspect related to the work'. Article 6(1) places general obligations on the employer in the context of this duty to workers.[27] The Defendants argued that the obligations in these articles were implemented through a combination of provisions, including those provided by the Health and Safety at Work Act 1974 (HSWA) and the

[25] *IWUGB*, n. 1 above, at [82(n)].
[26] Ibid., at [83].
[27] The duty is to take measures necessary for the safety and health protection of workers including the prevention of occupational risks and provision of information and training. An employer should also 'be alert to the need to adjust' these measures to take account of changing circumstances and improve existing circumstances.

Management of Health and Safety at Work Regulations[28] (MHSW Regulations) that confer protection to a wider range of individuals than employees.

Although Counsel for the Defendants noted that section 2 of the HSWA 1974 imposes a duty on employers only to protect employees,[29] they argued that compliance with this duty makes it necessary to protect others including limb (b) workers when working alongside an employee. Reference was made to section 3 of the HSWA 1974 and it was submitted that the effect of this section extends the duty imposed by section 2(1).[30] It was further argued that any textual distinction between the duties in the two sections 'do not reflect a difference in the substance or scope of the duties'.[31] It was also submitted that section 4 of the HSWA 1972 imposes obligations on a wide range of persons and also a broad range of workers, including those who are not employees.[32] The Defendants further relied on regulations 3(1)(b) and 3(2)(b) of the MHSW Regulations requiring the assessment of risks, including those to workers.[33] Reliance was also placed on regulations 11 and 12(3) of the MHSW Regulations,[34] as well as provisions of the Workplace Regulations[35], the Work Equipment Regulations[36] and the Carriage Regulations,[37] all of which protect a wider category of individuals than employees.

Whilst accepting that section 2 of the HSWA 1974 conferred protection on workers when working alongside employees in a shared workplace, the Claimant argued this protection was 'incidental' or 'parasitic' to the duty which is owed only to employees.[38] It did not assist Claimant's members who tended to work alone, or with other limb (b) workers, rather than alongside employees. Counsel for the Claimant relied on *R v Tangerine Confectionery Ltd*[39] to argue that section 3 of the HSAW 1974 was narrower than section 2 in not providing a duty to ensure welfare and stated that 'welfare is a long-standing aspect of UK occupational health

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[28] Management of Health and Safety at Work Regulations 1999, SI 1999/3242.

[29] Section 2(1) of the HSAW 1974 places a duty on employers to ensure 'so far as is reasonably practicable, the health, safety and welfare of all his employees'.

[30] Section 3(1) imposes a duty on employers to conduct his undertaking, so far as is reasonably practicable, so that 'persons not in his employment' are not exposed to risks to their health or safety. Section 3(2) places such a duty on self-employed persons not to expose themselves or other persons (not being his employees) to risks to their health and safety, so far as is reasonably practicable.

[31] *IWUGB,* n. 1 above, at [92].

[32] Section 4 imposes duties in relation to persons who are not employees, but use non-domestic premises as a place of work in respect of dangerous substances and certain emissions into the atmosphere.

[33] Regulation 3(1)(b) places an obligation to make a 'suitable and sufficient assessment' of the risks to the health and safety of 'persons not in his employment arising out of or in connection with the conduct by him of his undertaking'. Section 3(2)(b) extends this obligation to the 'self-employed person'.

[34] Regulation 11 requires co-operation and co-ordination between two or more employers sharing a workplace. Regulation 12(3) requires an employer to ensure that 'any person working in his undertaking who is not his employee' (and every self-employed person (not being an employer to ensure that any person working in his undertaking) is provided with appropriate instructions and comprehensive information regarding any risks to health and safety arising out of conduct of employer (or self-employed person).

[35] Workplace (Health, Safety and Welfare) Regulations 1992, SI 1992/3004 (Workplace Regulations).

[36] The Provision and Use of Work Equipment Regulations 1998, SI 1998/2306 (the Workplace Equipment Regulations).

[37] The Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations, SI 2009/1348. (The Carriage Regulations).

[38] *IWUGB*, n.1 above, at [98].

[39] *R v Tangerine Confectionery Ltd* [2011] EWCA Crim 2015. The case involved a prosecution under the HSAW 1974 following a fatality at a sweet factory.

and safety law'.[40] The Factories Act 1961 was cited as an example in providing a 'Welfare (General Provisions)' part that makes provision for such matters as drinking water and washing facilities.[41] Counsel for the Claimant further argued that the lack of an obligation to ensure welfare protection to limb (b) workers was not 'cured' by the Workplace Regulations as the provisions only applied to workplaces defined as controlled by the employer under regulation 2(1).[42] Argument regarding section 4 of the HSAW 1974 was also that it only applied to those who have control over premises, and would not impose duties in respect of private vehicles used by some of Claimant's members. It was further stated that regulation 3(1) of the MHSW Regulations applied only where there was at least one 'employee' within the undertaking and that many of the Claimant's members work for undertakings with no employees. The Claimant accepted that regulation 12(3) of the MHSW Regulations applies if there is at least one person who is not an employee, including limb (b) workers, but contended that this did not provide protection equivalent to those provided to employees under section 2 of the HSAW 1974, which provided protection 'well beyond' provision of instructions and information.[43] Finally, Counsel for the Claimant argued that the Work Equipment Regulations did not provide protection equivalent to section HSWA 1974 because the health and safety risks faced by the Claimant's members were not addressed by 'work equipment'.

In his judgment, Chamberlain J accepted that the Work Equipment Regulations only imposed duties in respect of work equipment, and that Carriage Regulations only applied to one very specific kind of activity. The judge stated that the broad and general obligations of Articles 5(1) and 6(1) of the Framework Directive were implemented primarily by section 2(1) of the HSAW 1974. He noted that the MHSW Regulations impose duties to assess risk, co-operate with other employers and provide information and instructions, but not the general duties required by the articles of the Framework Directive. The judge commented that the meaning of 'premises' in the Workplace Regulations should be given the same broad meaning as in section 53 of the HSAW 1974, including 'any vehicle, vessel, aircraft or hovercraft',[44] subject to exceptions in regulation 3, but this was of no assistance to many of the Claimant's members who worked in their own vehicles. He further observed that sections 2 and 4 of the HSAW 1974 protected some limb (b) workers but not all. Chamberlain J found that the Defendants' case depended on section 3 of the HSAW 1974 which imposes obligations described by the judge as 'broad and general' in applying to every employer under section 3(1) and every self-employed person under section 3(2).[45] Chamberlain J found, relying on the authority of the *R v Tangerine Confectionery Ltd*,[46] that the substance of the duty in section 3 to be the same as that under section 2, except for the omission of the word 'welfare', but observed that in imposing a duty to ensure the welfare of employees, the provision went beyond what the

[40] *IWUGB*, n.1 above at [99].

[41] The Factories Act 1961 makes provision for drinking water (section 57), washing facilities (section 58), accommodation for clothing (section 59) and sitting facilities (section 60). The HSE guide, *Workplace health, safety, and welfare: A short guide for managers*, 2007 (INDG244W/EREV2) was also given as an example. The guide provides separate sections on health, safety and welfare with the part on welfare covering areas such as sanitary conveniences and washing facilities.

[42] *IWUGB*, n.1 above at Beriberi [100].

[43] Ibid., at [103].

[44] The definition of premises in section 53 of the HSAW 1974 (General Interpretation of Part I) includes a 'tent or moveable structure'.

[45] *IWUGB,* n. 1 above, at [108].

[46] *R v Tangerine Confectionery Ltd* [2011] EWCA Crim 2015, Hughes LJ, at [7-8].

Directive required. Chamberlain J held that the general obligations in Articles 5(1) and 6(1) of the Framework Directive were properly implemented into domestic law as regards limb (b) workers by section 3 of the HSAW 1974 taken together with other more specific legislation relied on by the Defendants.[47]

Ground 2: Article 8(4) and (5) of the Framework Directive

The second claim that Article 8(4) and the second paragraph of Article 8(5) of the Framework Directive were not properly implemented into UK law as regards limb (b) workers was successful. The Defendants and the HSE had argued that the articles were implemented into UK law by sections 44 (1)(d)-(e)[48] and 100[49] of the ERA 1996 for employees and by section 47B[50] of the ERA 1996 for workers, read with regulations 8(1) and (2) of the MHSW Regulations.[51] However, as observed by Chamberlain J, there is 'no analogue of s. 44 of the ERA 1996 for limb (b) workers', suggesting a gap in the protection required by the Framework Directive.[52] Counsel for the Defendant submitted this gap was 'theoretical rather than real',[53] as a worker taking steps to leave their workstation in response to a serious and imminent would be likely to have made a protected disclosure and so be protected under the whistleblowing provision of section 47B of the ERA 1996 that extends to workers. Chamberlain J rejected this argument and found that it was possible that a worker taking steps envisaged by Article 8(4) and (5) may not make a protected disclosure. Section 47B is concerned with 'disadvantage visited on workers because of what they have said, not because of what they have done'.[54] It did not provide equivalent protection to section 44 of the ERA 1996, which only applied to employees and so in this respect, the UK failed to implement the Framework Directive with regard to limb (b) workers. Chamberlain J observed that it was 'perfectly possible' to confer the necessary protection on limb (b) workers by extending the protection afforded to employees by section 44 of the ERA 1996 'without undermining the structure of UK employment law',

[47] *IWUGB*, n. 1 above, at [113].
[48] Section 44(1) of the ERA 1996 (headed 'health and safety cases') provided the right for an employee not to subjected to any detriment by an employer on specified grounds including in (d) for leaving or proposing to leave work in circumstances reasonably believed to of serious and imminent danger and (e) where steps were taken to protect an employee or others from the danger. Provision now amended by Employment Rights Act 1996 (Protection from Discrimination in Health and Safety Cases) (Amendment) Order 2021 (see notes 64-66 below).
[49] Section 100 of the ERA 1006 provides that a dismissal of an employee in health and safe cases under sections 44(1)(d)-(e) is automatically unfair.
[50] Section 47B of the ERA 1996 confers a right on workers not to be subjected to a detriment for making a protected disclosure. A protected disclosure is a disclosure by a worker that is a 'qualified disclosure' under section 43(B)(1) and made in accordance with sections 43C-43H.
[51] The MHSW Regulations apply to both employees and workers and Regulation 8(1) and requires employers to establish and give effect to appropriate procedures in event of serious and imminent danger to persons at work, nominate sufficient competent persons to implement procedures for evacuation and restrict access to areas occupied as necessary. Regulation 8(2) require the procedures, as far as is practicable, to inform persons exposed to serious danger of the nature of the hazard and protective steps taken, to enable the person concerned to stop work and proceed to a place of safety, and prevent persons from resuming work while there is a serious and imminent danger.
[52] *IWUGB*, n. 1 above, at [124].
[53] Ibid., at [125].
[54] Ibid., at [126].

just as the protection of the whistleblowing provisions had been extended to workers by section 47B of the ERA 1996.[55]

Ground 3: The PPE Directive.

The final claim was that the UK had failed to properly implement Article 3 of the PPE Directive with respect to limb (b) workers. The Defendants and the HSE argued that Article 3 of the PPE Directive was implemented by a number of provisions, including section 2(1) of the HSAW 1974 and Regulation 4(1) of the Personal Protective Equipment at Work Regulations 1992 (PPE Regulations).[56] However, Regulation 4(1) only places an obligation to ensure the provision of suitable personal equipment to employees, and not workers. The Defendants and the HSE also submitted that provision of PPE was a 'measure of last resort' to be used when risks could not be avoided by other measures.[57] Counsel for the Claimant accepted that PPE may be a measure of last resort, but in many contexts relevant to the Claimant's members, PPE was necessary to reduce the transmission of Covid-19. Chamberlain J emphasised it was not the court's function in resolving the claim to determine whether the union members of couriers, taxi or private hire drivers should be provided with PPE to protect them from the risk of Covid-19. He considered such decisions regarding the provision of PPE to be 'intensely fact-specific' involving 'legal issues at a much higher level of generality', not limited to particular risks the current pandemic exposed the Claimant's members to.[58] Chamberlain J observed that the UK recognised the need to enact specific legislation with the PPE Regulations giving effect to the obligations imposed by the PPE Directive. However, he noted these Regulations only properly implemented the Directive's obligations as regards employees, leaving a gap in protection for limb (b) workers.[59] Counsel for the Defendants argued that in 'some or even most cases' a failure to provide PPE to limb (b) workers would involve a breach of section 3 of the HSAW 1974, which could be the subject to criminal proceedings. However, Chamberlain J stated the general obligations imposed by section 3 were 'insufficient to discharge the UK's obligations', and found that the UK had failed to properly implement Article 3 of the PPE Directive as regards limb (b) workers.[60]

Chamberlain J concluded that the claim succeeded in part and following agreement that declaration was an appropriate remedy, gave declaratory relief in the form of the following declaration:

> 'The UK Government has failed properly to implement in UK law:
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> > (a) Article 8(4) and the second paragraph of Article 8(5) of Council Directive 89/391/EC on the introduction of measures to encourage improvements in the health and safety of workers at work ("the Framework Directive"); and
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> > (b) Article 3 of Council Directive 89/656/EC on the introduction of minimum health and safety requirements for use by workers of personal protective equipment at the workplace ("the PPE Directive")

[55] Ibid., at [127].
[56] SI 1992/2966.
[57] *IWUGB*, n. 1 above, at [129].
[58] Ibid., at [134].
[59] Ibid., at [137].
[60] Ibid., at [138].

> by reason that in UK law those obligations have not been extended to workers as defined in section 230(3)(b) of the Employment Rights Act 1996, whereas the definition of "worker" in Article 3 of the Framework Directive (which also applies to the PPE Directive) includes such workers."

It is interesting that the declaration is framed in the failure to extend protection by using the domestic definition of 'worker' in section 230(3)(b) of the ERA 1996.

5. WIDER ISSUES

The circumstances of *IWUGB* demonstrates the precarity of gig work. Although Chamberlain J declared that he decided the case purely on law, he did examine the background to the case at the start of his judgment. He states that between the beginning of March and 21st May 2020, the legal department of the claimant union received around 144 queries relating to Covid-19 issues. In particular, the judge noted that the Couriers and Logistics Branch of the IWGB received over 50 requests for assistance raising concerns about the lack of PPE, the failure to implement social distancing whilst waiting for collections inside and outside restaurants, and failure to package Covid-19 samples correctly so as to protect medical couriers. Chamberlain J observed that the IWGB contributed to a report by the Fairwork Project, 'the Gig Economy and COVID-19' in April 2020 that made a number of recommendations including: regular, adequate and free provision of PPE; the installation of physical barriers between drivers and passengers in all ride-hailing cars; and the daily sanitisation of vehicles and upstream locations such as warehouses and hubs. Chamberlain J stated that he considered this background because 'it explains the importance' of the legal issue, but made it clear that he was solely concerned with the 'pure question of law' whether the UK had properly implemented the Directives.[61]

The background of *IWUGB* framed the question and highlights the legal distinction and inequity of treatment between employees and those defined as workers which is at the heart of case. The gap in protection had existed since the deadline of 31 December 1992 for transposing the Directives, but the Covid-19 pandemic case highlighted the significance of the differential treatment of employees and workers with regard to the exclusion of workers from health and safety laws and PPE protection. Chamberlain J noted that Choudhury J in the preliminary hearing, observed the 'vintage' of the provisions with the deadline for transposing the Directives passing almost 28 years ago. The very significant changes in working practices, with the substantial growth of workers in precarious employment outside a contract of employment, in recent years has made this a more pressing issue. In so commenting, Chamberlain J observed that 'it might be thought surprising' that no question as to whether the UK had properly implemented the Directives has risen before.[62] He held that the claim had passed the threshold and that, if the Claimant's argument was good, the fact that it had not been advanced before was of 'little relevance'. In doing so, he rejected the Defendants' argument that the failure of the Commission to bring infraction proceedings regarding implementation indicated compliance with obligations. The pandemic highlighted the disparity of health and safety protection in the workplace with Covid-19 making workers' rights a 'public health

[61] Ibid., at [8].
[62] Ibid., at [78].

concern'.[63] The success of the trade union claimant in *IWUGB* in arguing that UK health and safety laws should be extended to its members demonstrates the importance of collective voice in the gig economy.[64] Gig work is precarious and often low paid. Collective voice and the role of trade unions is therefore relevant in advancing claims that individual gig workers may struggle to make alone.

The context of *IWUGB* is important. As recognised by Chamberlain J, whether the UK properly implemented the obligations imposed by the Directives is a question of law that will have 'significant effects on many thousands of workers', as well their employers.[65] In recognising the judgment to be of 'potentially wide significance', Chamberlain J accepted the timetable proposed of the Defendants and Interested Party of 27th November 2020 to file an application for permission to appeal.[66] With the passing of the deadline and no permission to appeal sought, the Government were required to take steps to implement the ruling with the drafting of new provisions extending health and safety laws to limb (b) workers to provide protection from detriment for refusing to work or taking other action to protect health and safety.

A. New Health and Safety Provisions for Workers

The Employment Rights Act 1996 (Protection from Discrimination in Health and Safety Cases) (Amendment) Order 2021[67] extends protection under sections 44(1)) of the ERA 1996 to workers providing parity with employees. The Statutory Instrument adds a new section 44(1A) providing a worker with the right not to be subjected to a detriment if they reasonably believe there is a serious and imminent danger, and they leave or refuse to return to their workplace.[68] Workers also now have the right not to suffer detriment if they take appropriate steps to protect themselves or others from danger if they reasonably believe there is a serious and imminent danger.[69] Equality of employment rights is an important issue for workers, and this extension of protection to statutory provisions in sections 44, 48 and 49 of the ERA 1996 that was little used before the pandemic is significant. In the narrow sense, *IWUGB* achieved its objective of establishing legal recognition of the differential treatment of its worker members with regard to health and safety concerns. It also effected legal change with the extension of health and safety provisions, which is significant for all workers who do not fall within the strict statutory definition of 'employee'. It is also important for the 4.7 million gig workers in the UK.[70] As

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[63] IWGB, 'IWGB Judicial Review demands better Health and Safety for workers in High Court' 21st October 2020: https://iwgb.org.uk/post/h-and-s-judicial-review.

[64] Prassl, J. 'Collective voice in the gig economy: challenges, opportunities, solutions', *UK Labour Law Blog*, 22 October 2018: https://uklabourlawblog.com/2018/10/22/collective-voice-in-the-gig-economy-challenges-opportunities-solutions-jeremias-prassl/.

[65] *IWUGB*, n. 1 above, at [86].

[66] Ibid., at [146].

[67] The draft Order was laid before Parliament in March 2021 and the Statutory Instrument will come into force on 31st May 2021.

[68] The Statutory Instrument amends section 44(1) of the ERA 1996 by omitting sub-sections (d) and (e) and introducing a new right for workers.

[69] The relevant provisions of the ERA 1996 are also amended to provide a right to complain to an employment tribunal under section 48 in respect of a claim under section 44(1A) and remedies under section 49.

[70] Joint report of the TUC and University of Hertfordshire in 2019 found that the number of people working for on-line platforms doubled in the three years to 2019 from 4.7% of the adult population to 9.6%. See TUC & University of Hertfordshire *Platform Work in the UK* 2016-2019, 2019: platform work in the uk 2016-2019 v3-converted.pdf (feps-europe.eu).

set out above, Chamberlain J observed in *IWUGB* that it was possible to confer the necessary protection on limb (b) workers by extending the protection afforded to employees by section 44 of the ERA 1996 'without undermining the structure of UK employment law'. In his ruling, Chamberlain J is clear that his decision addressed the legal question in the case and not the wider context of employment protection. That can be argued to the correct judicial approach to the role of the court, but can it also be argued that a restructuring of the UK employment law is required rather than minor amendments to adequately reflect current working practices. Although it should be noted that the Order has quickly effectively secured reform for the benefit of workers that a review may not have secured.

IWUGB was followed in 2021 by the Supreme Court decision in *Uber BV v Aslam*[71] that also advanced the rights of gig workers. *Uber BV v Aslam* received more attention, but *IWUGB* can be said to be as significant and it effected specific legislative changes. *IWUGB* should not be viewed in the narrow sense of a case concerning the exclusion of gig workers from health and safety provisions that led to the amendment of section 44 of the ERA 1996. It is part of growing body of case law in which the courts are taking a purposive approach to the scope of employment law.[72] However, despite the successful litigation, *IWUGB* raises a number of issues for the nature of future employment proceedings, including the role of EU law, alternative claims based on human rights, the proposed reform of judicial review and the role of the Health and Safety Executive, which will be considered in turn below.

B. Relevance of EU law

EU law was central to the judicial review challenge in *IWUGB* that the UK Government had failed to implement EU Directives into domestic law. The hearing of *IWUGB* was timely and judgment on 13th November 2020 fell before the end of the implementation period expiring on 31st December 2020. From joining the EU in 1973 until the final British exit from the EU on 31st December 2020 following the EU Referendum,[73] EU law had effect in the UK by virtue of European Communities Act 1972 (ECA 1972).[74] This Act was prospectively repealed from the 'exit day' by the European Union (Withdrawal) Act 2018.[75] However, by the European Union (Withdrawal Agreement) Act 2020, the ECA 1972 continued to have effect, 'subject to immaterial modifications', during the 'implementation period' that extended to 31st December 2020. The parties in *IWUGB* agreed that this meant that the Administrative Court retained the

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[71] [2021] UKSC 5.

[72] See De Stefano, V. 'Regulation is not an À la carte menu: insights from the Uber judgment', *UK Labour Law Blog*, 2 March 2021: https://uklabourlawblog.com/2021/03/02/regulation-is-not-an-a-la-carte-menu-insights-from-the-uber-judgment-by-valerio-de-stefano/ and Atkinson, J. & Dhorajiwala, H. 'After Uber: Purposive Interpretation and the Future of Contract', *UK Labour Law Blog* 1 April 2021: https://uklabourlawblog.com/2021/04/01/after-uber-purposive-interpretation-and-the-future-of-contract-by-joe-atkinson-and-hitesh-dhorajiwala/https://uklabourlawblog.com/2021/04/01/after-uber-purposive-interpretation-and-the-future-of-contract-by-joe-atkinson-and-hitesh-dhorajiwala/.

[73] On Thursday 23rd June 2016 the UK voted in the EU Referendum to leave the EU by a majority of 17,410,742 votes to leave to 16,141,241 votes for remain. See Electoral Commission, Results and Turnout at the EU Referendum: https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/elections-and-referendums/past-elections-and-referendums/eu-referendum/results-and-turnout-eu-referendum.

[74] The ECA 1972 came into force on 1st January 1973 and the UK became a member of the European Economic Community (EEC) which became the EU following the Maastricht Treaty of 1992. The ECA 1974 was repealed on 31st January 2020 at 11.00 pm subject to the implementation period, by the European Union (Withdrawal) Act 2018, as amended by the European Union (Withdrawal Agreement) Act 2020.

[75] Exit day was 31st January 2020.

power to grant the declarations sought as if the UK had remained a Member State for the purposes of the case. Under the ECA 1972, EU Directives were required to be implemented into domestic law by primary or secondary legislation. With the repeal of the Act, this obligation ceased and future claims challenging domestic legislation on the ground it fails to comply with EU law will not be possible. This case illustrates the loss of EU law, including the EU Charter which was important in legal argument in this case, as the basis of claims to strengthen worker rights. It is early days with regard to any prediction of the future worker rights after Brexit, although the Government has already dismissed the value of implementing the Whistleblowing Directive that provides a wide definition of work and protects whistleblowers in 'work-related activities'.[76] There are already concerns that a post Brexit review of UK employment law may result in a reduction of worker rights.[77]

C. Human Rights as an Alternative Argument

In the absence of EU law to assist worker claims in domestic law, it may be that human rights argument could provide an alternative to EU law in support of workers' rights. Section 3 of the Human Rights Act 1998 (HRA) requires all legislation to be interpreted with regard to the Convention rights,[78] including the right to protection of life[79] and right to property,[80] which can include the right to a minimum wage. The Convention rights also include a parasitic right to non-discrimination in the protection of the Convention rights.[81] Discrimination was held by the Supreme Court in *Gilham v Ministry of Justice*[82] to include on the ground of occupational status. In this case, Lady Hale found the claimant judge had been denied employment protection under the relevant whistleblowing provisions of the ERA 1996, as she was held to be outside the statutory definition of worker. This was held to be breach of her human rights, which Lady Hale employed to address the technical difficulty of 'worker' status.[83] In its unanimous judgment, the Supreme Court did not simply rely on the right to freedom of expression to extend protection, but also found the denial of the right breached the right not to be discriminated against in respect of the right to express concerns on the ground of 'occupational classification'. Thus, the Supreme Court interpreted the ERA 1996 with regard to human rights to extend the definition of 'worker' to protect a wide range of rights in non-contractual employment relationships.[84] Proceedings can also be taken against public authorities by judicial review proceedings under the HRA as public authorities have a duty

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[76] See Hobby, C., 'Worker and Organisation Protection: The Future of Whistleblowing in the Gig Economy' in Page-Tickell, R. & Yerby, E. (eds.) (2020) *Conflict and Shifting Boundaries in the Gig Economy*, Emerald Publishing Ltd.

[77] See *The Financial Times*, 'Kwarteng confirms government review of UK employment law', 19 January 2021.

[78] Convention rights are articles 2-12 and 14 and articles 1-3 of the First Protocol of the European Convention on Human Rights and Fundamental Freedoms (ECHR) incorporated into domestic law by the HRA and set out in Schedule 1.

[79] A Convention right set out in Article 2(1) of the ECHR provides that 'everyone's right to life shall be protected by law'.

[80] A Convention right set out in Article 1 of Protocol 1 of the ECHR.

[81] The right to non-discrimination provides for the open-ended ground of 'other status' under Article 14 of the ECHR.

[82] [2019] UKSC 44 ('*Gilham*').

[83] See Hobby, C. 'The Silencing of Public Interest Concerns and Hidden Motives: *Jhuti v The Royal Mail Group*' (2020) 49(3) *Industrial Law Journa*l 377, at 388.

[84] Hanson, W. (2019). Whistleblowing judges: protected by human rights? *UK Human Rights Blog*, posted on 18th October 2019, accessed at www.ukhumanrightsblog.com.

under section 6(1) to act in compliance with the Convention rights. The definition of public authorities includes Secretaries of State in respect of the actions of their department and judicial review proceedings can be commenced under section 7 of the HRA. There are limits to the employment of human rights arguments. A free-standing right needs to be argued in conjunction with the parasitic right to non-discrimination, limiting potential human rights arguments for workers under the HRA. Section 3 of the HRA only requires courts (and tribunals) to read and give effect to the Convention rights in the interpretation of legislation so far as it is possible.[85] Thus, the HRA adheres to Parliamentary Sovereignty in a manner the compliance with EU law did not allow. The HRA cannot be used to strike down primary legislation, although it can quash secondary legislation provided primary legislation does not prohibit this. The HRA does not have the force or reach of EU law before Brexit, but it could provide the means of an alternative argument. As noted by Kountouris, Convention rights are broadly drawn, often phrased by reference to 'everyone'.[86] This allows for the broadest possible definition of an individual entitled to employment rights. However, any possible use of human rights to advance worker rights may be restricted by possible reform of the HRA. There is a currently a review of the HRA by the Independent Human Rights Act Review (IHRAR) that was established at the end of 2020 to consider 'how the Human Rights Act is working in practice and whether any change is needed'.[87] Its terms of reference include section 3 of the HRA and its possible amendment or repeal. The Review, in its call for evidence, questions whether the current approach to human rights 'risks "over-judicialising" public administration and draws domestic courts unduly into questions of policy'.[88] This restriction of the judicial power to interpret legislation such as the ERA 1996 to ensure compatibility with human rights will have a negative impact on worker rights.

D. The Future of Judicial Review

IWUGB demonstrates the importance of judicial review proceedings as a means of securing employment rights and effecting change. However, despite its obvious benefits, the Government established an Independent Review of Administrative Law (IRAL) in July 2020 to consider options for the reform of judicial review.[89] The IRAL reported in March 2021[90] that '*any* changes should only be made after the most careful consideration'[91] given the important constitutional role of judicial review, particularly in maintaining the rule of law. However, the Government responded with a consultation on judicial review reform presented to Parliament

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[85] If it is not possible courts can grant a declaration of incompatibility under section 4 of the HRA. However, this does not affect the validity or continuing operation of the provision under section 4(6).

[86] Kountouris, N. 'The Concept of 'Worker' in European Law; Fragmentation, Autonomy and Scope' (2018) 47 *Industrial Law Journal* 192, at 216.

[87] See Guidance: Independent Human Rights Act Review. Accessed at: https://www.gov.uk/guidance/independent-human-rights-act-review. The IHRAR launched a call for evidence which closed on 3 March 2021: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/962423/Call-for-Evidence.pdf.

[88] Independent Human Rights Act Review (IHRAR), *Call for evidence*, 2021. Accessed at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/962423/Call-for-Evidence.pdf.

[89] See https://www.gov.uk/government/groups/independent-review-of-administrative-law.

[90] The Independent Review of Administrative Law, 2021. Accessed at: https://consult.justice.gov.uk/judicial-review-reform/judicial-review-proposals-for-reform/supporting_documents/IRALreport.pdf.

[91] Ibid., at 129.

and appears to be pressing ahead with judicial review reform.[92] The consultation is exploring proposals beyond the minor recommendations of the IRAL.[93] The legal professions have expressed concern that the Government is choosing to go further than the limited reforms proposed by the advisers it appointed to the IRAL.[94] Rozenberg calls the government's proposals 'a solution without a problem'.[95] The IRAL report considers judicial review to be an 'essential element of access to justice'.[96] Reform of judicial review, especially if combined with reform of the HRA, places further barriers to workers seeking to secure rights, and fewer avenues to pursue claims.

E. The role of the HSE

Although *IWUGB* concerned the lack of protection for workers, all working in the pandemic are vulnerable and at risk from contracting Covid-19 in the workplace. The HSE is the independent regulator for work-related safety at work that has responsibility to prevent work-related death, injury and ill-health and secure compliance with health and safety laws. It is therefore concerning that the HSE was an Intervener in *IWUGB*, not to support the claimant, but to share the arguments of the Defendants to maintain the distinction of safety protection between employees and workers.[97] In its Business Plan 20021/21 the HSE commits to 'lead and engage' with others to improve workplace health safety and to 'provide an effective regulatory framework'.[98] Between 10 April 2020 and 13 March 2021, 31,380 occupational disease notifications of Covid-19 in workers were reported,[99] but the HSE has been criticised for failing to close workplaces that are putting workers at risk.[100] A recent report argues that HSE guidance on the management of Covid-19 risk has 'downplayed relevant legal provisions', for which it has regulator responsibility for and 'adopted an overly business-

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[92] Ministry of Defence, *Judicial Review Reform: The Government Response to the Independent Review of Administrative Law,* 2021. Accessed at: https://consult.justice.gov.uk/judicial-review-reform/judicial-review-proposals-for-reform/supporting_documents/judicialreviewreformconsultationdocument.pdf-1.

[93] Ibid., at 8.

[94] See, Fouzder, M. 'JR reform: Buckland to 'go further' than Faulks review', *The Law Society Gazette*, 18th March 2021. Accessed at: https://www.lawgazette.co.uk/news/jr-reform-buckland-to-go-further-than-faulks-review/5107866.article.

[95] Rozenberg, J. 'Fixing the unbroken', *The Critic*, 16 (2021) at 3.

[96] The Independent Review of Administrative Law, 2021, Chapter 1, para 1.43.

[97] Ewing & Hendy record that in 2020 the IWGB complained to the Department of Work & Pensions about the failure of employers to provide PPE. The union complaint was forwarded to the HSE who responded to the union in early 2020, expressing confidence that 'health and safety framework provides the necessary protection to workers'. This is the background to *IWUGB* and demonstrates the necessity of the union's claim. See Ewing, K. D. & Hendy, Lord., 'Covid-19 and the Failure of Labour Law: Part 1', (2020) 49 Industrial Law Journal 497, at 527. Although in 2016 the HSE argued in a strategy document that there 'needs to be a broader ownership of health and safety'. See HSE *Helping Great Britain work well*, 2016. Accessed at: https://www.hse.gov.uk/strategy/assets/docs/hse-helping-great-britain-work-well-strategy-2016.pdf.

[98] HSE *Business Plan 2020/21.* Accessed at: https://www.hse.gov.uk/aboutus/strategiesandplans/businessplans/plan2021.pdf.

[99] See HSE Management information: Coronavirus (COVID-19) disease reports: https://www.hse.gov.uk/statistics/coronavirus/index.htm

[100] *The Observer*, 'Covid: HSE refuses to close workplaces that are putting employees at risk: https://www.theguardian.com/world/2021/feb/14/hse-refuses-to-close-workplaces-that-are-putting-employees-at-risk. The work of the HSE has also been criticised by the Work and Pensions Committee. See Work and Pensions Committee, *DWP's Response to the Coronavirus Outbreak*, HC 178 (2019-21).

friendly approach to its framing'.[101] Workers have the right to voice concerns about health and safety at work and report them to a regulator willing to receive and act upon those concerns. The HSE is under resourced and stretched with its funding cut from £239 million in 2009-10 to £121 million in 2019-20,[102] but its role as a health and safety at work regulator has never been more important. Ewing & Hendy argue the Covid-19 crisis 'is a perfect case study of labour law failure'.[103] The workplace is a location for the transmission of the Covid-19 virus and *IWUGB* highlights the failure of the HSE to take a lead on controlling the virus, as well the limits of health and safety laws.

6. CONCLUSION

The decision of the Administrative Court in *IWUGB* involved a review of technical UK employment provisions, as well as EU law. *IWUGB* can be seen as part of continued litigation to secure the rights of workers. It can also be argued that the worker rights litigation is complex as courts are seeking to fit binary statutory definitions to multifaceted workplace situations to achieve the purpose of statutory employment rights. All workers are vulnerable in the Covid-19 pandemic and section 44 of the ERA 1996 has never been more relevant in providing a right to refuse to work. However, before *IGUGB* workers were denied access to this basic employment right. The decision of the Administrative Court was significant in leading to the reform of section 44 to extend protection to workers. However, limb (b) workers are still denied access to other employment rights as they fail to satisfy the strict 'employee' criteria. This is highlighted by the gig economy which 'disrupts' established borders of worker and employee status.[104] As recognised by the TUC in its response to the Taylor Review,[105] the current rules on employment status are 'complex and confusing' with problems relating to employment status not limited to gig work.[106] The TUC calls for a 'a new single and broad' definition of worker to establish access to all statutory employment rights.[107] One in ten workers of working-age adults now work in the gig economy with precarious employment protection.[108] In the absence of EU law to protect workers or provide the basis for a claim, reform is required to remove the employment rights distinction between employees and

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[101] James, P. (eds.) *HSE and Covid at work: a case of regulatory failure*, (2021), Institute of Liverpool: Employment Rights. See: https://www.ier.org.uk/product/hse-and-covid-at-work-a-case-of-regulatory-failure/.

[102] Ibid., at 27. See also Ewing, K. D. & Hendy, Lord., 'Covid-19 and the Failure of Labour Law: Part 1', (2020) 49 Industrial Law Journal 497, at 526.

[103] Ewing, K. D. & Hendy, Lord., 'Covid-19 and the Failure of Labour Law: Part 1', (2020) 49 Industrial Law Journal 497, at 530.

[104] Page-Tickell, R. & Yerby, E. 'Understanding Conflict and Shifting Boundaries in the Gig Economy Through the Dynamic Structural Model', in Page-Tickell, R. & Yerby, E. (eds.) (2020) *Conflict and Shifting Boundaries in the Gig Economy*, Emerald Publishing Ltd, at 1.

[105] The Taylor test has been argued to be a missed opportunity to provide a unified test for employment status: Collin, H., 'A Missed Opportunity of a Unified test for Employment Status', *UK Labour Law Blog* 31 April 2018: https://uklabourlawblog.com/2018/07/31/a-missed-opportunity-of-a-unified-test-for-employment-status-hugh-collins/. See also Collins, B. 'Defining the Employee in the Gig Economy: Untangling the Web of Contract', Page-Tickell, R. & Yerby, E. (eds.) (2020) *Conflict and Shifting Boundaries in the Gig Economy*, Emerald Publishing Ltd, at 41.

[106] TUC *Taylor Review: Employment Status*, TUC response to the BEIS/HMT/HMRC Consultation, 2018, London: Trade Union Congress, at 2

[107] Ibid., at 3

[108] See TUC & University of Hertfordshire *Platform Work in the UK* 2016-2019, n. 70 above.

workers. The Institute of Employment Rights proposes workplace rights should be available to all with a 'worker' defined 'simply as a person engaged by another to do a job'.[109] Enactment of such a new definition is urgent in the face of proposals to reform both judicial review and the HRA that will restrict the ability of workers, and their unions such as the IWGB, to seek extension of employment protection. *IWUGB* should be heralded as a success for all those involved, but the nature of its proceedings highlights issues moving forward for future claims of workers.

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[109] Institute of Employment Rights, *Guide to a progressive Industrial Relations Bill*, 2019, Liverpool: Institute of Employment Rights, at 13.

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