

The Global Labour Rights Reporter

Access to Labour Justice



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EDITOR'S NOTE

ACCESS TO LABOUR JUSTICE

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What is Access to Justice?

The right of access to justice is a multifaceted human right protected by numerous international¹ and regional² instruments and is undoubtedly a customary international law norm.³ At its most basic, it means possessing and enforcing a legally protected right before a court or other tribunal, although a fuller conceptualization of access to justice would include, inter alia, equality before the law, fair legal proceedings and an effective judicial remedy.

In recent years, the United Nations (UN) has had occasion to reassert the importance of access to justice. In 2012, the UN Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels emphasized the “right of equal access to justice for all, including members of vulnerable groups.”⁴ And, in 2015, the right of access to justice was incorporated into the 2030 Agenda for Sustainable Development - specifically Goal No. 16 (Peace, Justice and Strong Institutions), Target 3, which calls on states to “promote the rule of law at the national and international level and ensure equal access to justice for all.”⁵

¹ See, e.g., Universal Declaration of Human Rights, G.A. Res. 217 (III) A, at art. 1, 2, 6, 7, 8 and 10 (Dec. 10, 1948) (Articles 1 (equality of rights), 2 (entitlement of rights without distinction), 6 (recognition as a person before the law), 7 (equality before the law and equal protection of the law), 8 (right to an effective remedy) and 10 (fair and public hearing)).

² See, e.g., Francesco Francioni, *The Rights of Access to Justice Under Customary International Law*, in *ACCESS TO JUSTICE AS A HUMAN RIGHT* (Francesco Francioni ed., 2007).

³ Convention for the Protection of Human Rights and Fundamental Freedoms, Europ.T.S. No. 5, at art. 6, 13 (Nov. 4, 1950) (Articles 6 (fair and public hearing) and 13 (right to an effective remedy)); Organization of American States, American Convention on Human Rights, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, at art. 3, 8, 10, and 25 (Nov. 22, 1969) (Articles 3 (recognition as a person before the law), 8 (right to a fair trial to determine rights, including labour rights), 10 (right to compensation) and 25 (right to judicial protection, which includes the right to a competent tribunal, the right to judicial remedies and enforcement of said remedies)); African Charter on Human and Peoples' Rights, 1520 U.N.T.S. 217 at art. 3, 7 (June 27, 1981) (Articles 3 (equality before the law and equal protection of the law) and 7 (right to have his cause heard before an impartial tribunal)).

⁴ United Nations, General Assembly, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, U.N. Doc. A/RES/67/1 (2012), at ¶14, available at <https://www.un.org/ruleoflaw/files/A-RES-67-1.pdf>

⁵ Transforming Our World: The 2030 Agenda for Sustainable Development, U.N. Doc. A/RES/70/1 21 (2015), available at https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E (“The new Agenda recognises the need to build peaceful, just and inclusive societies that provide equal access to justice and that are based on respect for human rights (including the right to development), on effective rule of law and good governance at all levels and on transparent, effective and accountable institutions.”)

These articulations of the concept of access to justice require that States ensure that procedures are available to ensure effective exercise of the right. As the UN Working Group on Business and Human Rights has pointed out, however, effective procedures do not necessarily guarantee an effective outcome. Indeed, the Working Group considered a focus on the formal or procedural aspects of access to justice to embody a “narrow” sense of the right. Hence, the Working Group articulated a version of the right that extends beyond access to formal judicial procedures. The Working Group explained that “access to justice can also be used in a broader sense to deal with larger issues of injustice that may not be addressed through individualized remedies offered for a given set of human rights abuses, but would require more fundamental changes in social, political or economic structures.”⁶

In the specific context of labour, the ILO constitution⁷ and several instruments⁸ enshrine a right to access to justice for all workers without distinction, including that workers have access to courts and other formal dispute resolution mechanisms to pursue an effective remedy. Most recently, the 2017 ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, drawing on the UN Guiding Principles on Business and Human Rights, provides that states should provide workers access to a remedy.⁹ The ILO Committee of Experts on the Application of Conventions and Recommendations has also on numerous occasions called on states to guarantee access to formal

⁶ See, Human Rights and Transnational Corporations and Other Business Enterprises U.N. Doc. A/72/162 (18 July 2017), at ¶16, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/218/65/PDF/N1721865.pdf>.

⁷ It is the expectation with any ratified convention that a member state protects the rights and standards in national law and practice. See International Labour Organization, Constitution, Article 19.

⁸ See, e.g., International Labour Organization (ILO), Examination of Grievances Recommendation, 1967 (No. 130) at art. 17 (which recommends that states guarantee access to a labour court should grievances not be resolved at the workplace level); ILO, Workers' Representatives Recommendation, 1971 (No. 143) at art. 6 (which refers to access to an “effective remedy” for dismissal of a worker representative); ILO, Forced Labour (Supplementary Measures) Recommendation, 2014 (No. 203) at art. 12 (requiring “access to justice”); and ILO, Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204) at art. 11 (requiring “access to justice”).

⁹ ILO, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, 329th Session (March 2017) at ¶64 (“governments should take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction any affected worker or workers have access to effective remedy.”)

legal mechanisms and remedies.¹⁰

The ILO also protects the robust concept of the right to access to justice, including the right to take collective action in pursuit of social justice. The preamble of the ILO Constitution identifies the bedrock principle of the organization the realization of social justice, a point reaffirmed in the ILO Declaration of Philadelphia. These instruments make clear that social justice is realized both through the state duty to protect labour rights, as well as through the exercise of collective action through the exercise of, inter alia, freedom of association (including the right to strike).

Obstacles to Access to Justice During the 2020 Pandemic

Even before the outbreak of the pandemic, workers around the world faced significant obstacles to access to justice. In many ways, the pandemic has exposed and intensified the pre-existing weaknesses in existing labour justice systems while at the same time creating significant new obstacles for workers. Below are just some examples of note.

- In several countries, labour inspections were simply not conducted, including, critically, safety and health inspections. At the same time, many administrative tribunals and courts closed their doors. Even when courts reopened or went online, labour cases were not a priority. Workers without access to the internet or online video platforms were unable to pursue their claims where virtual hearings were possible. As a result, essential workers who were the most exposed to serious illness or death from COVID-19, and to exploitation by their employers, had few places to turn.
- In several countries, governments have invoked COVID-19 when issuing overbroad emergency decrees that have limited or effectively banned the right of workers to peacefully assemble, to freely associate or to strike.¹¹ While often framed as temporary measures, many are concerned that they will in fact become permanent. As such, workers have been unable to engage legally in collective action to protest violations of their rights at work, including working in unsafe conditions due to the pandemic.

¹⁰ See, e.g., ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations, ILC.109/III(1A), 2021 (Bangladesh, C 111) (urging the government to "ensure that domestic workers have effective access to adequate procedures and remedies"); ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations, ILC.109/III(1A), 2021 (Colombia, C 169) (urging the government to "guarantee the ... access to justice of the peoples covered by the Convention who continue to be victims of the conflict"); ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations, ILC.109/III(1A) (Cyprus, C97) (urging the government to "enhance[e] migrant workers' access to justice without fear of detention or deportation, both while legal proceedings are pending and also at earlier investigative stages.")

¹¹ See, e.g., Decree No. 5 on the Declaration of Public Calamity, 21 March 2020 (Guat.); 2020, Act XII of 2020 (Act on the Containment of the Coronavirus) (Hung.); Law on National Management in the State of Emergency, 10 April 2020 (Cambodia); Amendments to Emergency Law 162/1958, 8 May 2020 (Egypt).

- In several countries, millions of workers employed in global supply chains experienced mass unemployment and hunger when global garment brands suspended or cancelled contracts with suppliers worth billions of US dollars.¹² Workers had no real hope of an effective remedy from their employers, the suppliers, many of which were themselves facing insolvency. At the same time, workers had no effective legal avenues against global brands in local or foreign courts, despite the direct and devastating impact of their decisions.¹³
- Over 400,000 seafarers have been trapped at sea for well over a year. Unable to disembark and forced to extend their contracts, these workers are undoubtedly victims of forced labour. The crew change crisis is another stark reminder as to how workers, whose labour is necessary for global trade - including the transportation of essential goods such as food, personal protective equipment and medical supplies - are the least protected in a crisis.¹⁴

This Issue

The articles in this issue of the Global Labour Rights Reporter (GLRR) address the theme of access to justice from many different and interesting perspectives.

Several contributors to this issue examine the impact of the COVID-19 pandemic on access to justice in their respective countries. From Brazil, Pedro Daniel Blanco Alves and Maximiliano Garcez explain how the government's responses to COVID-19 have created significant new obstacles to access justice, reinforcing those recently erected by deeply regressive labour law reforms. From Argentina, María Paula Lozano and Matías Cremonte examine whether the country's occupational safety and health system effectively denies access to justice to workers, and whether the system would comply with the guarantees identified in the recent Spolotore judgment of the Inter-American Court of Human Rights. From Spain, Miguel Angel Garrido Palacios examines the law governing mass layoffs provoked by COVID-19 from the point of view of collective law. From Australia, Trevor Clarke evaluates the country's awards system and finds that, on balance, it has done more to protect the interests of employers over the protection of workers during the pandemic. And, from Poland, Łucja Kobroń-Gąsiorowska assesses the protections available to medical workers who blow the whistle on

¹² See, e.g., Mark Anner, *Abandoned? The Impact of Covid-19 on Workers and Businesses at the Bottom of Global Garment Supply Chains*, Penn State Center for Global Workers' Rights (2020) available at <https://www.workersrights.org/research-report/abandoned-the-impact-of-covid-19-on-workers-and-businesses-at-the-bottom-of-global-garment-supply-chains/>.

¹³ See e.g., ECCHR, ILAW & WRC, *Forcé Majeure: How global apparel brands are using the COVID-19 pandemic to stiff suppliers and abandon workers* (2020) available at https://www.ecchr.eu/fileadmin/ECCHR_PP_FARCE_MAJEURE.pdf

¹⁴ ILO, Committee of Experts on the Application of Conventions and Recommendations, General observation on matters arising from the application of the Maritime Labour Convention, 2006, as amended (MLC, 2006) during the COVID-19 pandemic, December 2020, online at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_764384.pdf

mismanagement in the health sector.

Still other contributors examine obstacles to justice created by structural and jurisprudential limitations of the judicial systems and other state mechanisms, separate and apart from the pandemic. From Zimbabwe, Munyaradzi Gwisai explains how rigid procedural formalism had frustrated workers' access to the courts for many years, although recent jurisprudence indicates a relaxing of this conservative approach. From the Republic of Georgia, Raisa Liparteliani and Tamar Gabisonia explain how workers have been unable to access courts and other state mechanisms effectively, first through the elimination of substantive labour rights, and, once partially restored, the elimination of the labour inspectorate's jurisdiction over all matters except occupational safety and health. And, Samantha Ramsay and Beryl Ter Haar review approaches to labour inspection and suggest that incorporating ideas from institutional dynamism into strategic labour inspection theory can result in inspectorates having a wider impact.

Bettina Braun, Avery Kelly and Charity Ryerson identify the problem of the lack of access to justice for workers engaged in manufacturing for global supply chains and suggest the novel approach – namely to include text in supply contracts that provides the employees of the supplier the right to hold the buyer accountable for labour violations.

Finally, this issue of the GLRR concludes with two “Case Notes,” both of including provisions how workers sought justice through the filing of “specific instances” under the OECD Guidelines for Multinational Enterprises after national legal systems failed to provide a remedy. The first, by Jeremy Blasi and Samir Sonti, explains how workers at Westin Long Beach Hotel in California successfully used the OECD Guidelines to bring Natixis, the hotel's private equity asset managers, before the French National Contact Point (NCP) to reach an agreement that led to a collective bargaining agreement. The second, by Mary Joyce Carlson, details the allegations in the specific instance filed with the Dutch NCP against McDonald's concerning systemic gender-based violence and harassment in its operations in Europe and the Americas. The Dutch NCP recently agreed to take up the matter, in coordination with the US NCP and the Norwegian NCP (home to one of McDonald's institutional investors – Norges Bank).

We hope that you find this inaugural issue of the GLRR interesting and useful. We welcome your feedback on this issue, which can be sent to admin@ilawnetwork.com.

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WORKER-ENFORCEABLE SUPPLIER CODES OF CONDUCT AS A TOOL FOR ACCESS TO JUSTICE IN GLOBAL SUPPLY CHAINS

**BETTINA BRAUN, AVERY KELLY
& CHARITY RYERSON**

Global

In 2018, fourteen U.S. companies, including major apparel brands, did something that many general counsels and corporate lawyers would find outrageous: they entered into contracts that gave supply chain workers legal rights to enforce their supplier codes of conduct. These contracts expose suppliers to legal liability for labour rights abuses in their supply chains, and present the potential to face claims from a large, undefined class of workers spread across Asia, Latin America, Africa, and the Middle East. Those workers also got access to U.S. courts, even where the abuses occurred far from U.S. soil. The decision to do this was not the result of a coordinated campaign or naming and shaming. It was not in response to a labour dispute or a regulatory requirement. These suppliers adopted worker-enforceable codes of conduct because the buyer asked them to do so.

Contracts that explicitly provide legally enforceable rights to workers are virtually nonexistent in global supply chains, regardless of whether the buyer or the supplier is the contracting partner with more leverage.¹ International buyers are often multinational corporations that source from less-powerful suppliers that, in turn, source from vulnerable manufacturers.² In other cases, buyers may be smaller companies with limited leverage, working with large suppliers like Foxconn or Cargill, or other supply chain actors with less recognisable names but significant market control. In both models, the party with less leverage can credibly argue that it lacks the power to influence the labour environment for supply chain workers. In the context of a deregulated global labour market, these dynamics generate abuses that span from health and safety impacts to

forced labour, child labour, withheld wages, and forced overtime.³ Conceptualising these abuses as occurring within an international supply chain-- rather than isolated abuses at the domestic level-- provides for a more systemic understanding of the causes of labour and human rights abuses, more accurate analysis of the incentives and power dynamics that drive abuses, and potential legal hooks for corporate accountability. This article discusses the possibility of using specific contract language--third party beneficiary clauses-- to provide workers with access to remedy for certain

"These contracts expose suppliers to legal liability for labour rights abuses in their supply chains, and present the potential to face claims from a large, undefined class of workers spread across Asia, Latin America, Africa, and the Middle East."

abuses through supplier contracts, with a focus on U.S. jurisdictions.⁴ First, we review the prevalent model of including codes of conduct in supplier contracts. These codes may technically have legal teeth, but in practice are almost never enforced. Second, we discuss the prospect of suing a supplier company under an implied third-party beneficiary theory (where there is no clause establishing those workers as intended beneficiaries of the contract) in U.S. states. The final section looks at the test case mentioned above, in which fourteen U.S. companies have entered into contracts with a U.S. buyer that expressly include workers as third-party beneficiaries of a supplier code, to determine whether this strategy is replicable, scalable, and has real potential

³ *Id.*

⁴ A different approach to using contract language to address human rights violations is taken in the Model Contract Clauses by the ABA Business Law Section Working Group to Draft Human Rights Protections in International Supply Contracts. See David Snyder and Susan Maslow, *Human Rights Protections in International Supply Chains - Protecting Workers and Managing Company Risk*, 73 BUSINESS LAW 1093 (2018). See Jonathon Lipson, *Something Else: Specific Relief for Breach of Human Rights Terms in Supply Chain Agreements*, 68 AMERICAN UNIVERSITY LAW REVIEW 1751 (2019) (discussing the challenges and possibilities of this approach).

¹ The most prominent initiative providing labour unions with enforceable rights is the Bangladesh Accord, a legally binding agreement between labour unions, brands and retailers in the Bangladeshi garment sector. See ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH, <https://bangladeshaccord.org/about> (last visited November 20, 2020).

² Haley Revak, *Corporate codes of conduct: Binding contract or ideal publicity?*, 63 HASTINGS LAW JOURNAL, 1645-1670 (2012).

to improve respect for the rights of workers or access to remedy where rights are violated.

Supplier Codes of Conduct as Tools to Address Rights Abuses Across Supply Chains

The Current Supplier Code Model: Lack of Enforcement and Perverse Incentives

As a result of criticism and public pressure, many companies that source goods internationally now use supplier codes of conduct and/or sustainability clauses in their supply chain contracts.⁵ This follows a general trend of contractualisation of human rights terms in business agreements.⁶ Supplier codes of conduct address issues like forced and child labour, working hours, health standards, environmental and sustainability standards, anti-discrimination, and freedom of association. Sustainability clauses often cover similar social and environmental provisions directly in supplier contracts. Both sustainability clauses in buyer-supplier contracts and codes of conduct require, at least on paper, that suppliers respect labour rights in the exercise of the buyer-supplier contract.⁷

However, even where supplier contracts contain environmental and social clauses, buyers rarely enforce these terms, and suppliers operate in conditions that disincentivise adherence.⁸ In practice, buyers sourcing goods transnationally, including some of the world's most profitable brands,⁹ benefit from consumers and the public seeing their adoption of sustainability policies and/or codes of conduct, while little change occurs for workers in supply chains who continue

to experience abuses and lack access to justice.

Towards a New Model of Supplier Code-Based Protection of Workers' Rights: The Possibility of Worker Enforcement

Supplier codes of conduct might be more effective in protecting workers' rights if their promises were enforceable by workers.¹⁰ Because intended third-party beneficiaries, in addition to contract parties, can sue for contract enforcement, workers could theoretically enforce codes of conduct part of buyer-supplier agreements either as "implied" or "express" third-party beneficiaries. The ability to enforce supplier codes of conduct as third-party beneficiaries could improve workers' access to justice by providing access to local and national court systems of the country whose law governs the contract. This is particularly relevant for workers in countries where courts are slow or dysfunctional. Additionally, supplier codes and sustainability clauses often provide substantive rights that surpass the protections workers have under local law (e.g. maximum working hours per week and minimum age requirements), and the ability to enforce these standards could make them a reality for workers.

"The ability to enforce supplier codes of conduct as third-party beneficiaries could improve workers' access to justice by providing access to local and national court systems of the country whose law governs the contract. This is particularly relevant for workers in countries where courts are slow or dysfunctional."



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⁵ Niklas Egels-Zandén, *Revisiting Supplier Compliance with MNC Codes of Conduct: Recoupling Policy and Practice at Chinese Toy Suppliers*, 119 JOURNAL OF BUSINESS ETHICS 58, 59–75 (2014); Katerina Peterkova Mitkidis, *Sustainability Clauses in International Supply Chain Contracts: Regulation, Enforceability and Effects of Ethical Requirements*, 1 NORDIC JOURNAL OF COMMERCIAL LAW (2014).

⁶ Robert McCorquodale et al., *Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises*, 2 BUSINESS AND HUMAN RIGHTS JOURNAL 195–224 (2017).

⁷ When national law conflicts with international human rights standards: *Recommendations for Business*, BINGHAM CENTRE FOR THE RULE OF LAW AND BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW (2018), https://www.biicl.org/documents/3_1930_biicl_bn_report_web.pdf.

⁸ Debra Maryanov, *Sweatshop Liability: Corporate Codes of Conduct and the Governance of Labor Standards in the International Supply Chain*, 14 LEWIS & CLARK LAW REVIEW 397 (2010).

⁹ For example, companies like Nike, Apple, PVH, and GM all have Supplier Codes covering child and forced labour, discrimination, freedom of association, wages and working hours, waste management, and other issues. See Nike, Inc. (n.d.), *Human Rights and Labor Compliance Standards*, <https://purpose.nike.com/human-rights> (last visited September 21, 2020); APPLE Inc., *Apple Supplier Code of Conduct*, (2020) <https://www.apple.com/supplier-responsibility/pdf/Apple-Supplier-Code-of-Conduct-January.pdf>; PVH CORP., *Corporate Responsibility: Supply Chain Standards and Guidelines for Meeting PVH's Shared Commitment* (2019) <https://responsibility.pvh.com/wp-content/themes/twentytynineteen/static-pages/static/resources/pvh-cr-supplier-guidelines.pdf>; GENERAL MOTORS (n.d.), *Supplier Code of Conduct*, <https://investor.gm.com/static-files/03da1ba8-5cbc-4e6b-b242-79fd50691c5d>.

The U.S. legal landscape appears promising for judicial recognition of third-party beneficiary rights related to supplier codes of conduct.¹¹ Third-party beneficiary law is part of state-based contract law in the U.S. federal system. While state jurisdictions differ on what third-party beneficiaries they recognise as "intended" (as opposed to "incidental," without enforcement rights), all states recognise that those third-parties that the contract parties intended to benefit from their contract have enforcement rights, unless a party revokes such rights before the third-party acts on them.

¹⁰ Worker-driven social responsibility initiatives have been highly successful. E.g., WORKER-DRIVEN SOCIAL RESPONSIBILITY NETWORK, *Success Stories*, (2020), <https://wsr-network.org/success-stories/> (last visited September 21, 2020) (this third-party beneficiary tool could be used by such initiatives or separately).

¹¹ The research Corporate Accountability Lab conducted, discussed below, examines only U.S. law.

Worker Enforcement of Current Codes of Conduct as Implied Third-Party-Beneficiaries

In some cases, workers may already be able to enforce standard supplier codes as implied third-party beneficiaries.¹² Implied third-party beneficiaries are non-parties to a contract that the contract parties intend to benefit from the contract but do not explicitly name in the contract. The benefit and/or beneficiary may be implied by the contract as a whole and/or the circumstances in which the contract was executed.

In the summer of 2020, Corporate Accountability Lab conducted research on third-party beneficiary law and relevant cases in all fifty U.S. states. We found that nine states have statutes that govern third-party beneficiaries, and more than one-third of states have expressly adopted Restatement (Second) of Contracts § 302 or have created tests consistent with § 302 to distinguish between intended and incidental third-party beneficiaries. Most states recognise implied third-party beneficiaries, with varying strictness in their standards for unnamed beneficiaries.¹³ Courts in most states are willing to consider circumstantial evidence to determine parties' intent regarding third-party beneficiaries,¹⁴ though many will only do so if there is ambiguity in the terms of the contract.¹⁵ Some states will consider contractual language in light of the surrounding circumstances related to third-parties.¹⁶ Some states recognise implied third-party beneficiaries where a high standard is met.¹⁷

In the international supply chain context, workers are arguably intended third-party beneficiaries of buyer-supplier contracts that include supplier codes of conduct, even where they are not expressly named in the agreement because the express purpose of such a code of conduct is to protect worker rights. Therefore, in those states favourable to implied third-party

beneficiaries, the language of the contract and supplier code of conduct, and the circumstances that drove the parties to include the code in the first place, might be enough to allow workers to recover against a supplier who failed to follow the code of conduct and harmed workers in the process.

Additionally, in some circumstances workers might be considered intended third-party beneficiaries of a buyer-supplier agreement not only where they are not expressly named as third-party beneficiaries, but even where the agreement itself states that it has no third-party beneficiaries. While almost all states generally find clear, unambiguous, uncontradicted "no third party beneficiary clauses" dispositive, a few states are more flexible on boilerplate clauses and sometimes find that such clauses do not reflect the true intent of the parties.¹⁸ Therefore, if a court found that a buyer and supplier intended supply chain workers to benefit from a contractualised code of conduct, and it found a boilerplate "no third party beneficiary clause" inapplicable, a worker producing for a buyer under a supplier agreement with a currently formulated code of conduct could theoretically bring a breach of contract claim against a supplier.¹⁹

Based on our research into third-party beneficiary law, the most favourable U.S. jurisdictions for an implied third-party beneficiary-based claim against a supplier are Colorado, Alaska, South Carolina, Wyoming, and Idaho. Courts in these states recognise or would likely recognise implied third-party beneficiaries without a high bar to establish party intent, and they do not automatically find "no third party beneficiary clauses" dispositive. Filing cases in these states, even in the absence of an intended third party beneficiary clause, may provide remedy for workers who were victims of labour rights violations that also violated the code of conduct. For this type of claim to be successful, however, the forum selection clause would have to name one of these states. Given that this list does not include Delaware, California, or other states that disproportionately house multinationals, this greatly limits the number of supply chain workers who may be able to bring successful implied third party beneficiary claims.

An Experiment in Making Supplier Codes Work: Worker Enforcement of Supplier Codes as Express Third Party Beneficiaries

While many states would not recognise workers as implied third-party beneficiaries of buyer-supplier agreements that include supplier codes of conduct as currently written, workers could likely enforce supplier codes in many jurisdictions if workers were expressly named as third-party beneficiaries. This section discusses the experimental use of such terms in supply

¹² There is one instance where this theory was tried in court, but the plaintiffs' sued the promisee (Walmart), rather than the promisor (the supplier companies). See *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677 (9th Cir. 2009). This section discusses the viability of suing the supplier company, or promisor. In another case, a worker's union wanted to intervene in a lawsuit between the University of Wisconsin and Adidas, claiming to have third-party beneficiary rights in the sponsorship agreement between the university and the apparel company. See *Complaint Board of Regents v. Adidas Am. Inc.*, Complaint, No. 12CV2775 (Cir. Ct. Dane Cty. 2013). The case was settled before the court came to a decision. For further discussion see Allie Robbins, *Outsourcing Beneficiaries: Contract and Tort Strategies for Improving Conditions in the Global Garment Industry*, 80 UNIVERSITY OF PITTSBURGH LAW REVIEW 371, 371-408 (2018).

¹³ Note that no state in the Seventh Circuit recognises implied third-party beneficiaries; all intended third-party beneficiaries must be expressly named in a buyer-supplier agreement.

¹⁴ E.g., *Cordero Mining Co. v. U.S. Fidelity & Guar. Ins. Co.*, 67 P.3d 616 (Wyo. 2003); *Neal & Co., Inc. v. Ass'n of Village Council Presidents Reg'l Hous. Auth.*, 895 P.2d 497 (Alaska 1995); *E.B. Roberts Const. Co. v. Concrete Contractors, Inc.*, 704 P.2d 859 (Colo. 1985).

¹⁵ E.g., *De Groot v. Standley Trenching, Inc.*, 157 Idaho 557 (Idaho 2014).

¹⁶ E.g., *Lauritzen v. Davis*, 214 Neb. 547 (Neb. 1983); *Sneve v. Mutual of Omaha Ins. Co.*, No. 13-SV-252-ABJ, 2015 WL 12866982 (D. Wyo. 2015) (unreported).

¹⁷ E.g., *Cleveland v. Ludwig Institute for Cancer Research Ltd.* No. 19cv2141 JM (JLB), 2020 WL 3268578, at *9 (S.D. Cal. 2020) (unreported); *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 982 (11th Cir. 2005).

¹⁸ E.g., *Fortis Advisors L.L.C v. Allergan W.C. Holding Inc.*, No. 2019-0159-MTZ, 2019 WL 7290945 (Del. Ch. 2019); *Branin v. Stein Roe Investment Counsel, L.L.C.*, No. 8481-VCN, 2014 WL 2961084 (Del. Ch. 2014) (unreported); *Barr Dev., Inc. v. Utah Mortg. Loan Corp.*, 106 Idaho 46 (Idaho 1983).

¹⁹ Contract parties can revoke third-party beneficiary rights at any time before a third-party seeks to enforce them.

chain contracts and several obstacles to effective use of contracts to create meaningful change in working conditions.

The purpose of this experiment was to determine (1) whether such terms were commercially viable; (2) whether companies would comply with the related clauses that were necessary for enforcement (i.e. factory disclosure, access, independent monitoring, etc.); and (3) whether practical impediments to enforcement would render the terms useless.

In 2018 and 2019, Corporate Accountability Lab began a limited test of this strategy, working with a buyer to include third-party beneficiary language in supplier contracts related to a particular line of merchandise.

At least fourteen manufacturers, including major U.S. apparel companies, have incorporated this language in supplier contracts with factories across the globe. While the details of this test case remain confidential, several shareable insights have emerged. First, third-party beneficiary language is commercially viable. In the test case, fourteen manufacturers had previously contracted to produce this line of merchandise with the buyer, and when the new language was introduced, the same fourteen companies renewed their contracts despite this change. While all companies were aware of the new language, none of them, not even the largest and most-recognisable, used their commercial advantage to resist the new language. This runs counter to the narrative that no buyer would agree to expose its suppliers to liability. And in theory, any supplier that is conducting sufficient due diligence would not be exposed to significant liability under these clauses.

Second, accurate factory disclosures are a threshold issue, and even those companies with the resources to provide accurate disclosures do not have sufficient internal practices in place to do so. In the test case, there has been partial compliance with factory disclosure requirements. Disclosures are often inaccurate, over-inclusive, or name supply chain actors at the wrong level (i.e., screen printers or distributors, rather than factories). Lack of supply chain transparency is a broader issue that impacts many legal and advocacy strategies, and this strategy is no exception.

Third, this test case indicates that absent certain additional clauses, third-party beneficiary language will be meaningless to workers. In addition to a third-party beneficiary clause, worker-enforceable agreements must provide for detailed factory disclosures and access to buyers for monitoring, worker education, anti-retaliation, and perpetual clauses (extending the requirements to subcontractors), among other clauses, to make workers' use of their third-party beneficiary rights a practical reality. Depending on the buyer-supplier power dynamics of the particular supply chain, it might

also be beneficial for a worker-enforceable code of conduct to include provisions ensuring that suppliers can negotiate order timelines and costs that make respect for and implementation of workers' rights (and code of conduct compliance) possible. Such codes could address buyer-supplier power imbalances by providing for buyer indemnification where buyer acts or omissions lead to the harms workers suffer and for which they demand compensation.²⁰ In order for the viability, limitations, and replicability of this strategy to be more fully assessed, more buyers need to adopt supplier codes of conduct with clauses naming workers as third-party beneficiaries and provisions to make worker enforcement possible.

Even at their most successful, third-party beneficiary language in supplier codes of conduct would not address structural problems that lead to the violation of workers' rights in international supply chains - including power dynamics between buyers and suppliers, deregulated labour markets, and the interchangeability of supply chain workers - and that create, maintain, and exacerbate the conditions in which workers' rights are systematically abused. However, worker-enforceable supplier codes could provide a concrete tool for workers to assert their rights where there are few other options available.

Conclusion

Workers in international supply chains rarely have access to justice when their rights are violated in connection with production of goods for foreign companies that source goods internationally, including global brands that have supplier codes of conduct. Adding third-party beneficiary language to supplier codes of conduct specifying that workers producing for a supplier (and that supplier's suppliers) are intended beneficiaries of the code could provide workers a straightforward-- if challenging to implement-- mechanism for workers to access justice under contracts between buyers and suppliers. While obstacles to enforcement remain, the fact that, from a limited data set, this language appears to be commercially viable, indicates that instrumentalising supplier codes of conduct to enforce workers' rights may have applications that could result in real world, positive impacts for workers.

²⁰ A point of criticism for pursuing such enforcement avenues against suppliers is that it exacerbates existing buyer power imbalances. This is a concern where such third-party beneficiary clauses could be used by buyers against particularly disadvantaged suppliers. However, third-party beneficiary clauses could also be used in licensing or procurement contracts where the brands are promisors. See Robbins, *supra* note 12.

ACCESS TO JUSTICE IN LABOUR RELATIONS IN GEORGIA

RAISA LIPARTELIANI & TAMAR GABISONIA

Georgia

Under the Constitution of the Republic of Georgia,¹ and international law, all persons have the right to apply to court (or alternative institutions) to defend their rights and obtain an effective remedy. The reality is quite different and the obstacles have only multiplied during the pandemic. However, there have been some important reforms that have improved the situation for workers, though much more remains to be done. This article provides a survey of the mechanisms available to workers in the Republic of Georgia.

The Judicial System

On 12 June 2013, groundbreaking changes were made to the Labour Code of Georgia, which reinstated many of the labour rights that had been eliminated outright in the extreme neoliberal reforms of 2005. Thereafter, the number of labour law related complaints significantly increased in the Georgian court system, in large part due to the restoration of rights under the 2013 reforms. According to the Supreme Court's statistics, 1258 labour law related complaints were registered for 2013, which increased to 1978 complaints in 2019.² However, not every worker whose labour rights are violated can access the courts. For instance, workers employed in informal economy, such as domestic workers, street vendors, and unpaid workers in family businesses, as well as self-employed workers, are not considered "employed" for purposes of the law and are unable to lodge claims against those for whom they perform labour. Moreover, the burden of proof to demonstrate the existence of a labour relationship rests with the complainant in litigation. Failure to do so will result in the court rejecting the application. Furthermore, even those workers who are able to apply to the court lack access to due process and right

to a fair trial. First of all, court proceedings on labour related claims are extremely lengthy due to persistent delays. Despite the fact that labour law cases should be resolved within one month of filing by the common courts,³ litigation lasts for several years in practice.⁴ Secondly, the absence of specialised labour courts dramatically diminishes the quality of the judgments. This leads to incoherent court judgements on important labour related claims. The obligation to pay fees for court applications also serves as an obstacle, especially for those who are unemployed. Although complaints concerning remuneration or requests for reinstatement are exempted from these fees, discrimination claims (including anti-union discrimination) require complainants to pay fees before filing the application.⁵

"The COVID-19 pandemic has significantly worsened the situation concerning access to justice. A decree issued by the President of Georgia on 21 March 2020 declared a state of emergency in the country and as a result a number of civil rights were restricted."

The Covid-19 pandemic has significantly worsened the situation concerning access to justice. A decree issued by the President of Georgia on 21 March 2020 declared a state of emergency in the country and as a result a number of civil rights were restricted. Although the restriction has not been applied to the right to a fair trial and virtual litigation has been promoted, this has largely covered criminal and some administrative cases. Labour rights related litigation was postponed. Even after the end of the state of emergency, when litigation was restarted, access to court buildings is still restricted and publicity of court hearings is limited. That said, some positive developments have been implemented during the pandemic. Everyone seeking to apply to the court has been granted the right to do so through an electronic complaint system, which has had a positive

¹ 1995 CONST. (Geor.) article 31.

² Supreme Court of Georgia, *Statistics*, <http://www.supremecourt.ge/statistics/> [available in Georgian] (last visited Nov. 2020).

³ Law on State Fee art. 5.1. (Geor.).

effect on labour-related complaints given that the time-limit for claims on, e.g., reinstatement is very tight. Complainants are required to apply to the court within one month from the day of their dismissal.

The inefficiency of the judicial system is also caused by the lack of accountability for acts of judicial misconduct. The only way to challenge procedural or substantive violations committed by a judge is through the High Council of Justice of Georgia⁶, which is not a transparent or efficient institution. Firstly, the decision of the High Council on the discipline of judges is confidential; consequently, applicants are never notified as to the outcome of their complaints. Secondly, even in case when discipline has been applied against a particular judge, it does not affect the disposition of the case in which the judge presided. Further, the High Council can only publish general statistical data on the violations by judges, not the outcomes on the particular cases.

In addition to the institutional and practical challenges that the judiciary faces, there is a firmly established stigma in the society toward people who seek justice through the courts. It is not uncommon that employers will maintain a “black-list” of the so called “unwanted and dangerous” - those who have applied to court to defend their rights - making it even more perilous for workers. This is why few people file claims while they are still employed (for example for wage and hour violations) and instead only resort to the courts after they have been dismissed and there is little left to lose. The Georgian Trade Union Confederation reports that other than in very exceptional circumstances, if complainant decides to apply to the court claiming anti-union discrimination or other labour rights violations, they are immediately dismissed. There is a steep cost involved for workers in fighting their rights through courts and it often amounts to them losing their jobs.

Non-judicial Mechanisms

There are also non-judicial state institutions that protect labour rights in the country, such as the Labour Inspection Department and the Office of the Public Defender of Georgia. Despite the fact that both of the institutions’ mandates are very limited, workers may apply to one or another institution in case their labour rights are violated.

Labour Inspection

The neoliberal reform introduced in 2005 abolished not only the labour law *but also* the entire labour inspection system. The Georgian Trade Unions Confederation, along with the number of international organisations, including the International Labour Organisation, demanded a res-

toration of labour inspection system. As a result of many years of struggle, the Labour Inspection Department was re-established under the Ministry of Labour, Health and Social affairs.

Initially, the Labour Inspection Department operated with a mandate to monitor only occupational health and safety standards. Even then, it could only do so with prior notice to employers and without the ability to sanction companies who violated these standards in their workplaces. Consequently, neither the situation of workers’ rights nor the alarming rate of occupational accidents improved in the country.

In 2018, a new law on “Occupational Health and Safety” was adopted. The Labour Inspection Department’s mandate was expanded to include monitoring of occupational health and safety standards in workplaces at any time without prior notice to employers. Moreover, the institution was granted the right to sanction companies who violated the regulations promulgated under the law. According to these regulations, every employer is obliged to take all necessary measures to ensure occupational safety at workplace and minimise the workplace hazards, such as: the introduction of risk management policies in employment, the carrying out of risk assessment studies with the participation of workers and their representative during the process, the obligation to have a certified inspector at workplace, among others, etc.

While the mandate of the Labour Inspection Department was extended to cover occupational health and safety, it still lacks the mandate to monitor the implementation of all other labour law. There is no rational separation between labour rights and occupational health and safety. Indeed, most workplace accidents are due to the physical fatigue of the workers, which itself is caused by the violation of their labour rights, such as excessive overtime work and denial of leave, for example sick leave or annual leave.

In comparison to 2018, the number of deaths and injuries at work decreased in 2019. Still, the number of workplace accidents is high (59 workers died in 2018, 199 were seriously injured; 38 workers died in 2019, 135 were seriously injured)⁷. The European measurement estimation of workplace accidents counts the number of deaths per 100,000 employees. In Georgia’s case there are 745,000 people employed in the country, out of which 42.4 workers are victim of the workplace accidents each year. It means that about 5.7 people per 100,000 die in the country as a result of the workplace accidents each year. The average number of deaths in the European Union member states amounts to 1.8 person per 100,000 employees, with the lowest rate in the



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⁶ Law on Common Courts of Georgia Chapter 13.

⁷ Department of Labour Inspection, <https://www.moh.gov.ge/en/728/#> (last visited Nov. 2020).

Netherlands (0.6 people) and the highest rate in Romania (5.6), it amounts to 5.6 people per 100,000 workers. These statistics show that the situation in Georgia is much worse than in EU countries. The share of occupational deaths in Georgia is 3.1 times higher compared to EU averages.

Forced labour cases also fall under the mandate of the labour inspection. However, its mandate on this particular issue is also very limited.⁸ Based on a workers' complaint, labour inspectors can monitor the situation in workplaces and issue a recommendation in case of finding forced labour. However, it does not have the right to sanction the violator and its decision has no force of law.⁹

One obvious way to solve the problems identified with labour inspection is to ensure a sufficient numbers of labour inspectors overall, and that they are distributed to guarantee geographic coverage. The ILO recommends that members states have at least one labour inspector for every 20,000 employees in the country. In Georgia, at least 90 labour inspectors are needed to meet the ILO recommendations. At present, Georgia has roughly 50 labour inspectors, and all of them are based in the capital city of Tbilisi.¹⁰ Despite the repeated request of the Georgian Trade Unions Confederation to ratify ILO conventions protecting the international standards on occupational safety and health (ILO Conventions 81, 155 and 176) the Georgian authorities have not done so. Moreover, according to the Georgian legislation, issues related to the occupational health and safety need to be discussed within the format of Tripartite Social Partnership Commission; however, the tripartite commission itself has been inactive on this matter.

Office of Public Defenders

Apart from the Labour Inspection Department, the state Public Defender's Office of Georgia is mandated to monitor the proper implementation of the labour rights in employment¹¹. The Public Defender of Georgia oversees the protection of any person whose rights are violated by state entities or local municipally officials, which precludes their oversight of labour rights in the private sector. The private sector has no obligation to cooperate with the Public Defender or provide requested information in ongoing litigation. The only exception is cases related to the workplace discrimination and harassment, where public service authorities, as well as, private sector representatives are obliged to provide any documentation upon the request of Office

of Public Defender of Georgia.¹²

The Public Defender's office is entitled to issue recommendations on violation of labour rights in Georgia. However, the rate of implementing the public defender's recommendations in practice by public agencies is generally very low. Sometimes, even in case when state agencies express their readiness to fulfil the Public Defender's recommendation publicly, it doesn't happen.¹³

If the state agency does not comply with the recommendation delivered and there is sufficient ground to prove discriminatory treatment, the Public Defender has the right to apply to the court against the public agency and, in case the court upholds the application, a court decision is obligatory and must be respected by the respondent agency.¹⁴ The time-limit for court application for applicants has been increased from three months to one year. The Public Defender is entitled to start litigation on discrimination cases based on applications or complaints of individuals and legal entities or a group of people or on its own initiative.

"While the mandate of the Labour Inspection Department was extended to cover occupational health and safety, it still lacks the mandate to monitor proper implementation of labour rights. There is no rational separation between labour rights and occupational health and safety. Indeed, it is important to underscore that most workplace accidents are due to the physical fatigue of the workers, which itself is caused by the violation of their labour rights, such as excessive overtime work and denial of leave, such as sick leave or annual leave."

Conclusions

Considering that the court system, which is estimated as the most effective institution in the country, has its own shortcomings as described above, it is even more important to have effective non-judicial bodies in the country with a fully-fledged mandate to monitor and enforce labour law. According to international labour standards, the labour inspection system needs to be equipped with a mandate to monitor not only occupational hazards, but also the implementation of labour rights generally.

The lack of the efficacy of the above-mentioned supervisory bodies became even more critical during the COVID-19 pandemic. Labour rights have been frequently violated - workers were denied payment of wages, refused paid or sick leave, unlawfully dismissed, etc. Even more, during the state of emergency, which lasted for 2 months, the law on Occupational Safety was suspended. Consequently, the labour inspection was not functioning even with a very limited mandate,

⁸ Resolution N473 on the approval of the Statute of the Ministry of Internally Displaced Persons from the Occupied Territories of Georgia, Labour, Health and Social Affairs, art. 2 and 19 (Geor.).

⁹ Resolution #603 on the State Program of Labour Inspection (2018) Article 2 and 3 (Geor.).

¹⁰ Id.

¹¹ Law on Public Defenders of Georgia (1996).

¹² Id. at art. 3.

¹³ Public Defender's Office, *Special report on prevention of discrimination* (2019), <http://www.ombudsman.ge/res/docs/2020030416283364211.pdf>

¹⁴ Law on Elimination of all forms of discrimination art. 6 (2014) (Geor.).

while many sectors of economy with hazardous working conditions (mining work, construction service, infrastructure projects, etc.) continued operating in the country.

Thus, while access to justice in labour relations in Georgia is formally guaranteed through the judiciary and other state institutions such as Labour Inspection and the Office of Public Defenders of Georgia, they all have challenges and shortcomings. It is a priority that Georgia create a specialised labour court system to enable the courts to consider labour cases within the established time-limits and deliver well-justified decision based on the unified court practice that meets an international labour standard. Establishment of fully-fledged labour inspection mandated to monitor all labour rights is also necessary to improve access to justice in the country. The Public Defender's Office should be granted the right to sanction an infringer of labour law in public and private sector in order to grant the institution an efficient role to fight discrimination in employment.

ACCESS TO LABOUR JUSTICE AND PROCEDURAL BARRIERS IN COMMENCEMENT OF PROCEEDINGS:

A PARADIGM SHIFT IN ZIMBABWEAN COURT PRACTICE OR A JUDICIAL MIRAGE?

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Zimbabwe

"This is a court of justice which is required to resolve the real issues between the parties. It should not dabble too much into small technicalities."

MATHONSI JA.²

The Labour Act,³ (hereinafter "the Act"), was widely hailed as ushering in a democratic framework governing employment relationships in Zimbabwe consistent with international labour standards. Section 2A(1) of the Act provided its purpose as advancing social justice and democracy in the workplace including the "the just, effective and expeditious resolution" of labour disputes.⁴ The Act established a special Labour Court with equity jurisdiction and empowered to deal with disputes in a just, flexible and inexpensive manner unsaddled with the rigidities of the civil courts.⁵

A cornerstone of labour justice is that access to the courts be fully facilitated and formalities kept to a minimum. Yet as pointed out in Mazambani, the use of technicalities has become the bane of courts in Zimbabwe with devastating effect on ordinary workers and poor litigants. The courts have developed

a phalanx of precedents pertaining to formalities of commencement of proceedings, especially the Notice of Appeal, that in effect have subverted access to the courts. The most minute non-compliance with court Rules has been held to be fatal rendering the appeal a nullity.⁶

This article critiques the approach followed by the courts and argues that the approach in Mazambani best accords with the interests of labour justice.

"A cornerstone of labour justice is that access to the courts be fully facilitated and formalities kept to a minimum. Yet as pointed out in Mazambani, the use of technicalities has become the bane of courts in Zimbabwe with devastating effect on ordinary workers and poor litigants."

The Right to Appeal and Court Structure

A fundamental element of the doctrine of rule of law is the right of a party aggrieved by a decision of a lower tribunal to appeal to a higher court. In terms of fair dismissal law, Article 8 (1) of the Termination of Employment Convention provides:⁷

"1. A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator."

The Labour Court sits at the apex of the appeal process

⁶ *Matanhire v BP Shell Marketing* 2004 SC 113 – 04 (SC) (Zim.); *Tamanikwa and Anor v Zimbabwe Manpower Development Fund and Anor* 2013 SC 197-11 (SC) (Zim.); *Chikura and Another v Al Sham's Global BVI Limited* 2017 SC 17-2017 (SC) (Zim.).

⁷ International Labour Organization (ILO), *C158 - Termination of Employment Convention*, 1982 (No. 158).

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² *Edmore Taperesu Mazambani vs International Export Trading Company (Private) Limited and Anor* 2020 SC 88-20 (SC) at 11 (Zim)[hereinafter *Mazambani case*].

³ The Labour Act [Chapter 28:01] of 1985 (Zim.) [hereinafter *Labour Act*].

⁴ Labour Act, *supra* note 3 §2A(1)(f).

⁵ *Zhakata v Mandoza N.O and N M Bank Ltd* HH 22-05 (HC) (Zim.) (the court stated that taking labour matters to the High Court where "proceedings are complex, expensive and cumbersome...can only serve to defeat the noble purpose for which the special Labour Court was created.")



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under the Labour Act. It enjoys exclusive appeal jurisdiction in the first instance in matters under its purview under s 89 (6).⁸ The court enjoys widespread appeals jurisdiction including appeals from workplace disciplinary processes under employment codes,⁹ appeals from decisions made under compulsory arbitration,¹⁰ decisions of workplace disciplinary authorities under the National Model Code,¹¹ or public sector disciplinary decisions under the Public Service Regulations.¹²

A party wishing to appeal to the Labour Court must lodge a notice of appeal that complies with Rule 19 (1) including Form LC 4.¹³ The grounds of appeal “must be concise and precise.”

A party aggrieved by a decision of the Labour Court may appeal to the Supreme Court but only on a question of law.¹⁴ The notice of appeal must comply with Rule 59 of the Supreme Court Rules, 2018;¹⁵

- (3) The notice of appeal shall state—
- (a) the date on which the decision was given;
 - (b) the tribunal or officer whose decision is appealed against;
 - (c) the grounds of appeal in accordance with rule 44;
 - (d) the exact nature of the relief sought;
 - (e) the address of the appellant or his or her legal representative; and
 - (f) if leave to appeal was granted, the date of such grant.

In terms of Rule 44, the “grounds of appeal shall be set forth clearly and concisely.”

A key battle ground has been the question of how peremptory these requirements are. Is a notice of appeal that is defective, fatally incurable or can be amended? Too strict an approach shuts the doors of the courts of justice to workers and the poor. The practice of the courts though has not been encouraging reflecting an inarticulate premise of neoliberal unitarism.

⁸ See *Nyanzara v Mbada Diamonds* 2016 HH 63-15 (HC) (Zim.); *Triangle Ltd and Others v Zimbabwe Sugar Milling Industry Workers Union* 2016 HH 74 – 169HC (Zim). See also *Chirwa v Transnet Ltd and Others* 2008 (4) SA 367 (CC) (S. Afr.); *Confederation of Zimbabwe Industries v Mbatha* 2015 HH125 – 15 (HC) (Zim.) (for a contrary minority position).

⁹ Labour Act, *supra* note 3 §92D.

¹⁰ *Id.* at §98 (10).

¹¹ Labour Act, *supra* note 3 §92D; *Sakarambe N.O and Another v Montana Carswell Meats (Private) Limited* 2020 SC 44-20 (SC) (Zim.).

¹² Public Service Regulations, SIs 1/2000 of 2000 §52 (Zim.); Public Service Act Chapter 16:04 of 2001 §26 (Zim.).

¹³ Labour Court Rules 2017 SI 150/2017 (2017) (Zim.); Labour Court Rules SI59/2006 (2006) Rule 15(1) (Zim.).

¹⁴ Labour Act *supra* note 3 §92F (courts have read this restrictively); *Sable Chemical Industries Ltd v Easterbrook* 2010 (2) ZLR 342 (S).

¹⁵ Supreme Court (Miscellaneous, Appeals and References) Rules, 1975 (Zim.); Rules of the Supreme Court, 1964 (Zim.) (if for high court).

Practice of Courts

In practice, the courts have adopted a conservative jurisprudence with emphasis on legal formality. The modern foundations lie in *Jensen v Avacolas*¹⁶ where KORSAN JA couched the applicable principle as;

“... a notice of appeal which does not comply with the rules is fatally defective and invalid. That is to say, it is a nullity. It is not only bad but incurably bad, and, unless the court is prepared to grant an application for condonation of the defect and to allow a proper notice to be filed, the appeal must be struck off the roll with costs ...”

The court has rigorously followed the above approach with MALABA JA (now Chief Justice) a particularly ardent proponent. In *Matanhire v BP & Shell Marketing Services (Pvt) Ltd*¹⁷, he held:

“It is not usual to write a judgment on a matter that has been struck off the roll... This judgment has been written for purposes of drawing the attention of legal practitioners to the fact that all the matters required by the Rules of Court to be stated in a valid notice of appeal are of equal importance so that failure to state one of them renders the notice of appeal invalid.”

In *Tamanikwa and Another vs Zimbabwe Manpower Development Fund and Another*,¹⁸ the notice of appeal was “against part of the judgment of the Labour Court...” whereas the relief sought prayed that “the judgment of the court a quo is set aside ...” BHUNU JA dismissed an application to amend the notice and struck off the appeal for failure to specify “the exact nature of the relief sought,” holding:

“It is settled law that save in exceptional circumstances, the term ‘shall’ denotes the law maker’s intention to render the rule mandatory. This Court has ruled on numerous occasions that failure to comply with mandatory provisions of the Rules of court will render an appeal a nullity.”

Appellants were punished with punitive costs because they had failed to heed “the learned Chief Justice’s wise counsel” who had alerted them of the fatal defect in “his routine supervisory and administrative functions.” Further, “those who deliberately defy wise counsel and go on to negligently cause others patrimonial loss must not cry foul when they are made to make good

¹⁶ *Jensen v. Acavalos* 1993 (1) ZLR 216 (S) at 220A-D (Zim.).

¹⁷ *Matanhire v BP & Shell Marketing Services (Pvt) Ltd* 2004 (2) ZLR 147 (S) (Zim.).

¹⁸ *Tamanikwa and Another vs Zimbabwe Manpower Development Fund and Another* SC 73 - 17, at 4 – 7 (SC) Zim.).

the loss.”¹⁹

In *Madyavanhu v Saruchera and Others*²⁰ the offending omission was failure to make a prayer for the success of the appeal. GWAUNZA DCJ held:

“The wording of the provisions shows that the Rule is mandatory in nature meaning that any document labelled ‘notice of appeal’ must comply with it in order to be a valid notice of appeal. The information required in terms of this provision must be clearly set out even where it may be obvious or deductible from the given text of the grounds of appeal.”

The exception has been in relation to grounds of appeal, where courts have shown a degree of flexibility, allowing for instance an appeal to stand where the notice contains some grounds which are valid and others invalid.²¹ Thus the approach of the courts has generally been conservative.

“This is consistent with the doctrine of rule of law and equal protection of the law...Over emphasis on technicalities places a premium on legal formality over substantive justice, which promotes abuse of courts especially by deep-pocketed litigants.”

Mazambani: Paradigm Shift?

However, since the separation of the Supreme Court from the Constitutional Court in early 2020 and ascendancy of the newer judges, a new wind seems to be blowing. In *Kundishora v Zimbabwe Red Cross Society*²² MAKONI JA, took a firm position against respondent’s preliminary point that the notice of appeal was invalid because it was against part of the judgment, when the appeal was against the whole judgment. Respondent was forced to concede.

But it is in *Mazambani v International Export Trading Co. (Pvt) Ltd and Another*, *supra*, that MATHONSI JA developed a jurisprudence that may mark a departure from the conservative approach of the past. The appellant argued, that per the weight of authorities, the notice of appeal was a nullity in that it prayed for the setting aside of the judgment of the court a quo and substitution of an order dismissing respondent’s claim before the arbitrator. This was invalid because the court a quo could only set aside the award and not substitute its own order. The court allowed an amendment to sever the incompetent part relying on the doctrine of severability incorporated from contract law, as argued by appellant.²³ It cited s 22 of

the Supreme Court Act empowering the court, where it thinks it necessary or expedient in the interests of justice, to take a course “which may lead to the just, speedy and in-expensive settlement of the case.”²⁴

In apt words, including a strong warning to lawyers apt to abuse technicalities, the court held;²⁵

“Where... the notice of appeal is, for all intents and purposes valid, but there is need for amendment to be effected to clean it up, by severing offending portions of it, this court should lean in favour of granting the amendment.... The appellant cannot be expected to start all over again, should the appeal be struck off, when the offending words can be severed leaving a valid appeal. This is a court of justice which is required to resolve the real issues between the parties. It should not dabble too much into small technicalities. A lot of time is spent by legal practitioners appearing before this court arguing small technicalities and trying to deploy the court’s rules to frustrate the disposal of cases. It is unacceptable.”

Critique

It is submitted that the approach taken in *Mazambani* is the correct one for several reasons. As pointed out by MATHONIS JA, the fundamental function of courts is to resolve real issues between parties and not be distracted by technicalities. This is consistent with the doctrine of rule of law and equal protection of the law.²⁶ Moreover, courts enjoy power to condone departures from the Rules.²⁷ Over emphasis on technicalities places a premium on legal formality over substantive justice, which promotes abuse of courts especially by deep-pocketed litigants. Regrettably, the approach by the courts saw the practice become entrenched, especially among younger advocates, undermining the development of a deep and sound jurisprudence in the superior courts.

The constitutional principle set out in s 162 of the Constitution that judicial authority “derives from the people of Zimbabwe” compels that courts be fully accessible to all.

The later approach now finds constitutional confirmation in s 85 (3) of the Constitution. This provides;²⁸

- (3) The rules of every court must provide for the procedure to be followed ... and those rules must ensure that -
 - (a) the right to approach the court under subsection (1) is fully facilitated;
 - (b) formalities relating to the proceedings, including their commencement, are kept to a minimum;
 - (c) the court, while observing the rules of natural

¹⁹ See also *Sambaza v Al Shams Global Bvl Limited* SC 03 – 18 (SC) (Zim.); *Dabengwa and Another v ZEC and Others* SC 32 – 16 (Zim.); *Ndlovu v Ndlovu* SC 133 -02 (SC) (Zim.).

²⁰ *Madyavanhu v Saruchera and Others* SC 75 – 17 (SC) (Zim.).

²¹ *Sambaza v Al Shams Global Bvl Limited* SC 03 -18 (SC) (Zim.); *Mazambani* case, *supra* note 2 at 7.

²² *Kundishora v Zimbabwe Red Cross Society* SC 48-20 (SC) (Zim.).

²³ *Sibanda A and H v Pentaville Investments (Pvt) Ltd and others* HH 14 – 03 (HC) (Zim.) at 2.

²⁴ Supreme Court Act Chapter 7:13 (1981) (Zim.) at §22 (1)(b)(ix).

²⁵ *Sibanda*, *supra* note 23 at 11.

²⁶ ZIM. CONST., §3 (1) and §56 (1).

²⁷ See Labour Court Rules, *supra* note 13 at Rule 32.

²⁸ Constitution of Zimbabwe Amendment (No. 20) Act, 2013 at §85 (3).

justice, is not unreasonably restricted by procedural technicalities.

The above is particularly true for labour disputes. Section 2A(1) (f) of the Act provides for the “just, effective and expeditious resolution of disputes.” To achieve this objective the court enjoys equity jurisdiction unlike civil courts.²⁹ The courts have long recognized that it is “undesirable that labour relations matters should be decided on the basis of procedural irregularities.”³⁰ BHUNU J (as he then was) justified this in *Zhakata v Mandoza N.O and Anor*;³¹

“... It is trite and a matter of common sense that in labour matters poor indigent employees are often pitted against the vast wealth and resources of employers. Rich employers will not hesitate to use their financial muscle to gain an unfair advantage over poor employees in the most expensive courts where the employee will be dazzled and lost in the intricacies of legal jargon and technicalities. The majority of employees who will have lost their jobs are unable to afford the services of a lawyer at the Labour Court let alone at the High Court.”

At the end of the day, a pedantic, narrow approach that places emphasis on legal formality subverts the basis of judicial authority, “the people of Zimbabwe.” Where substantive justice is subverted because a legal system allows the large-scale use of procedural technicalities “to frustrate the disposal of cases” the court risks losing its morale authority in society. Without that, a judiciary is nothing, as argued by American jurist Roscoe Pound.³² MATHONSI JA’s intervention in *Mazambani* is timely and welcome and one only hopes marks a paradigm shift in Zimbabwean courts and not a fleeting judicial mirage.

²⁹ *Samanyau & Ors v Fleximail Ltd* SC 21-14 (SC) (Zim.).

³⁰ *Dalny Mine v Banda* 1999 (1) ZLR 220 (S) at 222 (Zim.).

³¹ *Zhakata supra* note 5.

³² R Pound, *Liberty of Contract*, 18 Yale L.J 654 (1909).

EFFECTIVE JUDICIAL PROTECTION AND THE RIGHTS OF WORKING PEOPLE UNDER COVID-19: A VIEW FROM COLLECTIVE LAW

MIGUEL ANGEL GARRIDO PALACIOS

Spain

The declaration of the state of alarm in Spain as a result of COVID-19 forced the approval of a series of urgent measures to try to deal with the pandemic. From the labour perspective, and although there may be objections to the moderation of certain measures, it cannot be denied that the spirit that accompanies the prolific legislation approved now is committed to a different solution than the measures taken after the financial crisis of 2008.¹ In this sense, the approach taken calls for a balancing of sacrifices between companies and workers.² The more complex the definition and protection of rights is in the field of administration and in the procedural and judicial fields, the more workers need to know about their rights.

This situation led to the general suspension of the judicial hearings, except for those considered urgent. Thus, from the suspension of the procedural deadlines set out in RD 463/2020,³ collective disputes and fundamental rights cases were exempted. However, activity in the social jurisdiction was largely reduced until the state of alarm was lifted, with the exception of urgent procedures on the protection of workers' safety and health, as well as disputes over temporary layoff plans ("ERTES" in Spanish).⁴

A negative example for effective judicial protection is

¹ Antonio Baylos, *¿La legislación aluvional de la crisis del COVID-19 la reforma laboral de la "nueva normalidad"?*, BAYLOS BLOG (Jul. 21 2020), <https://baylos.blogspot.com/search?updated-max=2020-07-23T11:51:00%2B02:00&max-results=3&start=12&by-date=false>.

³ RD 463/2020, pp. 25390-25400 (R.D. 463/2020) (por el que se declara el estado de alarma para la gestión de la situación de crisis sanitaria ocasionada por el COVID-19, B.O.E. número 67, de 14 de marzo de 2020) (España).

⁴ Temporary Regulation of Employment Plans. These are an internal flexibility mechanism that allows for the suspension of work contracts or the application of a reduction in working hours as a way of adjusting the workforce to the real activity of the company and thus avoiding the destruction of jobs. While they are in this situation, workers receive unemployment benefit. It should be added that there has also been litigation in areas such as the reconciliation of family and work life, as the space for pandemic care has increased, or dismissals. As these are individual matters, they are not the subject of this study.

what has happened in the Mediation, Arbitration and Conciliation Service ("SMAC" in Spanish) of the Community of Madrid (CAM)⁵ where there has been considerable inaction on the part of the Administration in the management of COVID-19. It should be remembered that the management of these services depends on the government of the Autonomous Communities. The shortcomings of the CAM's SMAC are the following aspects: the paralysis of conciliations, the inability of presenting conciliation requests in person, the insufficiency of virtual services and, currently, a significant volume of conciliations without a summons. This is an unavoidable pre-trial step in cases such as dismissals or sanctions. This generates legal uncertainty since, when the subsequent legal action is filed, the agency requires that said conciliation be held, or, in the absence thereof, it requires a certificate of the failure to hold said conciliation. This led the workers' lawyers' associations to formalise a protest and rally at the SMAC.⁶

"Given that the incorrect functioning of state administration can lead to the defencelessness of citizens, it is appropriate to study the actions of the trade unions in the courts to defend the rights of workers during the pandemic."

Given that the incorrect functioning of state administration can lead to the defencelessness of citizens, it is appropriate to study the actions of the trade unions in the courts to defend the rights of workers during the pandemic. The interpretation of part of the compendium of emergency regulations can be viewed from

⁵ This is an existing body in the regional governments, which, among other powers, has the responsibility of attempting to reconcile workers and companies as a preliminary step to the judicial phase.

⁶ Bernardo García, Enrique Lillo y Miguel Ángel Garrido, *Acudir a los tribunales es un derecho de la ciudadanía que en Madrid se obstaculiza conscientemente*, BAYLOS BLOG (Jul. 23 2020) <https://baylos.blogspot.com/2020/07/acudir-los-tribunales-es-un-derecho-de.html>.

the perspective of collective law. This analysis focuses on the two fundamental areas of conflict: workers' health and safety and the ERTES mechanism.

The impact of COVID-19 on the health and safety of workers from the perspective of collective law.

There is a considerable number of cases related to the safety and health of workers exposed to the pandemic. Trade unions articulated preventive measures, even *ex parte*, in line with the need to ensure rapid and effective legal protection.

Thus, jurisprudence shows an understanding as to the material impossibility of the Administration to provide PPEs (EPIS in Spanish)⁷ and the necessary resources for workers' protection⁸ in view of the shortage of masks, gowns and other items experienced in the country.⁹ However, there are a number of decisions based on the employer's lack of vigilance in assessing workplace risks, also in the face of the threat of COVID-19, and thus it cannot be considered as resolved with a mere generic assessment.¹⁰

The contentious-administrative jurisdiction has addressed PPE shortage regarding medical personnel.¹¹ The main issue focuses not only on the insufficiency of resources, but also on whether there was culpable legal inactivity by the Administration. This was rejected, though understanding medical staff's concerns, due to the lack of evidence to reach such a conclusion.¹²

The level of protection of workers in relation to EU Community Directive 2019/1833¹³ was debat-

⁷ Personal protective equipment. This refers to material means that protect workers such as gloves or helmets.

⁸ Sindicato ESK vs. Osakidetza-Servicio Vasco de Salud, Jul. 1, 2020, (T.S.J. del País Vasco Sala de lo Social, No. 837/2020) (España); Sindicato Unificado de Policía vs. Ministerio del Interior, Abr. 6, 2020 (A.N. Sala de lo Social, No. Auto 18/2020) (España); Unión Federal de Policía vs. Dirección General de Policía, Abr. 6 2020 (A.N. Sala de lo Social, No. Auto 19/202) (España); Sindicato Unificado de Policía vs. Ministerio del Interior, Abr. 6 2020 (A.N. Sala de lo Social, No. Auto 20/2020) (España).

⁹ Elena Sevillano, *Por qué España está sin mascarillas cuando lo peor de la crisis no ha llegado*, El País (Nov. 2020), <https://elpais.com/sociedad/2020-03-18/por-que-espana-esta-sin-mascarillas-cuando-lo-peor-de-la-crisis-no-ha-llegado.html>

¹⁰ Sindicato CCOO vs. Osakidetza-Servicio Vasco de Salud, Jul. 7, 2020 (T.S.J. del País Vasco Sala de lo Social, No. 866/2020) (España).

¹¹ Court order dealing with claims in relation to public administrations governed by administrative law.

¹² Confederación Estatal de Sindicatos Médicos vs. Ministerio de Sanidad, Mar. 31 2020 (T.S. Sala de lo Contencioso-Administrativo, sección cuarta, No. Auto de 31 de marzo de 2020) (España).

¹³ Conviene recordar la primacía del derecho comunitario respecto de la legislación interna española, en particular las directivas una vez se traspongan al ordenamiento interno y cuando se supere dichos plazos, con los matices establecidos en la jurisprudencia. Directiva 2019/1833. Directiva (UE) 2019/1833 de la Comisión de 24 de octubre de 2019, Diario Oficial de la Unión Europea, de 31 de octubre de 2019, L 279, pp. 54-79.

ed, with Member States having until 20 November 2021 to transpose it. The Madrid Supreme Court¹⁴ held that the deadline cannot be interpreted as authorisation for companies to put the health of workers at risk, making their action dependent on knowledge and technically possible preventive measures.

In short, there is an awareness of the precarious situation experienced by Spain during the hardest moments of the pandemic concerning immediate resources, but that does not prevent requiring employers to comply with the permanent protection of workers' health and safety.

The ERTES mechanism in collective law

The ERTES mechanism was present in our legislation, specifically in Articles 47 and 51 of the Labour Code (LC)¹⁵ with its procedures found in RD 1483/2012.¹⁶ The specific regulations related to COVID-19, have brought an exceptional regulation emphasising articles 22 and 23 of RDL 8/2020¹⁷ which have been interpreted by jurisprudence.

We must start from the general aspects to arrive at some specific points. The jurisprudence maintains the criteria on collective bargaining procedures in terms of internal and external flexibility, with the need to apply cases within the framework of COVID-19.

The value attributed to dialogue, collective bargaining and consequently to agreement in this type of procedure stands out. It is stressed, as already stated in the pre-COVID case law, that an agreement with the trade union majority presupposes the existence of grounds, which can only be challenged when there has been fraud, deceit, coercion or abuse of rights,¹⁸ and which must be proven by the plaintiff.¹⁹

Another controversy that has arisen is the relationship between union representation and

¹⁴ Sindicato CSIF vs. Consejería de Sanidad de la Comunidad de Madrid, Abr. 1, 2020, (T.S.J. de Madrid Sala de lo Social, Sección Segunda, No. Auto de 1 de abril de 2020) (España).

¹⁵ Estatuto de los Trabajadores, pp. 100224-100308 (R.D. 2/2015) (España) (por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores, B.O.E., número 255, de 24 de octubre).

¹⁶ RD 1483/2012, pp. 76292-76322 (R.D. 1483/2012) (por el que se aprueba el Reglamento de los procedimientos de despido colectivo y de suspensión de contratos y reducción de jornada, B.O.E., número 261, de 30 de octubre de 2020) (España).

¹⁷ RDL 8/2020, pp.25853-25898 (R.D.L. 8/2020) (de medidas urgentes extraordinarias para hacer frente al impacto económico y social del COVID-19, B.O.E., número 73, de 18 de marzo de 2020) (España).

¹⁸ Article 47 of the LC establishes the presumption of grounds when there is an agreement between the majority of the social bank and the company for the suspension of the labour contracts, unless the illegalities described are present.

¹⁹ Sindicato TUSI y Sindicato CGT vs. Emergia Contact Center SL, Jul. 20, 2020 (A.N. Sala de lo Social, No. 52/2020) (España).



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worker representation in bargaining.²⁰ The primacy of the trade union option is maintained, declaring a company's manoeuvres unlawful at a final meeting if they contacted individual representatives to vote for an agreement that would not have been reached if the unions had voted as they did. Good faith in negotiations and freedom of association are declared to have been violated as this is an illegitimate intrusion and a fraudulent act to reach an agreement.²¹

The possibility of implementing an ERTE in the public sector has also arisen during the pandemic.²² Such is the case heard by the Social Court of Vitoria,²³ where a public urban transport company applied an ERTE due to force majeure. The company has more than 50% of public capital and is not financed mainly with income from the marketplace. The court held that the ERTE could not have been carried out at a public sector company with the aforementioned characteristics, and it was thus declared to be unjustified.²⁴ However, at the time of writing this article, the Basque Court of Justice²⁵ revoked said judgment, opting for strict public administration criteria by considering that said public company is not a part of the public administration, and therefore revokes the trial court judgment and declares the decision to apply the ERTE as justified.

In view of the avalanche of ERTES, mostly of force majeure that must be verified by the labour authority in accordance with article 51.7 Labour Code,²⁶ a situation occurs in which a number of applications do not obtain an express administrative resolution or it comes too late. The interpretation of the courts has come to endorse that, upon the lack of an express administrative resolution, once the term for a decision has been exceeded, silence produces a positive effect²⁷ enabling the company to apply the requested measures.

Regarding the documentation to be provided during

bargaining,²⁸ there is a reaffirmation of the criteria which stated that not all absences would give rise to the nullity of an ERTE and, therefore, a conclusive interpretation is recommended.²⁹ The manner in which the lack of documents has prevented the party from forming a view of the condition of the company in relation to the alleged grounds must be reasoned.

With regard to the parallel bargaining of measures that alter the working day established by the applicable collective bargaining agreement, the case law has ruled on compliance of these measures involving a substantial modification of working conditions in the context of COVID-19 and the execution of the agreement with the majority trade union.³⁰

Even though this is an unprecedented moment that requires flexibility within labour relations for the management of the pandemic, this cannot lead to ignoring the established procedure for negotiating the collective adjustment measure. As a result, a company that does not provide the established documentation, does not respect the deadlines, does not comply with the impact criteria and exceeds the 15-day period to notify those affected by the ERTE sees the measure declared null and void.³¹

"In short, there is an awareness of the precarious situation experienced by Spain during the hardest moments of the pandemic concerning immediate resources, but that does not prevent requiring employers to comply with the permanent protection of workers' health and safety."

Contractor ERTES have been the subject of debate with COVID-19 when the contracting company paralyzes activities in its facilities. In *Limpiezas Plata v. Consejería de Empleo*,³² the contracting company appealed against the administrative resolution that denied the ERTE due to force majeure. The Administration³³ understood that an ERTE for economic, technical, organisational and productive grounds should have been filed.³⁴ The judge disagreed with the administrative resolution since she considered that the ERTE is subsumed in the cause related to the suspension or cancellation of activities, representing an objective impossibility to render any services and, therefore, revoked the Administration's resolution.

Finally, there have been cases in which companies have

²⁰ Spanish legislation establishes the primacy of negotiation by the local union present in the company when these agree.

²¹ *Sindicato UGT vs. Cotronic*, Jul. 3, 2020 (A.N. Sala de lo Social, No. 44/2020) (España).

²² This concept basically includes the Spanish Public Administration, Public Bodies and Public Organisations attached to it, as well as public companies. It is not possible here to make a distinction with the concept of Public Administration in Spanish law; for the purposes of this article, public companies would be excluded since, although they may have a general interest, they operate predominantly within the framework of private law.

²³ *Comité de Empresa vs. Transportes Urbanos de Vitoria*, Mayo 20, 2020 (Juz. Soc., No. 63/2020) (España).

²⁴ The Labour Code establishes in its D.A. 17 that Public Agencies, Public Law Entities linked to or dependent on them and other public bodies cannot carry out an ERTE, except for those that are financed mainly by market operations.

²⁵ *Comité de Empresa vs. Transportes Urbanos de Vitoria*, Oct. 16, 2020 (T.S.J. del País Vasco Sala de lo Social, No. 1315/2020) (España).

²⁶ The Labour Code requires that the Labour Authority authorises the suspension of employment contracts. The concept of force majeure by COVID-19 relates to a loss of direct activity resulting from the pandemic such as the suspension of activity, closure of premises, lack of supplies, urgent measures related to the spread of infection among workers, etc.

²⁷ *Sindicato CCOO vs. Ana Naya García*, Jun. 15, 2020 (A.N. Sala de lo Social, No. 38/2020) (España).

²⁸ Although Spanish legislation establishes minimum documentation that must be provided in this type of process depending on the case, the additional documentation requested by the parties is a case-by-case issue interpreted by case law.

²⁹ *Sindicato CSIF vs. Securitas*, Julio 30, 2020 (A.N. Sala de lo Social, No. 62/2020) (España).

³⁰ *Sindicato AST vs. Securitas*, Jul. 29 2020 (A.N. Sala de lo Social, No. 61/2020) (España).

³¹ *Sindicatos CCOO, ELA vs. Rhenus Logistics*, Jul. 20, 2020 (A.N. Sala de lo Social, No. 53/2020) (España).

³² *Limpiezas Plata vs. Consejería de Empleo*, Abr. 2, 2020 (Juz. Soc., No. 165/2020) (España).

³³ Ministry of Industry, Employment and Economic Promotion of the Principality of Asturias

³⁴ Causas económicas, técnicas, organizativas y productivas.

sought to amortise their employment contracts, which in many cases is contrary to the spirit of the transitional labour regulations for COVID-19. Thus, the 13th Commercial Court of Madrid,³⁵ faced with the request for an urgent creditors' meeting, understood that it didn't belong, requiring it to be redirected to the ERTES mechanism. Although it is still too early to know the scope of Article 2 of RDL 9/2020³⁶ regarding non-justification of COVID-19 grounds for terminating work contracts, it represents an interesting precedent.

Conclusions

The rescheduling of oral hearings and proceedings with the pertinent restrictions in order to comply with COVID-19 protocols has caused a significant backlog due to the amount of proceedings prior to the pandemic in addition to those filed in this entire period. The challenge is that the acceleration of procedures, in the face of the avalanche of pending cases, does not mean a reduction in the guarantees of workers in the exercise of their right to effective judicial protection.

For the moment, the case law studied follows the same line as that already established, extolling the value of collective bargaining in employment contract suspension or working hour reduction procedures. This does not detract from the fact that, at the same time, the courts must be highly vigilant with respect to compliance with the "minimum" procedure regarding deadlines and submission of documents.

Case law will play a crucial role in interpreting exceptional rules which, by definition, leave room for uncertainty and open interpretative concepts. The ERTES or the layoffs due to COVID-19 despite the ban decreed by the government in the latter case, which is expected to generate unifying criteria for purposes of legal certainty. Pending the new Labour Code or the repeal of the most damaging aspects of the 2012 labour reform, it is crucial to continue advancing in the knowledge and application of international labour law in order to guarantee international standards of protection for workers and to establish a new regulatory framework that is more balanced than the most damaging elements of the 2012 labour reform.

³⁵ Asunto Comida de Cazuela, Abr. 29 2020, (Juz. Merc., No. Auto de 29 de abril de 2020) (España).

³⁶ The debate in the doctrine revolves around the consequences of the rule. The majority understands that the consequence would be that the dismissal would not be appropriate because of the non-justification of the grounds. A minority holds that the rule protects the prohibition so that the consequence of a dismissal for these reasons would be the nullity of the dismissal.

THE RIGHT TO FAIR AND SATISFACTORY WORKING CONDITIONS: RISK PREVENTION AND ACCESS TO JUSTICE

**MARÍA PAULA LOZANO
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Argentina

With the arrival of the COVID-19 pandemic, a national debate commenced concerning its tragic consequences on the world of work in Argentina. One issue of particular relevance has been the enforcement of the right to fair and satisfactory working conditions within the framework of the principle of compensation. The right not to suffer harm as a result of the labour relationship also has as a correlate the prevention of risk and the right of access to justice in pursuit of fair remedies in the case of harm.

In Argentina, this issue has been debated since the enactment of the Occupational Hazards Act¹ (LRT) in 1995. The Supreme Court of Justice has rendered numerous pronouncements on several aspects of the LRT over the years, including its labyrinthine compulsory administrative procedure. This procedure has a jurisdictional function (in that it determines the admissibility of a case and determines the potential disability), and as such is a prerequisite to any access to courts.

Recently the Inter-American Court of Human Rights (IACtHR) issued a ruling that held the Argentine state responsible for the violation of the rights to judicial guarantees, judicial protection and the right to equitable and satisfactory working conditions that ensure the health of working persons, in relation to access to justice.² However, the current occupational risks system in Argentina focuses on remediating occupational harms but avoids regulating adequately the most important aspect: the prevention of occupational accidents and diseases.

In this article, we will not only address these topics but will also highlight the importance of trade union action in the prevention of occupational risks and in the effective enforcement of the right not to suffer harm to psychophysical integrity within the framework of the labour relationship.

The “Spoltore” judgment from the Inter-American Court of Human Rights

For the first time in its history, the IACtHR addressed the issue of harms to the health of a worker. The Court found that the right to just and favourable working conditions, that ensures the health of the worker, is a right protected by Article 26 of the American Convention on Human Rights. In particular, it noted that an integral part of the right to just and favourable conditions of work is “the prevention of occupational accidents and diseases” as a means of ensuring the workers’ health.³ It added that it refers to the right to carry out their work in conditions that prevent occupational accidents and diseases.⁴

“The Court found that the right to just and favourable working conditions, that ensures the health of the worker, is a right protected by Article 26 of the American Convention on Human Rights. In particular, it noted that an integral part of the right to just and favourable conditions of work is “the prevention of occupational accidents and diseases” as a means of ensuring the workers’ health. It added that this right refers to the right to carry out their work in conditions that prevent occupational accidents and diseases.”

What is relevant to the right of access to justice, however, is that the Court ruled that States must ensure that workers affected by a preventable occupational accident or disease have access to adequate grievance mechanisms, such as the courts, to seek redress or compensation.⁵

In the case, Victorio Spoltore, after suffering two heart attacks, filed a proceeding against the company where he worked in order to have his health condition rec-

¹ Ley No. 24.557, Octubre 3 de 1995 (Arg.).

² Spoltore vs. Argentina, Excepción Preliminar, Fondo, Reparaciones y Costas, Corte Inter-Am. D. H. (ser. C) No. 404 (9 de junio de 2020), https://www.corteidh.or.cr/docs/casos/articulos/seriec_404_esp.pdf.

³ *Id.* at ¶94.

⁴ *Id.* at ¶99.

⁵ *Id.*



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ognised as an occupational disease and to be awarded compensation. This proceeding lasted more than twelve years and the state recognised that this excessive delay resulted in a violation of the guarantee of reasonable time and the right to judicial protection.⁶ The Court reiterated that access to justice is one of the components of the right to working conditions that ensure the health of the worker.⁷ Consequently, taking into consideration the recognition of the State's responsibility due to the excessive delay of the proceedings and given that Mr. Spoltore was not guaranteed access to justice in pursuit of compensation for a possible occupational disease, the Court concluded that the State was responsible for the violation of Article 26 of the Convention, in relation to Articles 8, 25, and 1(1) of the same instrument.

Consequences arising from the "Spoltore" judgement

Although the IACtHR did not refer to the occupational risk system currently in force in Argentina, the ruling applies since the State was being examined for the violation of the right to access to justice. In fact, the Supreme Court of Justice has ruled on several occasions that this system is unconstitutional and inappropriate as it relates to obstacles to access to justice.

The current system was established by local regulations in 1995 and was set up to allow for the outsourcing and socialisation of business costs, with resources going from salaried workers to the financial sector. It put insurance companies, which are private entities with a profit motive, in charge as managers of this system. These companies are charged with the management of the health and life of the workers: prevention, monitoring of compliance with occupational health and safety measures, medical assistance, rehabilitation, re-qualification and reparation. Their main business however is investing and managing the significant funds generated by the employer's insurance payments into the financial markets. As such, their interests are objectively opposed to the interests of the victims.

Originally, Articles 21, 22 and 46 of LRT 24.557 and its regulations, created a Kafkaesque compulsory administrative procedure, which removed occupational accidents and diseases from the jurisdiction of the courts, and put them through the compulsory procedures of the Jurisdictional Medical Commissions and the Central Medical Commission. This system granted exclusive jurisdiction to these administrative bodies in all matters relating to the determination of the occupational nature of an accident or illness, to the determination of the nature and degree of the disability, to the determination of the benefits and to the resolution of discrepancies between the injured

parties and/or rightful claimants and the occupational risk insurance companies.⁸ These are administrative bodies, whose members are medical professionals and who lack the legal training necessary for the resolution of legal disputes. As such, principles of labour law - which provide special protection for the working person - are not applied. Further, the system does not comply with the guarantee of access to a court specialised in social law.

With the reform carried out by Law 27.348,⁹ the obligatory and exclusive nature of the administrative procedure before the Jurisdictional Medical Commissions was reaffirmed. However, there were two modifications intended to give greater legality to the system and to circumvent the jurisprudence of the Supreme Court. These are that the provinces were invited to join¹⁰ and appeals to the ordinary labour justice system were allowed.¹¹

Does the system of occupational risks resulting from the modifications instituted by Law 27,348 comply with constitutional and conventional standards?

The answer is no, the unconstitutionality persists. The objective of reducing the litigiousness that coloured the reform was to design a façade that left its foundations intact, corroding the structural pillars of fundamental rights embodied in the National Constitution and in international human rights instruments with a supra-legal and constitutional character. In effect, the violation of articles 5, 14 bis, 16, 17, 18, 19, 28, 109, 121, 75, inc. 12 and 22 of the Argentine National Constitution, articles 8 and 25 of the American Convention on Human Rights, and article 6 of the International Covenant on Economic, Social and Cultural Rights, among others, continues.

The local standard maintains the validity of the Professional Disease Listing system, according to which only those included in it are recognised as such.¹² As a result of the application of such a "closed list", out of the total of 100% of claims recognized in Argentina, only 3% correspond to occupational diseases, when the International Labour Organization recognises that out of a total of claims, 33.54% are occupational diseases. This so-called "under-registration" seriously affects

⁸ María Paula Lozano, *Reforma de la LRT: Veinte años no es nada. Volver a las inconstitucionales comisiones médicas*, 1 REVISTA LABORAL DE ACTUALIDAD 464, 42 (2017).

⁹ La Ley No. 27.348, 23 de febrero de 2017 (Arg.).

¹⁰ *Id.* at art. 4.

¹¹ *Id.* at art. 2.

¹² Art. 2, Act 27348 ratifies that, in any event and for all legal purposes, the provisions of art. 9 of Act 26773 shall apply. That is, the competent administrative bodies and courts must adapt their reports, opinions and decisions to the List of Occupational Diseases [Listado de Enfermedades Profesionales] provided for in Annex I, Decree 658/96 and to the Table for the Assessment of Disabilities [Tabla de Evaluación de Incapacidades] provided for in Annex I, Decree 659/96 and its amendments, or any future modifications. The so-called opening referred to in Decree 1278/2000 has been found to be absolutely insufficient.

⁶ *Id.* at ¶102.

⁷ *Id.*

workers' rights, especially those of women, who suffer from many unrecognised conditions. This is the main reason why it is necessary to take legal action to access to compensation. In proportion to the number of ailments that remain uncovered, few claims are initiated.

Since the reform operationalised by Law 26.773¹³ - and without prejudice to the unquestionable unconstitutionality and inapplicability in many cases of the so-called "exclusionary option"¹⁴ - there has been a demonstrated substantial decrease in civil claims against employers. This results in the discouragement of prevention, protection of health and safety of workers.

This is even more so given that in our regulatory system, there is no criminal labour law that favors the protection of health and safety as a legal good.

Prevention: The participation of workers

The very serious global, regional and national crisis caused by the pandemic highlighted the irreplaceable role of public health systems and the need to protect individuals and society over the interest of the market, in compliance with the constitutional mandate of Article 14 bis CN and mandatory social insurance, which includes the subsystem of occupational hazards. Workers exempted from Obligatory Preventive Social Isolation (ASPO) still in force in Argentina are exposed to risks in the face of the health emergency.

Law 19.587 states that every employer must adopt and implement adequate health and safety measures to protect the life and integrity of workers (Article 8). LRT 24.557 establishes that it is the objective of the law to reduce the work accident rate through the prevention of risks derived from work (Article 1, sub-paragraph 2.a). Likewise, it obliges employers and the ARTs to adopt the legally provided measures to effectively prevent occupational risks (Article 4).

In addition to these basic rules, among others, which enshrine the duty of prevention and the obligation of security in the work contract, are multiple obligatory protocols to avoid the contagion of the COVID-19 according to zones and activities. The recognition of COVID-19 as a presumptive "unlisted" occupational disease¹⁵ has proven to be insufficient. The regulations are restrictive, as they introduce obstacles for workers who contract the coronavirus to obtain benefits and comprehensive care.

What are the tools that workers have in the face of employer non-compliance and conflicts over working conditions?

In the face of the pandemic, the principle of compensation, which is part of the social right, is being redefined. On the one hand, at the contractual level, there is the right to *withhold work*.¹⁶ On the other hand, there is a primary and non-delegable role of the enforcement authority - Ministry of Labour, local delegations, etc. - at its different levels, to monitor, inspect and sanction, if necessary, the lack of compliance with health and safety regulations.

But fundamentally, collective action proves to be the most suitable tool for prevention. According to local regulations, trade union action will contribute to remove the obstacles that make difficult the worker's full realisation.¹⁷

In view of the restrictions of movement and the difficulties of exercising trade union action in the context of isolation, the role of the Joint Committee on Health and Safety at Work in the establishment becomes fundamental. The action of the Joint Committees, through the representatives of the workers in the workplaces, means the possibility of participating, giving an opinion and demanding the adoption of all appropriate measures in order to avoid contagion and preserve the psychophysical integrity of the workers.

"On the one hand, at the contractual level, there is the right to withhold work. On the other hand, there is a primary and non-delegable role of the enforcement authority - Ministry of Labour, local delegations, etc. - at its different levels, to monitor, inspect and sanction, if necessary, the lack of compliance with health and safety regulations."

The Joint Committees are made up of the employer and union sides, in equal numbers. Their objective is to prevent accidents and occupational diseases.¹⁸ It is the workers, who are in direct contact with the productive process and know better than anyone else what risks they are exposed to, who will be able to exercise collective self-care to preserve their health and life.

Only two Argentine provinces have legislation requiring the establishment of Joint Committees in each establishment.¹⁹ However, there is no similar legislation at the national level, except for some collective bargaining agreements that enshrine this tool (mining, cable television, oil companies, among others). At a time of a serious health crisis and emergency, with drastic eco-

¹³ La Ley No. 26.773, 26 de Octubre de 2012 (Arg.).

¹⁴ María Paula Lozano, *El Rol de los Comité Mixtos frente a la pandemia*, REVISTA DE DERECHO LABORAL, 49-54, (2020).

¹⁵ Decreto de Necesidad y Urgencia N° 367/2020, del 14 de abril de 2020, reglamentado por la Resolución de la Superintendencia de Riesgos del Trabajo N° 38/2020 (Arg.).

¹⁶ La Ley No. 20.744, la Ley de Contrato de Trabajo, Art. 75, 13 de marzo de 1976 (Arg.); Código Civil y Comercial de la Nación [Cod. Civ.] [COMMECCIAL CIVIL CODE] art. 1030 -1031 (Arg.).

¹⁷ La Ley No. 23.551, Ley de Asociaciones Sindicales, Art. 3, 23 de marzo de 1988 (Arg.) (he/she affirms that "workers' interest encompasses everything related to their living and working conditions.")

¹⁸ Luciana Censi y María Paula Lozano, *La ley 14.408 y los comité mixtos en la Provincia de Buenos Aires*, EL ROBLE INFORMACIÓN DESDE LAS BASES (marzo 2016), <https://periodicoelroble.wordpress.com/2016/06/29/la-ley-14-408-y-los-comites-mixtos-en-la-provincia-de-buenos-aires/>

¹⁹ In Santa Fe Province Act 12913 has been in force since 2008; in Buenos Aires Province, Act 14408 has been in force since 2012.

conomic and social consequences, there is a risk of a return to the “unilateralism” of the employers, an aspiration that is always present in the business sector. Therefore, trade union action and the reaffirmation of the collective dimension is of vital importance.

Conclusion

Access to justice to seek reparation for the psycho-physical damage caused by work was strengthened by the Court’s ruling in the “Spoltore” case, and this is undoubtedly of vital importance. The inter-American human rights system is gradually becoming more receptive to addressing cases of violations of economic, social and cultural rights, including labour rights.

The delay in accessing the courts caused by previous mandatory administrative instances were aggravated by the excessive length of the judicial processes, and this easily turns into a denial of justice. In fact, in many cases the need of many workers compels them to accept conciliatory agreements that would in no way be acceptable if they had a decent livelihood or the prospect of a judgement within a reasonable period of time. The depreciation of the value of the currency, moreover, is not always accompanied by a mechanism to at least guarantee that the compensation received at the end of the process has not been devalued.

Consequently, the establishment of Joint Committees in all establishments that guarantee an adequate prevention of occupational accidents and illnesses constitutes the best tool for the effective enforcement of the principle of compensation. Therefore, the greater participation of workers, based on the care and avoidance of harm to occupational health, is beneficial to all parties, since it is the most effective way to reduce occupational risks - especially in times of pandemic.

AUSTRALIA'S UNIQUE AWARD SYSTEM HAS BEEN TESTED BY THE COVID-19 PANDEMIC:

IT HAS BEEN SHOWN TO BE READILY ADAPTABLE TO PROTECT EMPLOYER INTERESTS BUT LESS EFFECTIVE AT PROACTIVELY PROTECTING EMPLOYEES

TREVOR CLARKE

Australia

Australia's unique award system has been tested by the COVID-19 pandemic. It has been shown to be readily adaptable to protect employer interests but less effective at proactively protecting employees.

Australia's system of labour regulation has multiple levels and, as a Federation, some complexities. As a common law country, the basic framework of employment contracts is subservient to State and Federal statutes. Regulation of discrimination, health and safety, workers compensation and the public service are the main functions of State labour law. Federal regulation provides the framework for collective bargaining and enforcement, overlapping protections concerning discrimination, as well as for the registration and accountability of employer and employee associations. Thus far then, thoroughly unremarkable. What is unusual about Australia is its Award system.

The Award system was built at time when the moniker "Award" made some sense: in the earliest iterations of the system an "Award" was an arbitrator's determination of a dispute between employer representatives and worker representatives about pay and conditions and ancillary matters. The parties to that dispute determined the scope of their dispute, the areas they could agree on and the areas where arbitration was necessary. The arbitrator was a Tribunal constituted by quasi-judicial members appointed by the Parliament. Awards were made based on communities of interest in an industry or occupation. The constitutional requirement that disputes that had an interstate character was easily satisfied.

From the last two decades of the last century, the industrial relations framework, including the Award system, were substantially revised in multiple stages. This was associated with a change in emphasis from centralised determination to enterprise bargaining and coincided with the rising orthodoxy of neoliberalism in the United States and the United Kingdom. A change in government to the right in the 1990's accelerated the pace of change although many would argue not the overall direction of it. Under the revised model,

the Award system continued to operate, albeit with a reduced ambit of what types of terms and conditions were "allowable" in Awards and a set of principles (both legislative and emerging from the jurisprudence of the tribunal) that Awards should do no more than provide a "safety net" – the bare necessities. If workers and their unions wished for more than the bare necessities, then the bargaining system was to be their route.

Plenty has been written elsewhere about whether Australia's bargaining system and its associated right to strike has delivered on its promise of a fair distribution of productivity gains or properly gives effect to the international obligations which underpinned its design.¹ The bigger issue for the present purposes is that before Award system was allowed to wither on the vine by the aggressive "WorkChoices" amendments of 2006, it managed to navigate the many challenges of the 20th century and deliver not only basic regulation of wages and conditions for employees but also play a key role in broader reform, including skills based pay structures linked to a nationally consistent qualifications framework, regulation of garment workers in non-employ-

¹ See International Labour Organization (ILO), *Direct Request of Committee of Experts on the Application of Conventions and Recommendations (CEACR) Right to Organise and Collective Bargaining Convention, 1949 (No. 98) - Australia (Ratification: 1973)*, adopted 2009, published 99th ILC session (2010), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2317733,102544,Australia,2009; ILO, *Observation (CEACR) Right to Organise and Collective Bargaining Convention, 1949 (No. 98) - Australia (Ratification: 1973)*, adopted 2009, published 99th ILC session (2010), http://ilo.ch/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:2317726; ILO Committee on Freedom of Association, *Report in which the committee requests to be kept informed of development in Case No 2698*, Report No. 357, at 229, (June 2010) https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2911836; ILO, *Observation (CEACR) Right to Organise and Collective Bargaining Convention, 1949 (No. 98) - Australia*, adopted 2011, published 101st ILC session (2012) http://ilo.ch/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2698917; ILO, *Observation (CEACR) - Right to Organise and Collective Bargaining Convention, 1949 (No. 98) - Australia*, adopted 2013, published 103rd ILC session (2014) http://ilo.ch/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3148210; ILO, *Observation (CEACR) Right to Organise and Collective Bargaining Convention, 1949 (No. 98) - Australia*, adopted 2016, published 106th ILC session (2017), http://ilo.ch/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3299915.

ment relationships, meaningful work and a wage and welfare supplement for workers with intellectual disabilities, compulsory superannuation, and, facially at least, equal pay for women.

The Award system as we see it today is product of a short-lived change of government to the left between 2007 – 2013 which promised to “abolish WorkChoices” and start again. The statutory framework which governs the Award system is no longer about resolving real life practical disputes between workers representatives and employer representatives. Although the Award system still operates on the basis of industry or occupational groupings, its *raison d’être* is to make rules that ensure that “modern awards...provide a fair and relevant safety net.”² The tribunal (now called the “Fair Work Commission”) has accepted that its role in maintaining the Award system has transformed from resolving disputes between ascertainable parties principal to exercising a regulatory function which refines regulatory instruments³, albeit it accepts that the exercise of that role still carries with it the need to accord procedural fairness.⁴

The above is the context in which to examine how Australia’s system of “modern awards” adapted to the challenges posed by COVID-19.

Firstly, wages. The Fair Work Commission conducted its annual review of the minimum wage and wages in modern awards over an extended period, to give maximum time to take into consideration evolving information about the impacts of COVID-19 on the economy, living standards and the labour market. At the time the Annual Wage Review decision⁵ was being written, Australia at a national level was emerging from the first wave of infection having moved from a high of 300+ new cases daily in mid-March to early April to less than 40 per day consistently from late April. Business trading restrictions, social distancing and restrictions on movement were being progressively eased and government support measures to workers and employers were being rolled out. Nonetheless, the central bank (Reserve Bank of Australia), the Treasury and employer groups were predicting a period of ongoing uncertainty on the back of what had already been experienced in labour market and business conditions and difficulty in forecasting the global position including that of major trading partners. Whilst it was recognised that the economic recovery was clearly linked to the control of COVID-19 and the lifting of restric-

tions, it was nonetheless the case a second wave could not be ruled out, that effects as between industries had been uneven and that even the shorter term financial effects on business and households could have longer term effects on their economic behaviour.

Against this, the ACTU sought to refute demands by employers for wages to remain at present levels by highlighting the need to use wages to speed the economic recovery by contributing to consumption, particularly consumer spending on low cost/high turnover goods and services in the industries that had been most effected by the restrictions that were then being moderated. In the result, the Fair Work Commission opted for a small increase of 1.75% to minimum wages and wages in modern awards, rolled in out tranches: the industries least effected by the pandemic received their increase at the usual time of 1 July, whereas the intermediately effected industries received a delay of 4 months and the most effected industries received a delay of 7 months. The Commission was not persuaded by submissions that too low an increase would not amount to “acting cautiously”, in circumstances where the previous increases at the 3-3.5% level had merely stabilised the decline in the minimum wage bite (Australia is one of only 6 countries in the OECD which can be shown to have suffered a decline in the minimum wage bite in the last two decades⁶) and there was growing evidence of financial stress among low paid workers, including food insecurity and homelessness.⁷ The ultimate outcome then is one where downside risks to the economy associated with the pandemic translated to wage restraint. The likelihood of any recovery in next year’s decision is similarly likely to be heavily determined by “uncertainty,” with the Commission having already ruled that the legislation does not permit it to adopt a target range for where, in the medium term, minimum wages should be headed.⁸

“The ultimate outcome then is one where downside risks to the economy associated with the pandemic translated to wage restraint.”

In late March, before the Annual Wage Review concluded, employer groups began approaching unions and the ACTU in an effort to agree on temporary variations to Awards to accommodate their needs as a consequence of trading and social distancing restrictions imposed by State governments. That the employer associations approached the issue on the basis of seeking



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² Fair Work Act 2009, s. 34 (Austl.).

³ [2017] FWCFB 3001 at 271, Fair Work Commission (Austl.); [2015] FWCFB 3406 at 156, Fair Work Commission (Austl.); [2015] FWCFB 4466 at 253, Fair Work Commission (Austl.).

⁴ [2016] FWCFB 3500 at 15, Fair Work Commission (Austl.).

⁵ [2020] FWCFB 3500, Fair Work Commission (Austl.).

⁶ Australian Council of Trade Unions (ACTU), *Initial Submission to the 2019-2020 Annual Wage Review*, ACTU D. 17/2020 at Figure 87 (March 2020).

⁷ *Id.* at Chapter 4.4.3.

⁸ [2017] FWCFB 1931, Fair Work Commission (Austl.).

consensus before acting is a credit to the individuals involved. Nonetheless, the process was essentially one of concessional bargaining: Employer groups sought to reduce hours of work and other costs due to their operations being compulsorily restricted by regulation, unions sought limits and procedural safeguards on the exercise of the new employer rights.

The initial batch of proposed temporary variations affected clerical and hospitality industries and were supported by government in addition to the industrial representatives and approved by the Commission swiftly.⁹ The essential purpose of the variations was to ensure the viability of business in circumstances where it was so obvious that a risk existed to some of them (for example restaurants that were prohibited by law from seating customers) that it was pointless to insist on proof either of the risk of actual loss. The variations provided temporary rights to employers to reduce working hours, to reduce skill/job demarcations and to allow businesses to require workers to take accrued leave or allow them to take it for extended periods at half pay. Only one component of one of the temporary variations had any element of collectivist expression to it: clerical workers were to be given the right to vote on the reduction of their hours of work, with a 75% majority required, as well as information sheet from the relevant union prior to casting their vote. The remainder of the changes operated on the basis of providing rights for employers to either individually negotiate with these workers as to how far below the “bare minimum” they might go in particular areas, or simply provided a right to give directions about such matters.

The Commission saw some wider value in the use of annual leave at half pay as a support measure during the pandemic and proposed in early April to vary all awards to provide for this to be permissible, where agreed individually between employees and their employer. However, the Commission’s proposal also included a right for unpaid leave to be provided to workers in the event they were required by health authorities to quarantine or self-isolate due to COVID-19 conditions. Such a right was necessary, in the Commission’s view, because it avoided the employee being “placed in the invidious position of either contravening public health directions or guidelines, or placing their employment in jeopardy”.¹⁰ With the exception of a handful of Awards, these two temporary variations were rolled out across the Award system with an initial expiry date of 30 June 2020.

The early days of April were also significant in that they saw the introduction of a wage subsidy policy (the “JobKeeper” scheme), as part of the federal government response to the COVID-19 pandemic. The subsidy provided for \$1500AUD per fortnight to be contributed by government to the wages of employees of employers who had experienced or projected a decline

in turnover of between 30-50%. However, changes to the law which accompanied JobKeeper¹¹ enabled employers in receipt of the payment to reduce the hours of work of their workers, expand their duties and locations at which they could be performed as well as reach individual agreements about the use of accrued leave and hours of work. Such arrangements could be entered into irrespective of any contrary prescriptions in Awards or Enterprise Agreements and without the need to vary them: it was an entirely separate and superior scheme of regulation. There were requirements on employers not to give directions which were unreasonable in the circumstances, as well as requirements on workers to not unreasonably refuse to agree to employer requests and the Commission was given a dispute resolution function. Contrary to the general direction of labour law in Australia in recent decades, the Commission was specifically empowered to determine such disputes by arbitration. Such disputes were bound to and generally did focus on individual grievances, save where the context was employers issuing identical directions to all members of a workforce or section of it in reliance on the new rights.¹²

After those laws were operative, something interesting happened. The Commission started to take a different view about what the necessary ingredients of a “fair and relevant safety net” were, when faced with applications to vary Awards in response to COVID-19 or extend the term of existing variations. In the case of the variations to the Awards regulating the fast food industry and the sale and repair of vehicles, the COVID-19 variations (which like those that had gone before them, delivered the capacity to cut working hours among other things) were expressed to not apply to employers who were already receiving the JobKeeper payment: those employers had a means to reduce working hours and evidently didn’t need it.¹³ The Commission also required some evidence of business distress in the relevant sectors in support of the proposition that the variations were needed at all. In addition, the exercise of the new employer rights in those varied Awards became subject to a dispute resolution procedure which included arbitration as of right. The presence of that safeguard was “given significant weight” by the Commission in its consideration of whether the temporary variation sought “..would ensure that the Award provides a fair and relevant safety net of terms and conditions”, as it agreed that workers facing a reduction in hours under the Award provisions should not be materially disadvantaged compared to those whose hours may be reduced under the legislative provisions which formed part of the JobKeeper framework.¹⁴

The renewed interest in the merits of arbitration was welcome. Arbitration of disputes was a right that was

⁹ [2020] FWCFB 1960, Fair Work Commission (Austl.); [2020] FWCFB 1741, Fair Work Commission (Austl.); [2020] FWCFB 1574, Fair Work Commission (Austl.).

¹⁰ [2020] FWCFB 1837 at 68, Fair Work Commission, (Austl.).

¹¹ *Coronavirus Economic Response Package Omnibus* (Measures No. 2) Act 2020 (Austl.).

¹² See e.g. *Transport Workers Union of Australia v. Prosegur Australia Pty Ltd* [2020] FWCFB 3655, Fair Work Commission (Austl.).

¹³ [2020] FWCFB 2316, Fair Work Commission, (Austl.); [2020] FWCFB 2367, Fair Work Commission (Austl.).

¹⁴ [2020] FWCFB 2367 at 93, Fair Work Commission, (Austl.).

hard wired into the earliest iterations of the Award system and, whilst arbitration clauses were allowable in modern awards generally, the Commission had decided that compulsory arbitration of workplace disputes (as opposed to arbitration only where both parties agreed) was not necessary when it drafted those modern awards more than a decade earlier.¹⁵ That the turning point for the Commission came about through a comparison to a baseline set by emergency legislation which delivered extraordinary rights to employers and was introduced by the most right wing government the country has seen, is bewildering to say the least.

In the midst of the Commission's moves to introduce unpaid leave for workers who were required to self-isolate or quarantine in connection with COVID-19, the ACTU and its affiliated unions in health and ancillary sectors were preparing a claim for paid leave. The argument in favour was essentially that (a) those workers were more likely than others to come into contact with persons who had COVID-19, both because of the nature of their work and because their work was one of the few areas of activity which at the time was permitted to continue in a largely unrestricted way; (b) those workers were more likely than others to interact with persons who were at high risk of the virus or serious complications from it; (c) those workers were more likely to contract and spread the virus and (d) those workers were more likely to be subject to requirements to self-isolate or quarantine or do so on more than on occasion. In such circumstances, there were risks associated with employees continuing to work or seeking secondary employment in order to maintain their incomes when they ought to have been away from the workplace: a paid leave entitlement would therefore reduce the risk of workers infecting other workers, or infecting their patients or clients. The logical merit of that argument and the expert evidence in support of it were accepted by the Commission (albeit not in relation to every health and allied sector where the entitlement was sought), but that wasn't enough for the claim to succeed.¹⁶ The Commission explained its decision thus: "The overriding factor we have taken into account is that, in the current circumstances, the degree of success in controlling the COVID-19 pandemic means that the elevated potential risk to health and care workers of actual or suspected exposure to infection has not manifested itself in actuality".¹⁷ It thus seemed that preventative measures to save businesses and jobs were more readily obtainable than preventative measure to protect public

health and potentially save lives.

To its credit, the Commission did not dismiss the applications but instead adjourned them, so it could re-assess the merits of prevention in the event that actual loss did in fact occur. Two weeks later, it did - in the form of a second wave involving numerous outbreaks across aged care facilities involving both residents and staff. The Commission brought the matter back on of its own motion and decided it would grant paid leave for two weeks of self-isolation or quarantine for Award covered workers in residential aged care facilities, but no others.¹⁸ As at the date of writing, there were just under 4000 cases of COVID-19 in aged care residents and staff in Australia and 580 deaths.¹⁹

"That the turning point for the Commission came about through a comparison to a baseline set by emergency legislation which delivered extraordinary rights to employers and was introduced by the most right wing government the country has seen, is bewildering to say the least."

The ACTU and its affiliated unions are currently conducting further proceedings in the Commission seeking the entitlement to be extended to disability care workers, amid case numbers approaching those seen when the decision in relation to the aged care sector was made. Since the decision in relation to the aged care sector was made, the conservative government has rolled out a scheme to pay workers who are required to self-isolate or quarantine a cash payment of \$1,500, where they have no entitlement to take leave or are not already in receipt of income support. This is \$7.60 less than two weeks at the National Minimum Wage. Whilst this would be insufficient to cover the full-time earnings of the workers who stand to benefit from the current proceedings, the critical issue is what view the Commission will form about what the bare minimum demands, in light of this alternative source of income that the federal government clearly holds to be sufficient.

The Commission took the unusual step at the end of August of publishing a draft set of provisions for parties to consider in the event they are seeking further temporary variations to Awards

¹⁵ See [2008] AIRCFB 1000, Australian Industrial Relations Commission (Austl.).

¹⁶ [2020] FWCFB 3561 at 122-132, Fair Work Commission, (Austl.).

¹⁷ [2020] FWCFB 3561 at 129, Fair Work Commission, (Austl.).

¹⁸ [2020] FWCFB 3940, Fair Work Commission, (Austl.).

¹⁹ Australian Government Department of Health, *COVID-19 outbreaks in Australian residential aged care facilities* (Sept. 2020), <https://www.health.gov.au/sites/default/files/documents/2020/09/covid-19-outbreaks-in-australian-residential-aged-care-facilities-11-september-2020.pdf>

to deal with the fallout from COVID-19.²⁰

Some of the features of the provisions are familiar to those versed with the JobKeeper legislation and the variations already granted, such as capacities to reduce working hours, change hours of work, expand duties, take annual leave at half pay or relocate workers. However, compulsory arbitration of disputes is also a feature, as are some potentially beneficial provisions such as facilitation of agreements for working from home, working compressed work weeks or staged start and finish times to minimise congregation in common areas or in public transport. Paid leave in the event a worker is required to self-isolate or quarantine is not a feature. Unions to date have shown little interest in negotiating Award variations on the basis of these provisions.

These unusual times have clearly put pressure on the Commission, and it has so far tended to see erring on the side of caution as involving reducing risks to employers, while requiring more persuasion of the risks and concerns of workers beyond the voices of the workers themselves. A final assessment of the performance of the modern award system during the COVID-19 pandemic is however premature. Whilst the Commission is clearly evolving to become more responsive to the concerns of workers, there is a real risk that it will not be seen as an avenue for real relief by workers and that modern awards will have only a peripheral influence over working arrangements which best suit workers in the continuing pandemic and post COVID-19 landscape.

²⁰ Fair Work Commission, *The Fair Work Commission's Coronavirus (COVID-19) update – Draft Award Flexibility Schedule*, (August 2020) <https://www.fwc.gov.au/documents/documents/re-sources/covid-19-information/presidents-statement-fwc-covid-19-response-2020-08-31.pdf>.

COVID-19 & NEOLIBERALISM: IMPACTS ON LABOUR JUSTICE IN BRAZIL

PEDRO DANIEL BLANCO ALVES & MAXIMILIANO NAGL GARCEZ

Brazil

Brazil is a country with deep structural inequalities, rooted in the slave labour of African and indigenous workers; in fact, forced labour persists to this day in some parts of the country, often in the form of debt bondage. With the country's industrialisation in the 1930s, labour rights were gradually extended to urban workers who were integrated into fledgling national industries. It would take decades more for these rights to be extended to rural workers. Despite the rapid growth of the Brazilian economy in the 1960s and 1970s, as a result of the consolidation of the national industrial base, economic gains did not reach the working class and marginalised segments of the population.¹

In 1964, a bloody military coup plunged Brazilian society into more than 20 years of authoritarianism and dictatorship. The Labour Law of the 1930s was severely weakened during this time – the so-called “Years of Lead.” The Brazilian working class saw the end of job stability, the advent of temporary work (a normative prototype for outsourcing) and wage restraint. Political persecution and state terrorism meant that unions and movements in defence of workers were silenced. At the same time that industry owners experience extraordinary gains, poverty increased for the working class due to what some authors call the privatisation of the public space.² As a result of the debt crisis that strongly impacted the peripheral economies, already subordinated to US hegemonic power, the 1980s were a disastrous period for the Brazilian labour market.

The period of re-democratisation in Brazil was symbolised by the adoption of the Federal Constitution of 1988, which made the valorisation of work a principle axis of the legal system. It formalised, among other

principles, the prohibition of retrogression in relation to labour rights. However, Brazil passively inserted itself into globalisation³ and the neoliberal programme of the 1990s. This included structural unemployment, the dismantling of national industries, privatisation of strategic state companies and attacks on labour legislation. This destructive process was temporarily interrupted during the progressive and popular governments of Lula da Silva, starting in 2003, and, later, Dilma Rousseff, starting in 2011. Even though classic reforms of contemporary capitalism were not tackled (agrarian, tax and social), as pointed out by Pochmann,⁴ there was an unprecedented appreciation of the working classes, with a high expansion of wealth distribution policies, an increase in state investment in strategic areas, a rise in the minimum wage and the beginning of economic development with social inclusion never before promoted in the country's history.

The end of this social-developmental cycle came with the 2016 coup, with immediate impacts for workers and the whole of society.

Labour Repercussions of the 2016 parliamentary coup

The 2016 impeachment of President Dilma Rousseff, a euphemism for the parliamentary coup that cut short her second term (despite any evidence of unlawful activity), represented a historical moment in the process of flexibilisation of the social and labour protection systems of Brazil. This is largely a continuation of the austerity movement ongoing since the 1990s that was paused in 2003 with the beginning of popular governments.⁵

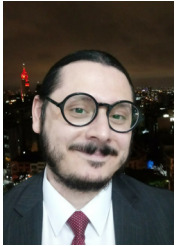
¹ See Maximiliano Nagl Garcez, *A Struggle for Democracy in the Workplace: The Possibilities and Limits of the Constitutionalization of Labour and Employment Law in Brazil*, 48(1-2) LES CAHIERS DE DROIT 137, 137-152 (2007).

² Eduardo Fagnani, *Política social e pactos conservadores no Brasil: 1964/92*, 8(1) ECONOMIA E SOCIEDADE 183, 183-238 (1997).

³ Marcio Pochmann, *Ajuste econômico e desemprego recente no Brasil metropolitano*, 29(85) ESTUDOS AVANÇADOS, 7-19 (2015).

⁴ Marcio Pochmann, *Brasil: segunda grande transformação no trabalho?*, 28(81) ESTUDOS AVANÇADOS, 23-38 (2014).

⁵ Marcio Pochmann, *Attack on Social and Labor Rights in Brazil*, 9(1) REVISTA ESTADO Y POLÍTICAS PÚBLICAS, 81-91 (2017).



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Labour Law in Brazil emerged in the 1930s and was symbolised by the Consolidated Labour Laws (CLT), adopted by the government of Getúlio Vargas in 1943. Although the CLT has undergone hundreds of modifications in the last 77 years, especially during the military regime (1964-1985), labour legislation had never been subjected to greater flexibility than with the 2017 labour reform. After the consolidation of the parliamentary coup on August 31, 2016, the illegitimate government of Michel Temer started a direct attack against the interests of the working class. On the last day of the 2016 legislative calendar, as Christmas celebrations approached and new bills would go unnoticed by the public, the federal government sent a bill to the Lower House that aimed to add, amend or strike 19 articles of the CLT and the temporary work law. By the end of April 2017, the bill, concluded in record time, changed 114 provisions of labour legislation, affecting, in addition to the CLT, laws such as the Guarantee Fund for Length of Service (FGTS) and social security legislation.⁶

When the bill reached the Senate, the government pressured members not to make any changes to the law in order to speed up the process, and, it was in fact approved in July 2017 without amendment. Among many of the measures approved, all anti-worker, the following are worth mentioning: the unrestricted use of outsourcing, charging the defendant's legal fees on the workers if they lose their legal claims, the end of mandatory union dues, allowing collective agreements to derogate from labour law protections, increasing the maximum workday from 10 to 12 hours, defining moral damage according to the employee's salary, allowing pregnant women to be assigned to work in unhealthy environ-

ments, legalising intermittent work (zero-hour contract), allowing collective layoffs without negotiation with the union, and many others that only benefit employers.

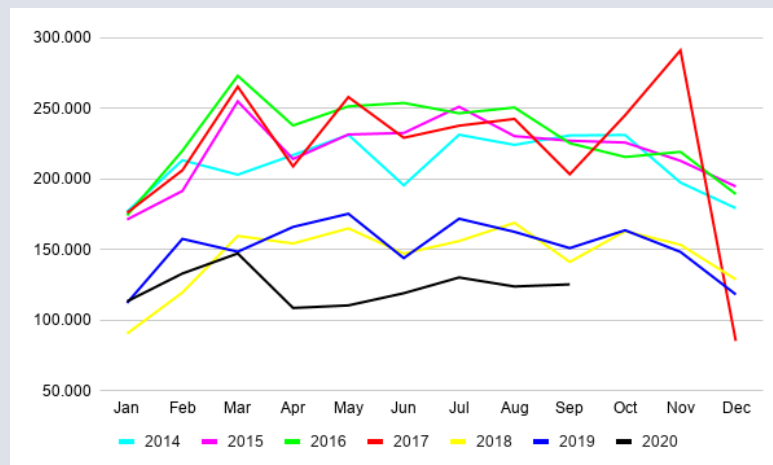
During this period, the government also approved an amendment to the Federal Constitution that froze spending in areas such as health and education for 20 years and reformed the pension system to impose a significantly longer work time requirement to qualify, and for a lower pension payment. It was such a low moment for Brazilian Labour Law that a parliamentarian from the *ruralist* bench even proposed the legalisation of the *truck system* (payment of wages in non-monetary form) for employment relations in the countryside. The *Truck Act* has banned this type of labour relation in England in 1831.

After the 2017 labour reform, the average number of cases before Labour Court dropped by 1/3 compared to previous years (falling from 2.6 million to 1.7 million), due to sharp limitations on access to justice. In addition, the context has been aggravated due to the increase in informality, the reduction of wages, increased working hours, the drop in union membership, the worsening of working conditions, growth in poverty and social inequality and failure to fulfil the promise of economic growth.⁷

The low rate of unionised workers, aggravated by the labour reform, and the large size of the service sector, with high rates of informal work, a high turnover of the labour force and increased outsourcing are some of the realities facing the

⁶ Magda Barros Biavaschi & Marilane Teixeira, *Balanço da reforma trabalhista em perspectiva econômica, as falácias dos argumentos de seus defensores e os impactos nas instituições públicas do trabalho*, 2(1) REVISTA JURÍDICA TRABALHO E DESENVOLVIMENTO HUMANO, 19-55 (2019).

⁸ The reduction of new labour lawsuits since the 2017 labour reform was very aggressive (red line). After the COVID-19 pandemic, the impact was even more visible (black line). It is the lowest level of lawsuits in the historical series.



New labour lawsuits in Brazil - 2014 to 2020
Superior Labour Court (TST)⁸

union movement, making it very difficult to organise and mobilise members. Organising is in dire need to revitalise the labour movement and fight back against the attacks workers have faced in Brazil - especially in sectors that are more susceptible to precariousness.⁹

Pandemic and work in Brazil

In Brazil, the impacts of the coronavirus pandemic started in March 2020. Despite the resistance of the business sector, measures imposing limits on commerce, services and industry were adopted across the country (however, with regional differences). After an initial proper response by the federal government and by most State and Municipal administrations, including lockdowns and restrictions where necessary, Bolsonaro fired his Minister of Health and started boycotting most measures adopted to restrict contamination by Covid-19, defending unproved medicines and attacking scientists. Brazil quickly became the country with the second highest number of deaths from coronavirus (second only to the USA), with almost 168,000 deaths and 6 million confirmed cases of the disease by November 2020.

Despite the spread of the virus, the president denied the seriousness of the problem. In addition to encouraging Brazilians not to follow WHO recommendations, President Jair Messias Bolsonaro officially stated that COVID-19 would be nothing more than a "little flu" -- responding ironically to a journalist who would not comment on the increase in the number of deaths caused by disease "because he was not a gravedigger." Later, also ironically, he would say "that he is the Messiah" (in reference to his middle name), "but he does not know how to work miracles."

The mismanagement of the pandemic has had a tremendous impact on employment. According to the Brazilian Institute of Geography and Statistics (IBGE), in June 2020 there were 12.8 million unemployed Brazilians and 5.7 million were discouraged (people who gave up looking for a job). The percentage of workers in these conditions went from 16% of the workforce in February (before the pandemic) to 19.2% in June.¹⁰ In other words, almost a fifth of the Brazilian labour market does not have or has given up looking for a job.

To make matters worse, the government authorised through provisional measures ("legislative acts" issued by the president without parliament) the suspension of employment contracts and the reduction of wages without negotiation with unions or the need for companies to prove necessity when seeking financial aid (even for the economically strongest). One of these provisional measures, No. 927, determined that COVID-19 should *not* be considered an occupational disease and that labour inspections would be limited during the pandemic. The Federal Supreme Court (STF),

the highest court of justice in Brazil, found that these two provisions of Provisional Measure No. 927 were unconstitutional. However, it ruled that it was possible to suspend workers' contracts and reduce their wages without negotiating with the unions.

In Brazil, labour disputes are resolved by specialised judges. According to data from the Superior Labour Court (TST), most of the claims initiated by workers since the start of the pandemic concern the failure to pay the required amounts upon the termination of an employment contract. That is, when a worker is dismissed, they do not receive what is due automatically and instead need to hire a lawyer to file a lawsuit to claim the amount. This can require waiting months or years for a decision. Unemployed and with few if any resources (most of the time they are not affiliated to a union), the worker must sue to try to receive uncontroverted amounts. This was made worse during the pandemic, as courts did not carry out face-to-face activities and judges scheduled hearings by videoconference -- pushing many cases into 2021. Further, many workers and witnesses, especially the poor, do not have the means to access videoconference services (25% of the Brazilian population does not have access to the internet).

"One of these provisional measures, No. 927, determined that COVID-19 should not be considered an occupational disease and that labour inspections would be limited during the pandemic. The Federal Supreme Court (STF), the highest court of justice in Brazil, found that these two provisions of Provisional Measure No. 927 were unconstitutional. However, it ruled that it was possible to suspend workers' contracts and reduce their wages without negotiating with the unions."

For lawless employers, the current process is a good deal. When the employer is served (which can be difficult, especially in cases of outsourcing, as the owner often cannot be located), they propose a settlement well below what is due to the worker knowing that, because of financial difficulties, they will accept the settlement. The settlement payment is also often split into several instalments. In general, the judges accept these agreements without examination, since it clears the docket and causes their "score" to rise according to the productivity indicators of the National Council of Justice (CNJ). Judges with good scores are promoted faster.

According to the TST, the number of successful lawsuits waiting the satisfaction of the judgment has increased since 2015. Often, the employer will disappear, or the enterprise will close without assets to seize to satisfy the judgments.

The coronavirus pandemic has made the pre-existing difficulties of practising labour law significantly worse. The suspension of the courts' face-to-face activities, social isolation and requests for extensions in the pay-

⁹ Andréa Galvão & José Dari Krein, *Les obstacles à la revitalisation syndicale*, 160 *CHRONIQUE INTERNATIONALE DE L'IRE*, 101-115 (2017).

¹⁰ Instituto Brasileiro de Geografia e Estatística (IBGE), *Indicadores IBGE: Pesquisa Nacional por Amostra de Domicílios Contínua - trimestre móvel abr./jun. 2020* (2020).

ment of funds obtained in court are examples. With hearings being held only by videoconference, tools that workers often do not have, hearings have been postponed to 2021 (and with the risk of being postponed again if the pandemic is not overcome). As most lawyers work on contingency fees, this also means that labour lawyers are not getting paid.

Although social distancing is a practice adopted by many Brazilian lawyers, paradoxically, lawyers who specialise in trial advocacy (and who, therefore, were greatly affected by income during the pandemic period) even protested in July 2020 for the return of face-to-face work in labour courts out of financial desperation. This and other facts demonstrate the precarious working conditions of labour lawyers in Brazil, most of whom work informally and without social protection.

During the pandemic, workers have sought to fight back against the crisis in their workplaces through class actions litigation filed by unions or by the Public Labour Prosecution Office (MPT), a public institution that also defends workers. Most of these class actions were aimed at simply forcing employers to adopt safety measures to prevent the spread of COVID-19 in the workplace. Despite having been weakened by labour reform, workers' unions reaffirmed their relevance in defending workers' lives and dignity. Thousands of class lawsuits were filed by the unions in all states of the country, seeking the supply of personal protective equipment (such as face masks and hand sanitizers) and adaptations of the work environment (such as social distance, adoption of home office, rotation of employees, paid leave for workers in risk groups). Due to the urgency of the measures, in many cases preliminary relief was granted with measures related to health promotion in the workplace, without waiting for the end of the procedural instruction. These measures were very important in the case of categories that perform essential activities.

However, in many other cases, judges demonstrated a lack of empathy in not granting the protective measures sought by workers. Judges were persuaded by employers' arguments about "managerial power" to organise the workforce as they see fit. In such cases, the narrow economic view prevailed, with some decisions stating that remote working environments (even when possible) could affect productivity or the economic viability of a business.

Hence, there are countless difficulties encountered by the Brazilian working class during the coronavirus pandemic. Although there are some instruments in the legal system to ensure better working conditions, the lack of social commitment by employers and the conservatism of the judiciary have been obstacles to achieving social justice in the workplace.

Such attacks on the working class have made labour relations in Brazil even more autocratic in 2020 than in the previous decade. They have also had a significant impact on the country's democracy. As is the case in several parts of the world, "the hierarchical corporate workplace model is coming to dominate the rest of society."¹¹ Brazilian democracy, as a result of the systemic attacks on workers and unions, is also suffering as a result of the Bolsonaro government's right-wing agenda.

Conclusion

Brazil is experiencing an unprecedented crisis. The situation has been exacerbated by the COVID-19 pandemic and the lack of any real government response. At a time when nations committed to social well-being of their people return part of the socially produced wealth to the population, guaranteeing stability and dignity, countries with neoliberal governments such as Brazil have instead seen the escalation of authoritarianism. Due to the sustained attacks against the working class since the beginning of his mandate, including having subjected millions of Brazilians to COVID-19, 41 impeachment requests have already been filed in the Lower House against President Jair Bolsonaro, and Bolsonaro is the subject of a complaint to the International Criminal Court alleging the commission of crimes against humanity.

As the crisis worsens, the federal government has responded only with neoliberal measures, such as the privatisation of state-owned companies and the reduction of workers' rights. This is leading to a general lowering of living standards of the working class.¹² However, new paths are being taken by the union movement to revitalise its relevance to workers. The recent national strike of digital platform drivers, who demanded safe working conditions, better wages and formalisation of their employment relationships, is one example. The unionising of precarious workers and the strengthening of social movements that seek to confront social inequality are creating new avenues of struggle for the construction of a more just society. Labour lawyers who defend the interests of workers have contributed significantly to this purpose, reaffirming with the judicial courts the fundamental principles of Labour Law, historically built from the struggle and achievements of the working class.

¹¹ Elaine Bernard, *Workplace Democracy*, Boston Review: A political and Literary Forum (1996), <http://bostonreview.net/archives/BR21.3/BernardE.html>.

¹² Ricardo Antunes, *Coronavírus: o trabalho sob fogo cruzado* (2020).

THE COVID-19 PANDEMIC AND THE WHISTLE-BLOWER PROTECTION IN POLAND

ŁUCJA KOBROŃ-GĄSIOROWSKA

Poland

Whistleblowing¹ in the workplace consists of the disclosure by an employee of irregularities in the functioning of the workplace by informing persons who have the authority to take action aimed at preventing such irregularities. Employees are often the most reliable source of information about improper situations in the workplace. However, by disclosing them, they expose themselves to several risks such as harassment, dismissal and even snubbing by co-workers.² A holdover from the communist era,³ the act of whistleblowing in Poland still has very negative associations. In Poland, the law does not provide adequate legal safeguards for, i.e. employees, interns, apprentices, former employees, or even persons not in a typical employment relationship. Its role in exposing misconduct, fraud and other forms of illegal or unethical behaviour allows the public to be aware of violations that would otherwise not be detected. As such, whistleblowing is an important mechanism in the fight for fairness and the public interest,⁴ especially now during the COVID-19 pandemic.

The Current Situation

The COVID-19 pandemic has presented a significant

challenge not only for the global economy, but above all for individual countries. In Poland, many sectors of the economy have essentially almost ceased to operate, while in others activity is significantly reduced. This affected the masses of employees, including persons employed under civil law contracts and self-employed persons.

"The pandemic has served as an excuse for many abuses against workers' rights, including censorship. The above-mentioned legal regulations protect to some extent workers' rights during a pandemic, although not fully. The pandemic inevitably shows how important in Poland the problem of whistle-blower protection will soon become."

Beginning with the diagnosis of the first COVID-19 patient on March 2, 2020,⁵ the Polish legislature prepared guidelines for the management, prevention and elimination of COVID-19, other infectious diseases and adverse conditions caused by crisis situations ("COVID Act 1"). The legislation was published on March 7, 2020. In mid-April and May more laws came into force, called COVID Act 2.0 and 3.0, and a week later (May 22, 2020), the draft of the next, and apparently the last, COVID Act 4.0. A number of these COVID Acts concern the protection of jobs and the actions and responsibilities of employers. However, problems identified by both employers and employees relating to occupational health and safety, responsibility for PPE and the setting of working time, have not lost their relevance.

The pandemic has served as an excuse for many abuses against workers' rights, including censorship. The above-mentioned legal regulations protect to some extent workers' rights during a pandemic, although

¹ See PWN POLISH DICTIONARY, <https://sjp.pwn.pl/szukaj/informator.html> (last visited Nov. 13, 2020).

² David Banisar, *Whistleblowing: International Standards and Developments*, CORRUPTION AND TRANSPARENCY: DEBATING THE FRONTIERS BETWEEN STATE, MARKET AND SOCIETY, I. Sandoval, ed., World Bank-Institute for Social Research, (2011); Dilara Huseynova and Katerina Piperigos, *Justice for justice: Protecting whistleblowers in the EU: Protection of whistleblowers - the why and the how*, COLLEGE OF EUROPE TRANSPARENCY GROUP (2017/2018).

³ See Łucja Kobroń, Czy Polskę czeka era etycznych donosów? Społeczno-prawne aspekty działania [Is Poland waiting for an era of ethical denunciations? Socio-legal aspects of whistleblower action], 82 Zeszyty Naukowe Towarzystwa Doktorantów UJ Nauki Społeczne 10 (2015) (Poland); Łucja Kobroń, Informator strażnik wartości czy donosiciel [Whistleblower of value guardian or informer] 296-300 Palestra (2013) (Poland).

⁴ Simon Wolfe, et. al, *Whistle-blower protection laws in G20 countries: Priorities for action*, TRANSPARENCY INTERNATIONAL AUSTRALIA (MELBOURNE) (2014) at 10, <https://blueprintforreespeech.net>.

⁵ LAW of 2 March 2020 on special solutions related to the prevention, counteraction and combating of COVID-19, other infectious diseases and emergencies caused by them (Dz.U.2020.374) (Poland) [hereinafter COVID-19 Act].

not fully. The pandemic inevitably shows how important in Poland the problem of whistle-blower protection will soon become.

The most famous case of censorship is the case of a midwife from a hospital in Nowy Targ. There, the employee posted a photo of herself on Facebook wearing a makeshift protective mask made of a paper towel with a caption explaining that her hospital did not have basic protection against the coronavirus. The employer gave the midwife a declaration of termination of the employment contract without notice because she violated the good name of the hospital and her basic employee duties, i.e. care for the welfare of the workplace.⁶

It was not the only case when a whistle-blower in Poland experienced retaliation for reporting irregularities at the workplace. An earlier case, that of doctor Barbara Sosinowska, was the subject of proceedings before the European Court of Human Rights (ECtHR). The doctor was a specialist in pulmonary diseases at the hospital in Ruda Śląska. In 2004, the doctor critically questioned her supervisor's diagnosis and treatment of patients. On this matter, she wrote a letter to a regional medical consultant in the field of pulmonary diseases. Disciplinary proceedings were initiated against the doctor, accusing her of violating the principles of professional ethics because of her open criticism of the supervisor's diagnostic and therapeutic decisions in the presence of other colleagues from the hospital. The medical courts sentenced B. Sosinowska to a reprimand.

The doctor lodged a complaint against this decision with the ECtHR. The Court found that the doctor's freedom of expression had been violated. In the opinion of the Court, her criticism was substantive, and the action was aimed at drawing the attention of the competent authorities to a serious, in her opinion, dysfunction in the work of her supervisor. The Court noted that the medical courts had failed to take into account whether the doctor's opinion was justified and expressed in good faith and whether it was intended to protect the public interest. The disciplinary courts had focused solely on the fact that another doctor was criticised, which the Code of Medical Ethics considered a disciplinary offense. Such an interpretation, as stated by the Court, entails a risk that doctors will refrain from providing patients with objective information about their health condition for fear of disciplinary sanctions.⁷

⁶ Karolina Nowakowska, *Lekarze mają milczeć o koronawirusie. Dyrektorzy wyciszają medyków*, GAZETA PRAWNA.PL (March 26, 2020) https://serwisy.gazetaprawna.pl/zdrowie/artykuly/1463864,koronawirus-w-polsce-uciszanie-lekarzy.html?fbclid=IwAR0TugvIMeeqzlpb5vX7Rk_xqbGY8-8SmWbaB8b-KujPfVWYeZVF176aHtE.

⁷ Sosinowska v. Poland, App. No. 10247/09 (Jan. 1, 2012), <http://hudoc.echr.coe.int/fre?i=001-148571>; See also Frankowicz v. Poland, App. No. 53025/99 (Dec. 16 2008) Eur. Ct. H.R.

European Union and whistleblowing legislation

Directive (EU) 2019/1937 of the European Parliament and of the Council on the protection of persons reporting breaches of Union law was published in the Official Journal of the European Union,⁸ commonly called "Directive on the Protection of Whistle-blowers." Starting from December 17, 2019, Member States have two years to transpose into their national legal systems regulations providing, inter alia, legal protection to whistle-blowers. As shown by the latest data from 14 out of 27 countries,⁹ the European Union has started the process of implementing the directive; however, it has already encountered resistance in some countries, including Germany. According to Transparency International, the EU agrees: "We have 18 months to ensure that the necessary whistle-blower legal protection, which we have worked so hard for at the EU level, really works in practice at the Member State level. These are the same months that Europe will ease restrictions on COVID-19. More whistle-blowers will tell us where and how existing weaknesses in our systems need to be remedied in order to move the necessary public funding away from those who need it most. The EU whistle-blower rate will help us request the change we need across Europe to protect whistle-blowers who help us protect the public interest."¹⁰

The doctor and nurse can criticise objectively

The perspective of the Polish Labour Code¹¹ emphasises the protection of an employee as the weaker entity in standing with respect to labour law. The law refers to the relationship of two parties to a contract in which the weaker labourer is protected by the scope of the labour code. The essence of the labour code is essentially to "specify" the nature of the individual employment relationship in the direction of defining minimum employee standards.¹² In the context of this issue, the Polish Labour Code does not contain protective provisions that can effectively protect whistle-blowers against the negative effects of reporting irregularities such as harassment or the so-called "disciplinary dismissal" due to a se-

⁸ See Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, 2019 O.J. (L 305), <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32019L1937>.

⁹ See EU Whistleblowing Meter, <http://euwhistleblowingmeter.polimeter.org/> (excluding Poland) (last visited November 16, 2020).

¹⁰ Whistleblowing International Network and EU Whistleblowing Meter, *NOW is the time for every European government to protect whistleblowers!* (August 20, 2020) <https://whistleblowingnetwork.org/Our-Work/Spotlight/Stories/FINAL-WIN-EU-Whistleblowing-Meter-Press-Release-22.aspx>

¹¹ Labour Code of 26 June 1974 (Dziennik Ustaw., 1974 Nr 24 poz. 141) (Poland).

¹² See Arkadiusz Sobczyk, *Różnicowanie praw (ochrony) zatrudnionych – wybrane kryteria i ich ocena* [Differentiation of employees' rights (protection) - selected criteria and their assessment] 1 (Maria Bosak et al., eds. 2014).

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rious breach of employee duties.¹³

It should be noted, however, that one of the main charges against female employees is a breach of loyalty to the employer. The Polish Supreme Court has dealt with the so-called criticism of the employer by the employee.¹⁴ According to the Supreme Court, the employee has the right to public criticism of the supervisor (the right to whistleblowing, i.e. revealing irregularities in the functioning of his workplace consisting in various types of acts of dishonesty, dishonesty involving the employer or his representatives), if this does not lead to a breach of employee duties consisting in particular in caring for the welfare of the workplace and keeping secret information, the disclosure of which could expose the employer to damages¹⁵ or breach compliance with the corporate rules of social coexistence.¹⁶ The employee may not rashly, in a manner justified only by subjective reasons, formulate negative opinions towards the employer or its representatives. In another ruling, the Supreme Court emphasised that the basic feature of permitted criticism is the employee's "good faith", i.e. their subjective conviction that they base the criticism on facts (with due diligence in checking them) and acts in the legitimate interest of the employer. On the other hand, the criticism should take into account the principles of the protection of personal rights (Articles 23, 24),¹⁷ because negative evaluations cannot directly lead to the infringement of the employer's personal rights, and the infringement of these rights may only occur exceptionally as a result of an evaluative statement, if it is not supported by a real, assessed event.

of the Labour Code, an employee with whom an employment contract was terminated without notice, in violation of the provisions on the termination of employment contracts, is entitled to a claim for reinstatement on the previous terms or for compensation. I am convinced that the pandemic will strengthen the role of whistle-blowers, although it will be a long-term process, not only legal, but above all social.

"The essence of the labour code is essentially to 'specify' the nature of the individual employment relationship in the direction of defining minimum employee standards. In the context of this issue, the Polish Labour Code does not contain protective provisions that can effectively protect whistle-blowers against the negative effects of reporting irregularities such as harassment or the so-called 'disciplinary dismissal' due to a serious breach of employee duties."

Conclusion

The COVID-19 pandemic re-started the discussion on the need to protect whistle-blowers who report irregularities acting in good faith. The situation of the informants presented in this article regardless of the time when they reported, resulted in their employment contract being terminated without notice. This is simply retaliation against whistle-blowers. The Polish Labour Code is on the side of employees. Pursuant to Art. 56

¹³ Labour Code, *supra* note 11 at art. 52 §1.

¹⁴ Supreme Court judgment of 10 May 2018, II PK 74/17; Supreme Court judgment of September 7, 2000, I PKN 11/00).

¹⁵ Labour Code, *supra* note 11 at art. 100 §1 (duty of loyalty; non-violation of employer's interest).

¹⁶ *Id.* at art. 100 §2

¹⁷ The Act of 23 April 1964 - Civil Code (Dz.U. 1964 nr 16 poz. 93) (Poland).

LABOUR INSPECTION: MORE THAN AN EXERCISE IN ETHICS

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Global

Ensuring compliance with labour regulations is an essential part of worker protection and a 'core function[s] of a system of labour administration.'¹ As former Director General of the ILO Francis Blanchard said, "labour legislation without inspection is an exercise in ethics, but not a binding social discipline."² Labour inspection is an essential tool for inducing compliance. However, despite the importance of labour inspection, in 2006 the ILO recognised it was an institution in crisis.³ This crisis continues today.⁴

The primary issues identified by the ILO in 2006 as causing the crisis were that labour inspectorates are underfunded, under resourced and understaffed.⁵ These were further emphasised in 2011 when the ILO issued its last report on this issue.⁶ According to Amengual and Fine suggested solutions for this 'crisis' fall broadly in to two categories:

- (a) a call to increase resourcing, the number of labour inspectors and greater professionalisation of the labour inspectorate; and
- (b) a set of proposals that rests on the theory that how inspectors work, rather than how many inspectors there are, determines the efficacy of enforcement ('strategic inspection').⁷

Even the ILO's own handbook on labour inspection recognises that 'no inspectorate will ever have "sufficient" inspectors.'⁸ Given these resourcing issues, additional focus should be placed on 'strategic inspection' and how available resources can be deployed in the most effective manner.

When considering how to undertake 'strategic' labour inspection, insight can be sought from the discipline of behavioural economics as well as law. In this article, the behavioural economic theory of institutional dynamism will be introduced and then used as a framework to consider some recent research on labour inspection. By undertaking this analysis, it will be demonstrated that institutional dynamism can be used to examine labour inspection practices to determine if they are having a wider than anticipated reach. It will then be used to analyse the ILO's leading document on 'strategic inspection' from recent years. Finally, it will be argued that a theory like institutional dynamism may be an element that can augment the ILO's current offering in relation to strategic labour inspection.

"As former Director General of the ILO Francis Blanchard said, 'labour legislation without inspection is an exercise in ethics, but not a binding social discipline.' Labour inspection is an essential tool for inducing compliance. However, despite the importance of labour inspection, in 2006 the ILO recognised it was an institution in crisis."

The Economic Theory: Institutional Dynamism

'Institutional dynamism' is the technical name given to the way that a legal institution (such as a labour inspectorate) is able to influence actors that are not directly affected by that institution's actions and/or a specific regulation. It is described as a useful instrument for analytical measurement and policy development.⁹ A range of processes, that are not yet fully understood, are thought to influence institutional dynamism. Lee and McCann's construction of institutional dynamism has two primary classifications: internal and external.¹⁰

² Wolfgang von Richthofen, *Labour Inspection: A Guide to the Profession*, INTERNATIONAL LABOUR OFFICE, 7 (2002).

³ David Weil, *A Strategic Approach to Labour Inspection*, 147(4) INTERNATIONAL LABOUR REVIEW 349 (2008).

⁴ Laurent Vogel & David Walters, *Labour Inspection: a Public Service in Crisis*, HESAMAG #14 ETUI (2016).

⁵ Weil, *supra* note 3.

⁶ ILC, *supra* note 1.

⁷ Matthew Amengual & Janice Fine, *Co-enforcing labor standards: The unique contributions of state and worker organisations in Argentina and the United States*, 11(2) REGULATION AND GOVERNANCE 129 (2017).

⁸ Von Richthofen, *supra* note 2 at 73.

⁹ Judy Fudge & Dierdre McCann, *Unacceptable Forms of Work: a global and comparative study*, International Labour Organization (2015) [hereinafter Fudge & McCann].

¹⁰ Sangheon Lee & Dierdre McCann, *New Directions in Labour Regulation Research*, REGULATING FOR DECENT WORK: NEW DIRECTIONS IN LABOUR MARKET REGULATION (Sangheon Lee et al. eds.) (2011); Sangheon Lee & Dierdre McCann, *Regulatory indeterminacy and protection in contemporary labour markets: innovation in research and policy*, CREATIVE LABOUR REGULATION: INDETERMINACY AND PROTECTION IN AN UNCERTAIN WORLD (Dierdre McCann, et al. eds.) (2014).



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There is very little published research that considers when the reach of labour inspectorates has been extended beyond its specific targets (known as general deterrence, ripple effects, institutional dynamism etc.). This is problematic. A theory that includes this aspect could assist policy makers to make new choices about how to drive compliance through labour inspection.

External Dynamism

External dynamism is the more straightforward category. It refers to the influence of labour laws in informal settings. A key example is how an awareness of statutory legal norms may enhance compliance. The influence of minimum wage legislation in informal settings is a key example. It has also been described as a 'lighthouse effect'.

Internal Dynamism

Internal dynamism is a little less straightforward. It captures the capacity of regulatory regimes to host interactions between a range of institutions, for example collective bargaining, labour legislation, minimum wage rules etc. Consideration of the interaction between institutions must also include the unpredictability of the interactions. An example that has been provided by McCann is the operation of 'ripple effects' that result from a change in minimum wages, whereby changes to minimum wages can effect wages above the minimum level.¹¹ For example, through the incorporation of an equivalent percentage change to wages in a collective agreement to that which applies to the minimum wage.

China: A Case Study

Institutional dynamism can be used to analyse when and how the influence of an institution, like labour inspection, is extended beyond the reach one would expect when viewing its formal legal capacities and influence. Thus, it can be readily linked to the most common aim of strategic policy in labour inspection: making the most of inspectorate resources. The theory suggests we should identify where actions of inspectorates are encouraging compliance in those to whom the inspectorates' actions are not strictly directed. This could be by way of increasing awareness of statutory legal norms etc.

For example, in 2008 the central Chinese government introduced the Labour Contract Law (LCL)¹² and the Mediation and Arbitration Law¹³

¹¹ Fudge & McCann, *supra* note 9.

¹² Labour Contract Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2007) P.R.C. LAWS No. 65 (China).

¹³ Law of the People's Republic of China on Labour-Dispute Mediation and Arbitration (promulgated by the Standing Comm. Nat'l People's Cong. Dec. 29, 2007) P.R.C. Law No. 80 (China).

to protect the rights of workers.¹⁴ The recent implementation of these regulations by relevant government bodies, including inspectorates, has improved.

When considering this improvement, the research of Zhuang and Ngok looks at the interaction of two institutions, the labour inspectors and 'allies of the labour inspectorate.'¹⁵ Institutional dynamism suggests that we look for evidence that this interaction has altered the effect of inspectorate actions on persons who are not directly impacted by them. Unions were one of the allies, as they are empowered by legislation to partner with labour inspectors and enforce regulations. However, they are unwilling to engage in these activities. Is this an example of a regulation having an indirect effect on employers? Arguably it is. Potentially, labour inspection is made less effective. Breaches are not detected because of the actions of a third party, trade unions, and their unwillingness to act. While this is not a textbook example of internal institutional dynamism, it could fall within this category. While compliance is not increased it is equally important to look at 'failures.'

Research by Chung about the enforcement by local government bodies (inspectors) of the LCL that involved interviewing labour related stakeholders provides an interesting contrast.¹⁶ It focused on the part of the LCL which required written labour contracts (WLC) and a copy of WLCs to be given to the employee. The findings suggested that there were two other stakeholders who were helping to drive inspectorate enforcement: various labour intermediaries¹⁷ and workers.

Chung suggests that the enforcement activities of inspectors are having an impact that is extended by the actions of intermediaries and workers. This is largely demonstrated by the findings that compliance with WLC regulations, the issue that labour inspectorates took the most stringent position on, has increased more than compliance with other areas of the LCL. However, the actions of inspectorates alone do not appear to fully account for the rapid increase in WLC compliance. Labour intermediaries and employee knowledge also played a role. As China's employment pro-

¹⁴ Chris King-Chi Chan & Khalid Nadvi, *Changing labour regulations and labour standards in China: Retrospect and challenges*, 153(4) INTERNATIONAL LABOUR REVIEW 513 (2014).

¹⁵ Wenjia Zhuang & Kinglun Ngok, *Labour inspection in contemporary China: Like the Anglo-Saxon model, but different*, 579, 153(4) INTERNATIONAL LABOUR REVIEW 561 (2014).

¹⁶ Sunwook Chung, *Explaining compliance: A multi-actor framework for understanding labour law compliance in China*, 68(2) HUMAN RELATIONS 237 (2015).

¹⁷ Chung defined labour intermediaries as 'actors outside the labour bureaucracy that directly and/or indirectly engage in labour law enforcement and have a relatively high level of technical knowledge of labour/employment issues'. See Chung, *supra* note 16 at 241 (Examples include trade unions, NGOs, legal clinics and local media).

tection system is entirely complaint based, inspectors will often refuse to act without additional pressure from labour intermediaries and employees. They perceive laws as 'removed from reality' because they 'impose extremely high standards on employers' (p.244). In Chung's (2015) interview some inspectors described regulations as 'absurd'. This suggests that it is possible the labour inspectorates activities are having a wider impact than would be anticipated, when combined with labour intermediaries, a key indicator of institutional dynamism.

The fieldwork undertaken by Chung (2015) highlighted four ways that labour intermediaries could influence employer compliance, particularly in relation to WLCs:

- (a) Publicising employer wrong-doing.
- (b) Facilitating workers making claims.
- (c) Offering employers acceptable standards and solutions.
- (d) Lobbying government leaders to shape labour law policy.

While it is not possible to determine exactly which interaction enhanced the actions of the inspectorates the most, it is possible to draw the conclusion that at least one of the interactions between two institutions has enhanced compliance activities. As such, it is likely that there is a level of internal institutional dynamism at play.

Media may also play a key role in encouraging compliance with WLC laws by leveraging state slogans to bring attention to labour abuses and contributing to the creation of local-level norms that expected unethical employers to be punished.¹⁸ Interviews indicated that media exposure had made institutions take the WLC regulations more seriously. Backed by a series of pro-labour policies, workers were able to use labour laws and official mechanisms as a source of leverage to assert their rights. This is a classic signal of external dynamism. The existence of pro-labour policies and the work of the labour inspectorate is providing a signal to workers that they can successfully use labour laws as a tool to improve their working conditions.

The ILO Approach to Strategic Compliance Planning for Labour Inspectorates

By using institutional dynamism as a framework to analyse the above example from China, it has been demonstrated that interactions between institutions can allow labour inspectorates to have a wider impact and increase compliance with labour regulations. As such, it is now proposed to use this framework to analyse the ILO's latest guidance on strategic labour inspection to see where the ILO may be able to encourage inspectorates to take advantage of interactions between institutions to increase compliance.

Published in December 2017, the ILO Approach to Stra-

tegic Compliance Planning for Labour Inspectorates (IASCPPI) provides an outline of the ILO's outward facing position in relation to strategic labour inspection.¹⁹ The IASCPPI is designed to direct inspectorates towards 'proactive, targeted and tailored interventions that engage multiple stakeholders'. It involves 6 steps:

1. Explore the Labour Inspectorate
2. Explore Issues and Targets
3. Explore Influences
4. Explore Stakeholders
5. Explore Interventions
6. Operationalise the Strategic Compliance Plan

Overall, it demonstrates an interesting shift in the ILO's public views on labour inspection processes.

A crucial feature of the IASCPPI is found in Step 1 which states that its 'key objective... is to overcome resource gaps by identifying previously untapped resources and using available resources differently.'²⁰ This is essential for labour inspectorates looking to make the most of limited resources. However, the document only asks inspectorates to 'think broadly and creatively' to catalogue available resources.²¹ As such Step 1 could be developed by a better outline of how to conceptualise untapped resources. The incorporation of theories which examine how resources can be extended, like institutional dynamism, would assist with this. However, a person reading the IASCPPI is provided with no suggested theories to guide this consideration.

In addition, Step 3 describes how inspectorates should explore influences on compliance. This is the key purpose behind the theory of institutional dynamism. However, the examples given primarily encourage the consideration of compliance which occurs because of specific deterrence, i.e. inspectorate actions that have a direct impact on an employer. This suggests the LABADMIN team (the authors) may still have a restricted vision about the impact labour inspection can have. Institutional dynamism offers a broader vision. It asks inspectorates to look beyond where they have a direct influence and consider circumstances where their actions may have a wider impact on those who they are trying to induce compliance in. A specific reference to a theory like institutional dynamism would add a dimension to the ILO's position in this regard that is not currently obvious, if anticipated at all.

Step 4 asks the inspectorate to look to social partners and consider developing partnerships. This is a partial endorsement of institutional dynamism. It clearly demonstrates that the ILO envisions that partnerships can be formed between inspectorates and other stakeholders to enhance compliance. However, no suggestion is made as to how to quantify the impact that

¹⁹ International Labour Organization, *ILO Approach to Strategic Compliance Planning for Labour Inspectorates (IASCPPI)*, (2017), https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/publication/wcms_606471.pdf

²⁰ *Id.* at 4.

²¹ *Id.*

¹⁸ Chung, *supra* note 16.

partnership may have. For example, there is no recommendation in relation to the consideration of ripple effects. While this is potentially alluded to in Step 5, when the ILO recommends considering 'how the impact of any of these [chosen] interventions might be enhanced and expanded by leveraging other stakeholders',²² it is not explicit. By using this language, the ILO indicates an openness to further developing its position by incorporating a theory like institutional dynamism. It essentially looks to describe almost exactly this effect and predict how it may improve compliance.

Ultimately, it is perhaps Step 6 where it becomes clearest that despite some promise, the IASCPLI has not yet taken the step of explicitly considering the wider impact of labour inspectorate actions. Step 6 deals with implementing the strategic compliance plan developed under the IASCPLI. While it once again explicitly refers to partnering with allies, it lacks an explicit reference to how this can extend the impact of the actions of labour inspectorates. Instead, the document states that 'when developing an escalation timeline, the labour inspectorate should consider that each intervention is an opportunity to encourage a target to comply'.²³ This is an explicit reference to specific deterrence, and in this author's view, limits the deterrence possibilities available. There is not a clear reference to ripple effects or other broader impacts.

Conclusion

Initially, the ILO's IASCPLI appears to be an attempt to present a new version of 'strategic labour inspection'. However, closer examination suggests that it could be perceived as an attempt to repackage old ideas. It also appears to largely ignore insights that can be taken from other disciplines, for example psychology and behavioural economics. As such, it appears this element of the ILO's offering remains underdeveloped.

Lessons for the ILO

This does not need to be the case. The ILO has recently faced some intense criticism.²⁴ To answer these criticisms the ILO could embrace the modernisation and reinvigoration of labour inspection through the incorporation of elements of psychology and economic enforcement. Institutional dynamism is not the only option in this field, it is one way to show how thinking around labour inspection can be reconceptualised. La-

bour inspection is the perfect institution for finding new ways to engage as it can be seen to form a part of the ILO's core mission.²⁵

Despite some promise being shown among alternative non-government enforcement avenues, many have now concluded governments must retain their central role for labour inspection and enforcement to be effective.²⁶ Unfortunately, the ILO is not able to conduct labour inspections itself and its standards on labour inspection²⁷ provide only very high level guidance. As such, the ILO's offering will logically be limited to proving technical guidance. Throughout its existence the ILO 'has been at the forefront of global debates on social justice and the world of work'.²⁸ It is accepted by governments as a source of authority.²⁹ This means that when it comes to labour inspection, the only way for the ILO influence change is to target governments and inspectorates directly. It is government that needs to be convinced of the wisdom of taking an alternative approach. The ILO can take the lead in relation to this matter.

Some may criticise this as a step away from the ILO's traditional and 'true' purpose: standard setting.³⁰

However, as early as the 1930s the ILO was offering technical assistance to members to facilitate compliance with its conventions³¹ and technical co-operation assistance is a feature of most international organisations.³² It is also a vision that fits in well with those commentators that see a future where the ILO follows embraces full membership of the club of international development agencies.³³ Further, it is a common view, both in and outside of the ILO, that adding more conventions to an already crowded field will not solve its problems. Instead better and smarter solutions are needed which can result in real world change.³⁴

"This means that when it comes to labour inspection, the only way for the ILO influence change is to target governments and inspectorates directly. It is government that needs to be convinced of the wisdom of taking an alternative approach. The ILO can take the lead in relation to this matter."

²² *Id.* at 4.

²³ *Id.*

²⁴ Velibor Jakovleski et al., *The ILO's Role in Global Governance: Limits and Potential*, 82, THE ILO @ 100 (Christophe Gironde and Gilles Carbonnier eds., 2019); Guy Standing, *The ILO: An Agency for Globalization*, 39(3) DEVELOPMENT AND CHANGE 355 (2008); Brian A. Langill, *Core Labour Rights – The True Story (Reply to Alston)*, 16(3) THE EUROPEAN J. OF INT'L LAW 409 (2005);

²⁵ Guy Standing, *The ILO: An Agency for Globalization*, 39(3) DEVELOPMENT AND CHANGE 355 (2008).

²⁶ Lilian Miles, *The 'integrative approach' and labour regulation and Indonesia: Prospects and challenges*, 36(1) ECONOMIC AND INDUSTRIAL DEMOCRACY 5 (2015).

²⁷ E.g. International Labour Organization, *C081 - Labour Inspection Convention*, No. 81 (1947)

²⁸ Velibor Jakovleski et al., *The ILO's Role in Global Governance: Limits and Potential*, 82, THE ILO @ 100 (Christophe Gironde and Gilles Carbonnier eds., 2019).

²⁹ Standing, *supra* note 25.

³⁰ *Id.*

³¹ Sandrine Kott, *ILO: Social Justice in a Global World? A History in Tension*, THE ILO @ 100 (Christophe Gironde and Gilles Carbonnier eds., 2019).

³² Standing, *supra* note 25.

³³ Steve Hughes & Nigel Haworth, *The International Labour Organization Coming in from the cold*, (2011).

³⁴ Brian A. Langill, *Core Labour Rights – The True Story (Reply to Alston)*, 16(3) THE EUROPEAN J. OF INT'L LAW 409 (2005).

Even if it is a significant step away from the ILO's traditional role it is also worth reflecting on whether this would be a genuine issue if the ILO ended up being in a better position to meet the challenges of today's world of work.³⁵

Conclusion

Some legal purists and traditional legal scholars may approach an expansion of thinking that includes economics and psychology in enforcement with some trepidation, as it is not a completely legal solution. However, the ILO has long been and remains an interdisciplinary organisation and its goal of Decent Work cannot be achieved through law alone. It is also worth noting that the ILO can set many kinds of standards. Just because traditional legal scholars would not consider institutional dynamism a 'legal standard,' does not mean it cannot form a part of standard practice when considering how best to induce compliance using labour inspection.

As Standing suggested in 2008, 'unless the ILO can be recast as a world-class information and advisory body, its future looks bleak.'³⁶ A continued focus on simple solutions framed around resourcing will not allow the ILO to hold its place as a world leader in standard setting or as a development agency. Only by embracing interdisciplinary theories on labour inspection will allow the ILO and other interested agencies to find ways around resourcing issues.

Ultimately, this article hopes to show that the incorporation of the ideas that underlie institutional dynamism into strategic labour inspection theory can allow inspectorates to identify ways that their actions are having a wider impact than would be expected and rethink how they undertake inspections. This is key to solving the labour inspection crisis. For those who are still cautious a final call to action is made: only more dedicated research on this topic can reveal whether institutional dynamism can ensure that labour inspection and labour inspectorates are able to get maximum compliance for their 'buck'. This author certainly hopes that is the case.

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³⁵ Hughes, *supra* note 33.

³⁶ Standing, *supra* note 24 at 381.

PRIVATE EQUITY, HUMAN RIGHTS DUE DILIGENCE, AND GLOBAL LABOUR RIGHTS: THE CASE OF “HOTEL CALIFORNIA”

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When Juana Melara—an immigrant mother who works as a room attendant at the Westin Long Beach Hotel in California—and her coworkers launched a campaign to unionise, they faced an increasingly familiar problem: No one could tell them who was in charge.

Sick of indignities like being told to get on her knees to clean the bathroom floor and not being paid for all of her work, Melara led a delegation asking that local management let workers freely decide whether to unionise without management interference. But the hotel’s general manager told them he could not agree to the workers’ demand and the hotel instead launched an aggressive American-style effort to defeat the unionisation drive. The workers, and their union UNITE HERE Local 11, travelled to Utah to complain to the hotel’s principal investor, but the investor—a public pension fund—told them that they had to speak to a private equity asset management firm that oversaw the hotel on the investor’s behalf. And when the union sought to engage the asset manager—a U.S. subsidiary of the French banking giant Natixis—they met another brick wall.

Despite these challenges, two years later, Melara and her coworkers had won a path-breaking collective bargaining agreement providing for not only improved wages and benefits but precedent-setting provisions to protect housekeepers from sexual harassment and assault. Melara herself had been named one of Time Magazine’s Persons of the Year, honoured for her leadership as activist for low-wage women workers. She is now a leader in a campaign for worker safety amid the COVID-19 pandemic.

This paper tells the story of how the Westin Long Beach workers’ victory was accomplished with the help of a relatively new and little-used legal doctrine coupled with critical engagement of investor stakeholders. The union filed a complaint against Natixis under

the OECD Guidelines for Multinational Enterprises in what became the first application of “human rights due diligence” to private equity asset managers. Heralded by one publication as a “landmark case,”² the complaint resulted in constructive engagement with Natixis by France’s OECD National Contact Point. This effort was critically complemented by the involvement of French union leaders serving as trustees to public pension funds with investments in Natixis. The leaders, who coordinate *Réseau des administrateurs pour l’investissement* (RAIR), successfully engaged Natixis to ensure effective implementation of so-called ESG principles, resulting in the breakthrough outcome.

“The union filed a complaint against Natixis under the OECD Guidelines for Multinational Enterprises in what became the first application of “human rights due diligence” to private equity asset managers.”

The Rise of Private Equity and Human Rights Due Diligence

Across the global economy, companies that were once standalone businesses are increasingly being swept up into complex networks managed by private equity firms.³ The nature and complexity of the investment or supply chains pose hurdles for efforts by workers at the bottom of the chains to successfully organise. In many cases, it is these firms at the commanding heights of the chains that are the ultimate decision-makers regarding labour policy among subsidiaries and contractors. But because they do not directly employ workers and often do not exercise day-to-day control over labour operations at the worksite level, they are generally not obligated under U.S. law or that of other countries to participate in collective bargaining and are not held responsible for labour abuses such as wage theft or unsafe conditions. Developing strategies to hold these lead firms accountable and to bring them to the bargaining table is among the most urgent chal-

¹ The authors thank Ashwini Sukthankar for her comments on an earlier draft of this paper and for her contribution to the campaign it describes.

² Jessica Agache-Gorse, *OECD National Contact Point for France accepts a complaint filed by a US trade union against the Natixis banking group*, PLANET LABOR (May 17, 2017), www.planetlabor.com.

³ See Eileen Appelbaum & Rosemary Batt, *PRIVATE EQUITY AT WORK: WHEN WALL STREET MANAGES MAIN STREET* (2014).

lenges facing low-wage workers.

The concept of “human rights due diligence” has emerged as one potentially promising tool to create such lead firm accountability. The framework was first formulated as part of the United Nations Guiding Principles on Business and Human Rights, which was endorsed by the UN Human Rights Council in 2011. It has been incorporated as part of newly revised versions of the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy and the OECD Guidelines for Multinational Enterprises.

As set forth in the OECD Guidelines, the basic framework is as follows: Businesses subject to the Guidelines have a duty to avoid adverse impacts on workers and to address such impacts even where they occur at a supplier or another type of business partner. An enterprise should: “(a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; [and] (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.”⁴

Under this formulation, whether a firm contributes to an adverse human rights impact or is only linked to a firm causing or contributing to such harm, it must use whatever leverage it has to influence the other entities that have caused or contributed to the adverse impact to mitigate the impact.⁵ Thus, “[i]f the business enterprise has leverage to prevent or mitigate the adverse impact, it should exercise it.”⁶ This formulation is notably distinct from common law tort doctrines under which a person or business may be liable only by causing reasonably foreseeable harm but absent special circumstances has no affirmative duty to mitigate harms caused by others. Under the human rights due diligence framework, a worker who is subjected to an adverse impact may expect any firm that has “the ability to effect change in the wrongful practices of an entity that causes [the] harm” to do so.⁷

The rights implicated by the human rights due diligence framework include expansive labour rights

protections. Under the OECD Guidelines, human rights include—“[i]n all cases and irrespective of the country or specific context of enterprises’ operations”—the core ILO conventions affirmed in the 1998 International Labour Organisation Declaration on Fundamental Principles and Rights at Work,⁸ which are significantly more protective of worker rights than is the domestic law of U.S. and many other countries.⁹ The ILO Committee on Freedom of Association has, for example, interpreted Conventions 87 and 98 to prohibit employers from denying reasonable union access to the workplace to communicate with workers about the advantages of unionisation¹⁰ and making threats or actual permanent replacement of striking workers¹¹—employer practices that are privileged under U.S. labour law. The OECD has stated that management should “adopt a positive approach toward the activities of trade unions and, in particular, an open attitude toward organisational activities within the framework of national rules and practices.”¹² Under this approach, many common U.S.-style employer antiunion tools such as subjecting workers to antiunion “captive audience” sessions while depriving union organisers of comparable access to workers—tactics used by the original employer in the Westin Long Beach case—are prohibited.¹³

⁸ *Id.* at Commentary 39. The Guidelines also make specific reference to the right to organise, stating that enterprises should “[R]espect the right of workers employed by the multinational enterprise to have trade unions and representative organisations of their own choosing recognised for the purpose of collective bargaining, and engage in constructive negotiations, either individually or through employers’ associations, with such representatives with a view to reaching agreements on terms and conditions of employment.” *OECD Guidelines*, *supra* note 4 at Commentary Chamber V (1)(a).

⁹ *OECD Guidelines* at Chapter IV, ¶1(a)-(b) and Commentary 39.

¹⁰ See ILO Committee on Freedom of Association, *Complaint against the Government of the United States by the United Food and Commercial Workers International Union et al.*, Report No. 284, Case No. 1523 (1992) (“The Committee requests the Government to guarantee access of trade union representatives to workplaces, with due respect for the rights of property and management, so that trade unions can communicate with workers, in order to apprise them of the potential advantages of unionisation”).

¹¹ See International Labour Organisation (ILO) Committee on Freedom of Association, *Complaint against the Government of the United States by the AFL-CIO*, Report No. 278, Case No. 1543 (1991) (“The right to strike . . . is not really guaranteed when a worker who exercises it legally runs the risk of seeing his or her job taken up permanently by another worker just as legally.”).

¹² OECD Committee on International Investment and Multinational Enterprises, *The Review of the 1976 Declaration and Decisions on International Investment and Multinational Enterprises*, at ¶ 60 (1979).

¹³ Prior to the resolution of the case, a clinic at the UC Irvine School of Law produced a report assessing the employer’s practices in light to international labour standards, concluding that the employer’s antiunion campaign—involving captive audience meetings where antiunion consultants attempted to dissuade workers from organising—and its refusal to grant the union with access to the worksite to communicate with workers and counter the employer’s antiunion messages violated ILO standards. See Sam Cretcher and Sameer Ashar, *Report Regarding Compliance with Domestic and International Labor Standards at The Westin Long Beach Hotel*, IRVINE SCHOOL OF LAW IMMIGRANT RIGHTS CLINIC (May 18, 2016) [hereinafter UC IRVINE LAW CLINIC REPORT], http://www.law.uci.edu/academics/re-al-life-learning/clinics/pdfs/UCI-OECD-Report_5-18-16.pdf.



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⁴ Organisation for Economic Co-operation and Development (OECD), *OECD Guidelines for Multinational Enterprises*, at ¶13 (2011) [hereinafter *OECD Guidelines*].

⁵ See, e.g., OECD, *Responsible Business Conduct for Institutional Investors* at 34-35 (2017); *OECD Guidelines* at Chapter II, ¶10, Chapter IV, ¶15, Commentary 19 and Commentary 41.

⁶ U.N., *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, at 21-22, HR/PUB/11/04 (2011) [hereinafter *UN Guiding Principles*] (“Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm”). See also, *OECD Guidelines* at Commentary 41.

⁷ *OECD Guidelines*, *supra* note 4 at Commentary 41; *UN Guiding Principles* at 21.

In addition to these and other process rights, the OECD Guidelines also include a key substantive worker right: Employers must “[o]bserve standards of employment and industrial relations not less favourable than those observed by comparable employers in the host country.”¹⁴ In the Westin Long Beach case, the union alleged that the hotel violated this standard by providing health insurance to employees that was seven times more expensive than the most common plans offered to employees at peer group hotels, a majority of which were unionised.¹⁵

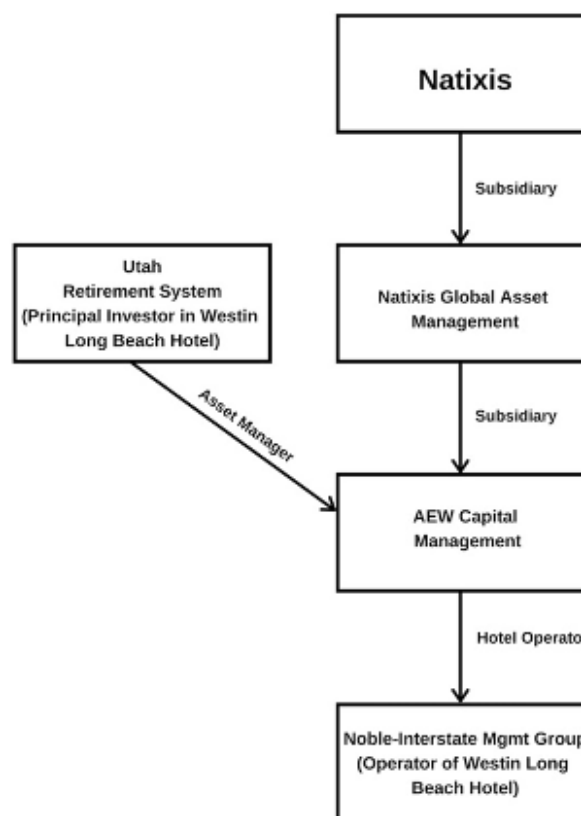
The OECD Guidelines, like the UN Guiding Principles, also have notable shortcomings—the most obvious that it is an instance of “soft law” with no binding effect in courts of law. The only means of enforcement is the submission of a complaint—referred to as a “specific instance”—with National Contact Points (“NCPs”) that are established by each signatory government. If it accepts a case, the NCP may offer its good offices to help resolve the dispute and issue reports but cannot issue binding decisions. Respondent companies may choose whether or not to engage in NCP-mediated dialogue, and many do not: In 2018, for example, of the 34 specific instance cases NCPs closed, only 11 went to mediation facilitated by the NCP and in nearly a quarter of cases (23%), the OECD attributed a lack of agreement between the parties to the respondent company’s failure to engage in the process.¹⁶ Skepticism concerning the utility of the mechanism is likely a factor driving the relatively small number of cases that have been filed—52 were submitted across all offices in 2018—though use of the mechanism has grown in recent years.¹⁷

The Westin Long Beach Hotel Investment Chain

Before discussing the legal issues and stakeholder engagement in our case study, we briefly review the business entities involved.

As is increasingly typical in the hospitality sector, the case involved a complicated investment chain. At the bottom of the chain was the Westin Long Beach Hotel. At the start of the case, the hotel was operated by a U.S. based firm called Noble-Interstate Management Group California LLC (“the operator”), which directly employed its workers. As noted above, the hotel’s principal investor was a public employee pension fund in the State of Utah, Utah Retirement Systems (URS). URS owned the hotel through a holding company held by a joint venture. Of relevance for the international dimensions of the case, URS contracted with an asset management firm called AEW Capital Management to oversee the property. AEW is a U.S. subsidiary of the French firm Natixis Global Asset Management (NGAM),

which is owed by Natixis. As an asset manager, AEW advised URS as well as the hotel’s operator on labour and other issues.¹⁸ These relationships are summarised in the diagram below:



OECD Complaint Office Finds Responsibility for Asset Managers

The union did its best to utilise domestic legal mechanisms to resolve the labour issues at the hotel, including filing unfair labour practice charges against the operator with the National Labour Relations Board. Its workers also filed a class action wage-and-hour case against the operator. But when its domestic U.S. efforts did not achieve a resolution, the union began to think internationally.¹⁹ Assisted by French-American attorney Veronique Camerer and with the help of the banking sector affiliate of the French union confederation CFDT, it first sought to engage Natixis at its annual shareholder meeting in Paris. When the company did not agree to dialogue, it filed an OECD Guidelines complaint. The complaint alleged that Natixis had violated its human rights due diligence obligations by failing to

¹⁴ OECD Guidelines, *supra* note 4 at Chapter IV, ¶4(a).

¹⁵ UC IRVINE LAW CLINIC REPORT, *supra*, note 14, at 8-10, http://www.law.uci.edu/academics/real-life-learning/clinics/pdfs/UCI-OECD-Report_5-18-16.pdf.

¹⁶ OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises 2018* at 8, 21, (2019) <http://mneguidelines.oecd.org/2018-Annual-Report-MNE-Guidelines-EN.pdf>.

¹⁷ *Id.* at 31.

¹⁸ See French OECD PCN, *Report of the French NCP in the specific circumstance Natixis-NGAM in the United States*, at 6-8 (2017) [hereinafter *France NCP's Detailed Report on Natixis Case*] <https://www.tresor.economie.gouv.fr/Articles/2017/12/14/5-decembre-2017-rapport-du-pcn-francais-dans-la-circonstance-specifique-natixis-ngam-aux-etats-unis>.

¹⁹ See, e.g., Beth Healy, *Hotel workers cross an ocean to prod Natixis on union*, BOSTON GLOBE (May 24, 2016), <https://www.bostonglobe.com/business/2016/05/23/springtime-paris-hotel-workers-fly-miles-prod-natixis-union/ikYFdc0r5ichAHPN1x9fBN/story.html>; Beth Healy, *Natixis CEO urges counsel to keep protesting Calif. hotel workers at bay*, BOSTON GLOBE (Apr. 8, 2016), <https://www.bostonglobe.com/business/2016/04/08/natixis-ceo-email-urges-counsel-keep-protesting-california-hotel-workers-bay/jx7KJSAeznITwiYQAKBNzj/story.html>.

ensure that its subsidiary AEW and the hotel operator it oversaw on behalf of the hotel's owner ceased its antiunion campaign.²⁰ The union asked the French NCP to use its good offices to facilitate dialogue to achieve this outcome.

The French NCP is housed within the French Ministry of the Treasury. It is a tripartite body governed by representatives of trade unions, employers, and government. Perhaps owing to the accountability this structure creates, UNITE HERE Local 11 found the NCP—led by General Secretary Maylis Souque—to be highly transparent and responsive to its concerns. The NCP displayed impressive technical expertise in teasing out the relationships between the various corporate entities. And, importantly, its mediation efforts with Natixis were personally led by its senior-most officials.

The union's complaint, submitted in September 2016, presented novel issues for application of the Guidelines' human rights due diligence framework: At a general level, it presented the question of what due diligence obligations firms other than direct employers have in complex investment chains, particularly where multiple entities play some role in the investment or decision-making process. With respect to Natixis, the more precise question was what obligations, if any, apply to financial sector firms that serve as "investment advisors" or "asset managers" for private equity investors, even where the advisors or managers do not have any equity interests themselves in the business?

In its final report on the case, the NCP observed that Natixis—through its U.S. subsidiary AEW—could have "contributed" or was "directly linked" to the adverse consequences on workers resulting from the local operator's antiunion campaign to the extent that it provided operational advice or played a role in hotel's acquisition and selection of the hotel's operational partners. Natixis was obligated to ensure that its subsidiary adhered to the OECD Guidelines by using its influence to mitigate the adverse labour impacts. This obligation was not fulfilled, however, as the subsidiary knew about the antiunion activities by the hotel's operator but "did not act to remedy the situation."²¹ Based on these findings, the NCP's senior lead-

ers engaged with Natixis to facilitate a resolution. A summation of the NCP's interpretation of the Guidelines is that financial sector actors that provide investors with operational advice have an obligation to provide advice that is consistent with the OECD Guidelines, including its standards related to the rights of workers to unionise. Given the increasingly prominent role of asset management and investment advisor firms, this conclusion is significant. The NCP's analysis also implies that where private equity asset management firms have an equity stake in the business at issue, which is also quite common, there would be even more cause to expect the firms to take steps appropriate steps to ensure responsible business practices.

Critical Engagement by Network of French Pension Fund Trustees

As mentioned at the outset, a second critical development leading to the resolution of the case was the parallel engagement with Natixis by labour-side trustees of a French pension fund whose assets the company managed. This engagement was facilitated by Réseau des administrateurs pour l'investissement responsable (Network of Trustees for Responsible Investment, or RAIR). Founded in 2013 by Jean-Pierre Costes, a trade union leader, and the late Eric Loiselet, a member of French Socialist Party and prominent environmentalist, RAIR was launched to help pension funds ensure that their investments follow principals of social responsibility. As an initiative of union-based trustees, it has been particularly keen to see that the "S" for "social" in ESG is not given short shrift relative to the issues of the environment and governance.

RAIR's members include administrators of pension funds set up by unions and employers to supplement the retirement benefits provided by the French government, including those for public sector civil servants, teachers, healthcare workers, and others (IRCANTEC, PREFON, ERAFP, FRR), as well as two private sector funds for agricultural workers (AGIRC and ARRCO). RAIR does not have or invest assets itself. However, the funds whose labour-side trustees participate in the network hold more than \$100 billion in assets.

In summer 2017, with the help of attorney Camerer, UNITE HERE Local 11 contacted RAIR's then-president Luc Prayssac to express concern regarding the Natixis case. The network shared information on the case and learned that one of the funds, IRCANTEC, had significant assets under management by Natixis—approximately \$2 billion of the fund's \$11 billion in assets. Prayssac and Costes, both trustees of IRCANTEC, arranged to meet with Natixis to discuss the case.

During what turned out to be a fateful meeting

²⁰ *Une Plainte Contre Natixis Pour Non-Respect Des Droits Syndicaux Aux États-Unis*, NOVETHIC, May 17, 2017, <http://www.novethic.fr/isr-et-rse/actualite-de-la-rse/isr-rse/natixis-attaque-pour-non-respect-des-droits-syndicaux-aux-etats-unis-144093.html>; Dan Isreal, *A Paris, les employés d'un hôtel américain demandent des comptes à Natixis*, MEDIAPART, May 24, 2016, <https://www.mediapart.fr/journal/economie/240516/paris-les-employes-d-un-hotel-americain-demandent-des-comptes-natixis?onglet=full>; Aaron Chappell, *Unite Here Local 11 Calls for OECD Investigation into Long Beach Westin Hotel—Complaint Filed against French Firm Natixis*, Sept. 20, 2016, AFL-CIO NOW, <http://www.aflcio.org/Blog/Organizing-Bargaining/Unite-Here-Local-11-Calls-for-OECD-Investigation-into-Long-Beach-Westin-Hotel-Complaint-Filed-against-French-Firm-Natixis>.

²¹ See France NCP's Detailed Report on Natixis Case, *supra* note 18 at 6-8.

with the company, they emphasised concerns brought forth by UNITE HERE that the hotel was on the market for sale – a development which, in addition to eliminating the potential for Natixis to take positive steps to resolve the situation, could result in further negative consequences for the hotel's workers who risked losing their jobs. According to Prayssac, the Natixis representatives initially stood by the company's public stance that it did not have any relationship to the Westin Long Beach Hotel, but the company's position evolved over the course of the discussion to the point where it expressed openness to taking constructive action.

Reflecting on this engagement, Prayssac recounted: "In a Socially Responsible Investment (SRI) approach, it is critical that institutional investors like ones I represent have information about the social impact of their investments. In this context, it is not acceptable in a SRI investment chain when we learn of workers who are suffering and are denied the opportunity to exercise their rights. This is what I reminded the leaders of Natixis."

Resolution and Conclusion

The NCP and RAIR's engagement with Natixis ultimately yielded a breakthrough. In late 2017, the hotel was sold in a manner that effectively resolved the dispute. A buyer was selected whose operator, HighGate Hotels, immediately negotiated with the union on procedures for union recognition and then recognised the union based on the union's showing of majority support through signed authorization cards, all within a month of the sale. As the French NCP observed in its report, "the hotel's sale conducted by AEW Capital Management on behalf of its client URS obviously took due consideration of the OECD Guidelines and notably the importance of social dialogue on one hand, in the choice of new buyer and, on the other, in the choice of the new operator made by the new owner."²² Thus, remediation ultimately involved selecting a buyer willing to adhere to take a positive approach with respect to the union.

The union and the new employer subsequently negotiated a breakthrough collective bargaining agreement. Among significant improvements in workers' wages and benefits, the agreement provides comprehensive family healthcare paid for almost entirely by the employer and improvements in workloads for housekeepers. The agreement also broke new ground in the protection of workers from sexual harassment and assault, requiring among other things that housekeepers be provided with panic buttons to summon immediate assistance if they are confronted with threatening conduct while cleaning a guest room. Juana Melara played a central role in both the worksite organising and a successful

campaign to instantiate the same protections against sexual assault in a citywide law. Since the COVID-19 pandemic began, she and her coworkers have successfully pushed for safety upgrades and worker protections in their workplace and throughout the region.

In September 2018, Luc Prayssac and Philippe Sebag—the union pension fund leaders coordinating RAIR—travelled to Los Angeles on what they said was a "pilgrimage." Although their network of pension fund trustees had played a key role in persuading Natixis to change course, they had never met the Westin Long Beach's worker leaders. When Prayssac and Sebag learned of a chance to come to San Francisco for a Center for Workers' Capital conference, they leapt at the chance to finally meet the workers of what, with a nod to the Eagles, they had taken to calling "Hotel California."²³ At the hotel, they were greeted with hugs from Juana Melara and her coworkers who took them on a tour—introducing them to its cooks, dishwashers, housekeepers and others, as well as its new general manager—while they pointed out the improvements they had won through their union contract.

That night, they continued their international exchange over dinner. At one point, everyone at the table took turns sharing a favourite memory. Melara recalled her disbelief when she learned she was going to go to France for Natixis's annual shareholders meeting, and the disbelief of her managers when she returned, a moment she described as a turning point in how workers at the hotel were treated. Prayssac recalled being brought to tears when he received a picture of the hotel's workers on the night of their victory holding a sign reading "thank you for your solidarity" in French, which he said he still keeps on his desk.

The Westin Long Beach campaign is what we might call a "green shoot." The campaign transformed the lives of the workers and others involved and was a critical step toward the transformation of Long Beach's hotel sector. But in the broader scheme of things the campaign's impact was relatively modest. Its greater import may lie in the lessons and possibilities it revealed for how financial sector actors at the commanding heights of our economy may be held accountable for the conditions at the bottom of the chains they sit atop.

²² *Id.* at 8.

²³ IRCANTEC and RAIR founder Jean-Pierre Costes, who played a leading role on the Natixis case, also planned to join the French delegation but health concerns prevented him from doing so.

UNIONS USE THE OECD GUIDELINES TO CHALLENGE GENDER-BASED VIOLENCE AND HARASSMENT IN THE GLOBAL OPERATIONS OF MCDONALD'S CORP

MARY JOYCE CARLSON

Global

On May 18, 2020, four trade union and union federations—The International Food, Agriculture, Hotel Restaurant, Catering, Tobacco, and Allied Workers' Association (IUF); their European affiliate EFFAT-IUF; the Service Employees International Union (SEIU) and União Geral dos Trabalhadores (UGT)—filed a “specific instance” complaint with the Netherlands NCP for the OECD against McDonald's, an international fast food company with nearly 40,000 stores, nearly 2 million workers, and annual revenue over \$20 Billion.¹ The complaining unions and union federations represent, among other sectors, service, retail, and restaurant workers, including fast food workers' internationally (IUF), in Europe (EFFAT-IUF), in Brazil (UGT), and in America and Canada (SEIU).² The complaint also alleges that two of McDonald's institutional investors, APG Asset Management and Norges Bank, failed to follow guidelines requiring due diligence before investing.³

The complaint alleges that throughout its global operations—in seven countries on four continents—McDonald's has completely failed to protect its workers from widespread gender-based violence and harassment.⁴ It argues that in doing so, McDonald's has failed to follow OECD guidelines on preventing gender-based violence and harassment. The unions' “specific instance” complaint includes story after story of sexual harassment in McDonald's stores across seven countries and four continents. In Brazil, a worker was regularly followed into the changing room by her manager—then told she

would need to perform sexual favours to get a promotion.⁵ In France, a manager installed a cellphone camera in the women's changing room, then fired a woman who complained.⁶ In the UK, a manager constantly asked a subordinate if she would sleep with him, and when she refused, exposed himself to her at work.⁷ In the US, “workers as young as sixteen accused supervisors of . . . attempted rape, indecent exposure, groping, and sexual offers.”⁸ The “specific instance” alleges that these are not isolated incidents, but reflect a pattern of harassment.⁹

“The complaint alleges that throughout its global operations—in seven countries on four continents—McDonald's has completely failed to protect its workers from widespread gender-based violence and harassment. It argues that in doing so, McDonald's has failed to follow OECD guidelines on preventing gender-based violence and harassment.”

The complaint details how prior efforts to hold McDonald's accountable through national channels have proven ineffective. Twenty-three separate complaints of harassment filed with local authorities in Brazil,¹⁰ fifteen in Colombia,¹¹ and more than twenty-five in the United States have all failed to produce a company-wide change.¹² It describes how a culture of sexual harassment has pervaded the company's highest levels—a \$42 million buyout of CEO Steve Easterbrook

¹ Specific Instance: Gender-Based Violence and Harassment in Global Operations of McDonald's Corp. and Related Due Diligence by Investors APG Asset Management and Norges Bank, at 1, National Contact Point (NCP) (May 18, 2020) [hereinafter “Specific Instance”]

² *Id.* at 2.

³ *Id.* at 2, 21-26.

⁴ *Id.*

⁵ *Id.* at 15.

⁶ *Id.* at 17.

⁷ *Id.* at 20.

⁸ *Id.* at 8-9.

⁹ *Id.* at 9.

¹⁰ *Id.* at 14.

¹¹ *Id.* at 21.

¹² *Id.* at 8, 13.

after he was discovered in a sexual relationship with a subordinate; and a corporate “culture of drinking, partying, and sexual dalliance . . . in which women employees in subordinate positions were expected to play along.”¹³

The “specific instance” complaint to the OECD regarding gender-based violence and harassment at McDonald’s



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The Organisation for Economic Cooperation and Development (OECD) is an international organisation comprised of forty-two member states, including most European countries, the United States, and countries in Asia and Oceania.¹⁴ A major role of the OECD is developing guidelines for multinational employers outlining “principles and standards for responsible business conduct in a global context.”¹⁵ Relevant to this complaint, the OECD has guidelines on human rights that bar gender-based violence, sexual harassment, and that require workplaces to be safe.¹⁶ It also has guidelines that explicitly call for non-discrimination in employment, and bargaining between employers and their workers.¹⁷ The OECD guidelines also explicitly incorporate International Labour Organisation Conventions 111 and 190, barring sexual harassment and gender based violence in the workplace.¹⁸ Finally, the OECD offers separate guidelines for investors in multinational enterprises, encouraging them to “identify an assess actual and potential adverse impacts” of their investments, and “[c]ease, prevent and mitigate” them.¹⁹

To encourage compliance with these guidelines, OECD member nations are asked to designate National Contact Points (NCPs) within their own government.²⁰ Government agencies designated as NCPs are responsible for promoting the guidelines to the local business, union, and NGO community in their respective countries.²¹ A major role of NCPs is receiving, investigating, and trying to resolve “specific instance” complaints—complaints alleging that a multinational enterprise is not following these guidelines.²² Generally, where a “specific instance” complaint describes

¹³ *Id.* at 8.

¹⁴ ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), <https://www.oecd.org/about/> (last visited Sept. 14, 2020).

¹⁵ OECD, *OECD Guidelines for Multinational Enterprises* (2011) [hereinafter *OECD Guidelines*].

¹⁶ Specific Instance, *supra* note 1, at 3, *OECD Guidelines*, at Chapter IV (Guidelines Chapter IV on Human Rights, that incorporate: International Bill of Human Rights, consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights).

¹⁷ Specific Instance, *supra* note 1, at 3.

¹⁸ Specific Instance, *supra* note 1, at 3-4.

¹⁹ *Id.* (citing sections of the OECD Due Diligence Guidance for Responsible Business Conduct).

²⁰ *OECD Guidelines*, *supra* note 15 at 68.

²¹ *Id.*

²² *Id.*

issues in a single country, that country’s NCP is expected to receive the complaint, investigate it, and try and resolve it.²³ However, where a “specific instance” describes issues in multiple countries, a lead NCP must be identified.²⁴ A number of factors are to be considered, but generally, a lead NCP should be one that is best suited to “reach . . . resolution of the issues and further . . . the effectiveness of the Guidelines.”²⁵

Allegations against McDonald’s in the “specific instance”

The unions’ “specific instance” complaint describes how McDonald’s has repeatedly failed to protect female workers, some as young as sixteen, from sexual harassment and gender-based violence at all levels of its organisation. The “specific instance” begins by highlighting a culture of sexual harassment at the company’s American headquarters. It then details reports and complaints of sexual harassment at McDonald’s stores in seven countries. Finally, it discusses McDonald’s efforts, helped by the Trump administration, to avoid either accountability for sexual harassment, or a process through which workers could bargain over workplace issues. The complaint alleges that this conduct violates OECD guidelines designed to combat gender-based violence and harassment in the workplace.

“The OECD guidelines also explicitly incorporate International Labour Organisation Conventions 111 and 190, barring sexual harassment and gender based violence in the workplace.”

First, the complaint describes how sexual harassment is an issue at the very top of McDonald’s corporate structure. In 2019, McDonald’s CEO Steve Easterbrook was removed because he was having a sexual relationship with a subordinate employee.²⁶ The company stated that Mr. Easterbrook was not terminated “for-cause,” and he received a \$42 million severance package.²⁷ After Mr. Easterbrook’s removal, an internal report found that McDonald’s American headquarters had “a culture of drinking, partying, and sexual dalliance between top executive and subordinates in which women employees in subordinate positions were expected to play along.”²⁸

Second, the complaint describes in detail the sexual harassment and gender-based violence

²³ Coordination between OECD National Contact Points during Specific Instance Handling, 4, 6 (2019).

²⁴ *Id.* at 8.

²⁵ *Id.*

²⁶ Specific Instance, *supra* note 1 at 7.

²⁷ *Id.* at 7-8.

²⁸ *Id.* at 8.

experience by McDonald's workers in seven countries: Australia, Brazil, Chile, Colombia, France, the United Kingdom, and the United States. In Australia, the complaint describes a survey conducted by Australia's Human Rights Commission. The survey found that workers in the retail sector regularly experience sexually suggestive comments and jokes, intrusive questions, leering, unwelcome touching, inappropriate contact, being followed, and repeated invitations for dates.²⁹ In the UK, another "comprehensive survey of McDonald's employees . . . told of managers making repeated sexual comments, brushing up against staff and discussing sexual desires, abusing their access to workers' contact details in order to send texts and explicit photos, and offering better hours and promotion in return for sex."³⁰ In Colombia, researchers have identified fifteen legal cases alleging sexual harassment against McDonald's.³¹ In Chile, researches have received anecdotal reports of wide-spread harassment, and are attempting to identify more through the labour ministry.³² In Brazil, the complaint describes twenty-three legal actions brought by McDonald's workers alleging sexual harassment and discrimination.³³ One female worker described being repeatedly stroked and followed into the bathroom by her manager.³⁴ Another describes being followed around the store by a manager saying sexual things, like that he wanted to kiss her, describing her body, and asking her out.³⁵ She described it as extremely humiliating.³⁶ A third worker described a coworker fabricating, through photo editing, sexual and nude images of her, and sharing them around the workplace and on social media, including with her managers, who encouraged and "reveled in it."³⁷

In France, the complaint describes multiple accounts of sexual harassment at McDonald's, many identified by a local NGO. In one case, four women described being sexually harassed by a single manager over many years at a Paris McDonald's.³⁸ He repeatedly—explicitly—said he hoped to make the female employees cry through his comments about their bodies, questions about their sexual preferences, grabbing and pinching them, and encouraging other male colleagues to treat them similarly.³⁹ When the women complained, their complaints were dismissed, and he only grew more brazen in his abuse.⁴⁰

Finally, in the United States, in May 2019 alone, twenty-five women filed sexual harassment complaints against McDonald's with the US Equal Employment Op-

portunity Commission.⁴¹ In these cases, many involving teenage girls working under older men, workers described being groped, physically assaulted, verbally taunted and insulted, and almost raped.⁴² Additionally, women repeatedly described being retaliated against for speaking up.⁴³ In one case: "a 16-year-old harassed by her manager complained using the company's internal procedures. Both she and her mother, who also worked at McDonald's, suffered demotions and loss of pay and eventual job loss."⁴⁴ Most recently, in April 2020, two workers filed a class action against McDonald's, alleging "repeated . . . sexual harassment and physical assault . . . at a company-owned McDonald's in Sanford, Florida, and that McDonald's is not training store managers or adequately punishing serial harassers."⁴⁵

Third, the complaint alleges that McDonald's, with the assistance of the Trump administration, has avoided taking any responsibility for sexual harassment at its stores. It documents how McDonald's has both refused to expand sexual harassment training to its franchise stores—meaning ninety percent of its stores have no mandatory sexual harassment training—and refusing to engage with its workers on the sexual harassment training it claims to be doing at the remaining stores.⁴⁶ It also documents how the Trump administration has refused to enforcement existing workplace standards against McDonald's, including laws that prohibit sexual harassment,⁴⁷ and laws that would require McDonald's to meet with, and negotiate with, its workers.⁴⁸

Allegations regarding institutional investors APG and Norges

The complaint also alleges that two of McDonald's investors, APG Asset Management and Norges Bank, failed to meet OECD due diligence guidelines. APG Asset Management is the largest pension capital investor in the Netherlands and one of the largest in the world.⁴⁹ Norges Bank is the central bank of Norway.⁵⁰ While minority shareholders, together, they represent one of the largest shares of investment in McDonald's—\$1.7 Billion.⁵¹ The OECD due diligence guidelines require investors, even minority investors, to investigate potential abuses in companies they invest in, and use their leverage to prevent or mitigate adverse impacts.⁵² This

²⁹ *Id.* at 14.

³⁰ *Id.* at 20.

³¹ *Id.* at 21.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Specific Instance, *supra* note 1 at 14-15.

³⁸ *Id.* at 18.

³⁹ *Id.* at 17-20.

⁴⁰ *Id.* at 17.

⁴¹ *Id.* at 8.

⁴² *Id.* at 9.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Specific Instance, *supra* note 1 at 10-11.

⁴⁷ *Id.* at 13.

⁴⁸ *Id.* at 12.

⁴⁹ *Id.* at 23.

⁵⁰ *Id.* at 24.

⁵¹ *Id.* at 22 ("Norges Bank is the 8th-largest single investor in McDonald's, behind institutional investor that include Vanguard, Black Rock and Fidelity investments").

⁵² Specific Instance, *supra* note 1 at 22 (citing OECD, "Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises" (2017)).

due diligence includes engaging with stakeholders, including workers, that are directly affected.⁵³ Additionally, the complaint notes that both companies have their own stated commitments to due diligence and socially responsible investing.⁵⁴ The unions argue that, at minimum, the publicity around sexual harassment at McDonald's should have notified APG and Norges of the issue.⁵⁵ However, the complaint notes that the unions do not hold APG or Norges responsible, but merely believe that, given their commitments to social responsibility, it would benefit workers for APG and Norges to participate in any NCP negotiations.⁵⁶

The Netherlands NCP should investigate the complaint and convene the parties for negotiation.

The Netherlands NCP should accept the "specific instance" complaint and convene the parties for negotiations because (A) the "specific instance" complaint describes clear failures to meet OECD guidelines on gender based violence and harassment by McDonald's and due diligence by institutional investors; and (B) the Netherlands NCP is the appropriate NCP to investigate and try to resolve these issues.

The "specific instance" complaint describes clear failures to meet OECD guidelines on gender-based violence and harassment by McDonald's, and a lack of due diligence by institutional investors.

McDonald's has clearly failed to meet OECD guidelines on gender-based violence and harassment, and APG and Norges Bank have failed to exercise due diligence. OECD guidelines clearly prohibit managers from mistreating female employees because they are women, and threatening women with gendered violence, including rape and other forms of physical assault.⁵⁷ To identify just a few examples, there is no interpretation of these guidelines that would allow a sixteen year old and her mother to be fired for reporting physical sexual harassment,⁵⁸ or that would allow an employer to condition a promotion on sexual favours.⁵⁹ Likewise, the broader OECD guidelines clearly require employers to be open to dialogue and bargaining with their workers.⁶⁰ Among other things, McDonald's insistence that it has no legal obligations to workers in its franchise stores, let alone to bargain with them,⁶¹ clearly fails to meet these guidelines. Finally, insti-

tutional investors are required to investigate the companies they invest in and attempt to remedy issues they find.⁶² Given the publicity around sexual harassment at McDonald's,⁶³ APG and Norges cannot say they did not know about it. Yet, they have done nothing to remedy it.⁶⁴ Thus, the "specific instance" describes clear shortcomings on the part of McDonald's, APG, and Norges.

The Netherlands NCP is the appropriate NCP to investigate and try to resolve the issues in the unions' "specific instance."

The Netherlands NCP is the appropriate lead NCP to investigate and try and resolve the issues in the unions' "specific instance," and should convene the parties for negotiations. Where a "specific instance" describes conditions that have occurred in multiple countries, but arise from the same issues, the OECD guidelines recommend a multi-NCP investigation.⁶⁵ In multi-NCP investigations, a single NCP becomes the lead NCP. There is no bright-line rule for which NCP should be designated a lead NCP. However, factors to consider are: where the complaint was filed, where the multinational enterprise is headquartered, and whether any NCPs that could be designated as lead NCP lack the capacity or willingness to resolve the specific instance.⁶⁶ Most importantly, a lead NCP should be one that is best suited to "reach . . . resolution of the issues and further . . . the effectiveness of the Guidelines."⁶⁷

Here, many of the instances of sexual harassment have occurred in Europe, Europe is McDonald's most profitable market, and McDonald's operations in Europe are coordinated in part out of the Netherlands.⁶⁸ The Netherlands NCP has a history of facilitating dialogue between employers and workers,⁶⁹ and McDonald's European operations have a history of bargaining with unions.⁷⁰ What's more, one of the institutional investors is headquartered in the Netherlands, and another is headquartered in Europe.⁷¹ The only other possibly appropriate lead NCP is the United States NCP, as McDonald's is headquartered in the United States, and much of the sexual harassment occurred there. However, the US NCP is part of the same government that refuses to hold McDonald's accountable for sexual ha-

⁶² OECD, *Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises* (2017), <https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf>

⁶³ Specific Instance, *supra* note 1 at 26-27.

⁶⁴ See *id.* at 27.

⁶⁵ Coordination between OECD National Contact Points during Specific Instance Handling 8 (2019).

⁶⁶ See *id.* at 15-16.

⁶⁷ *Id.* at 8.

⁶⁸ Specific Instance, *supra* note 1 at 4.

⁶⁹ *Id.* at 8.

⁷⁰ *Id.* at 7.

⁷¹ Specific Instance, *supra* note 1 at 2.

⁵³ Specific Instance, *supra* note 1 at 25-26.

⁵⁴ *Id.* at 24-25, 26-27.

⁵⁵ *Id.* at 26-27.

⁵⁶ *Id.* at 27.

⁵⁷ OECD Guidelines, *supra* note 15 at Chapter IV.

⁵⁸ Specific Instance, *supra* note 1 at 9.

⁵⁹ *Id.* at 8.

⁶⁰ OECD Guidelines, *supra* note 15 at Chapter V.

⁶¹ Specific Instance, *supra* note 1, 12-13.

harassment under its own laws.⁷² Likewise, McDonald's US leadership has categorically refused to bargain with its own employees,⁷³ *let alone acknowledge them as employees*,⁷⁴ and excused sexual harassment in its own ranks.⁷⁵ Thus, the Netherlands NCP is best suited to accept the unions' "specific instance" complaint, lead the investigation into McDonald's failure to meet OECD standards on gender-based violence and harassment, and convene the parties for negotiations on how to resolve the issues.

According to the procedural guidelines of the Dutch NCP, it should have performed an initial assessment "to determine whether further consideration by the NCP is warranted" within three months of receipt "wherever possible".⁷⁶ The purpose of this assessment is to determine whether, *inter alia*, the Dutch NCP is the appropriate forum, whether the issue is "material and substantiated". On 19 November 2020, the Dutch NCP replied to inform the unions that it had accepted the specific instance and that the matter would thereafter proceed as three parallel yet coordinated specific instances. The NCPs of the US, Norway and the Netherlands will each lead as to the issues arising within their respective jurisdictions, with the Dutch NCP also playing a coordinating role.

Conclusion

Despite several efforts to hold McDonald's accountable at the national level for the rampant gender-based violence, the practice persists throughout its global operations – as meticulously documented in the unions' "specific instance." By failing to address this in a systemic and meaningful way, McDonald's and its institutional investors have fallen short of the OECD Guidelines for Multinational Enterprises. While this is not an issue that can or will be solved by the mediation of the Dutch NCP, it nevertheless could provide a meaningful forum for McDonald's workers and their representatives to seek commitments from the company that, if adopted, could start to put it on a path towards compliance throughout its operations. It is therefore critical that the NCP accept the "specific instance," investigate its allegations, and convene McDonald's, the complaining unions, and the institutional investors, for negotiations on how to resolve the issue and protect their workers.

⁷² *Id.* at 12; see U.S. NATIONAL CONTACT POINT FOR THE OECD GUIDELINES ON MULTINATIONAL ENTERPRISES, U.S. DEPT. STATE, <https://www.state.gov/u-s-national-contact-point-for-the-oecd-guidelines-for-multinational-enterprises/> (last visited September 14 2020).

⁷³ Specific Instance *supra* note 1 at 7.

⁷⁴ *Id.*

⁷⁵ *Id.* at 7-8.

⁷⁶ Specific instance procedure - Dutch National Contact Point OECD Guidelines for mne's, <https://www.oecdguidelines.nl/notifications/documents/publication/2018/12/05/dutch-specific-instance-procedure> (last visited November 11, 2020).

The International Lawyers Assisting Workers (ILAW) Network is a membership organization composed of trade union and workers' rights lawyers worldwide. The core mission of the ILAW Network is to unite legal practitioners and scholars in an exchange of information, ideas and strategies in order to best promote and defend the rights and interests of workers and their organizations wherever they may be.