



INTERNATIONAL  
LAWYERS ASSISTING  
WORKERS NETWORK



# Fighting for Lives and Livelihoods:

Workers, the Pandemic, and the Law

August 2023

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Workers wait in line behind barbed wire to be tested for COVID-19 after their hostels are placed under lock-down. November 19, 2020. Selangor, Malaysia.

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**‘Power concedes nothing  
without a demand. It never  
has and it never will.’**

- Frederick Douglass\*

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\* Douglass, F. 'No Progress Without Struggle'. Available from *The W.E.B. DuBois Learning Center*, <http://www.duboisc.org/html/BlackStruggle.html>.  
Quoted in: Frederick Douglass, "Frederick Douglass Declares There Is "No Progress Without Struggle"," *SHEC: Resources for Teachers*, accessed November 1, 2022, <https://shec.ashp.cuny.edu/items/show/1245>.

# Fighting for Lives and Livelihoods:

## Workers, the Pandemic, and the Law

Jason Moyer-Lee<sup>1</sup>

It was mid-December when Wei Guixian got sick at work. Very sick. This is perhaps unsurprising; the 57-year-old woman sold shrimp<sup>2</sup> at a garbage-strewn, poorly-ventilated market without proper sanitation.<sup>3</sup> At other stalls, vendors sold live, wild animals, waiting in cages to be slaughtered on site.<sup>4</sup> Just months earlier the building had caught fire.<sup>5</sup> The people who worked next to Ms. Wei – on both sides – would also become ill, as would several other vendors. At first, she thought it was just a cold, so she got some inexpensive medicine from a clinic and then went back to work. When a couple days later she did not feel better, she went to a hospital close to the market. The doctor there gave her more medicine but to no avail. Within a week she was able to work no more; a couple days later she was unconscious. She remembers her daughters crying before

she blacked out.<sup>6</sup> As she later recounted, the older daughter ‘would touch me every so often, afraid I would pass away.’<sup>7</sup> When she came to, Dr. Kong, who was attending to her, told her that two of her co-workers at the market had also been hospitalised. When the doctors tried to transfer her to another hospital, better equipped to deal with her type of illness, she refused, fearing it was a ploy to get rid of what they deemed a dirty market worker. By the time the hospital discharged Ms. Wei she had racked up around US\$ 10,000 worth of medical bills. And she wasn’t able to go back to work because the government had closed down the market. Within days her entire city was locked down.<sup>8</sup> Ms. Wei was the first known person to get Covid-19.<sup>9</sup> With a failure of occupational safety and health, the pandemic had begun.<sup>10</sup>

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<sup>2</sup> Page, J., Fan, W. & Khan, N. (2020). ‘How It All Started: China’s Early Coronavirus Missteps’. In: *The Wall Street Journal*. 6 March. <https://www.wsj.com/articles/how-it-all-started-chinas-early-coronavirus-missteps-11583508932>. [Accessed 17 February 2023].

<sup>3</sup> Buckley, C. & Lee Myers, S. (2020). ‘As New Coronavirus Spread, China’s Old Habits Delayed Fight’. In: *The New York Times*. 7 February. <https://www.nytimes.com/2020/02/01/world/asia/china-coronavirus.html>. [Accessed 17 February 2023].

<sup>4</sup> Doucleff, M. (2022). ‘Newly published evidence points to Wuhan seafood market as pandemic origin point’. In: *NPR*. 27 July (updated). <https://www.npr.org/sections/goatsandsoda/2022/03/03/1083751272/str...vidence-points-to-seafood-market-in-wuhan-as-pandemic-origin-point>. [Accessed 15 February 2023].

<sup>5</sup> Law, E. (2020). ‘Everything is going on normally’ – Wuhan’s curious nonchalance to virus outbreak’. In: *Straits Times*. 11 January. <https://www.straitstimes.com/asia/east-asia/wuhan-grapples-with-mystery-pneumonia>. [Accessed 17 February 2023].

<sup>6</sup> Page, J., Fan, W. & Khan, N. (2020). ‘How It All Started: China’s Early Coronavirus Missteps’. In: *The Wall Street Journal*. 6 March. <https://www.wsj.com/articles/how-it-all-started-chinas-early-coronavirus-missteps-11583508932>. [Accessed 17 February 2023].

<sup>7</sup> Quoted in: Page, J., Fan, W. & Khan, N. (2020). ‘How It All Started: China’s Early Coronavirus Missteps’. In: *The Wall Street Journal*. 6 March. <https://www.wsj.com/articles/how-it-all-started-chinas-early-coronavirus-missteps-11583508932>. [Accessed 17 February 2023].

<sup>8</sup> Page, J., Fan, W. & Khan, N. (2020). ‘How It All Started: China’s Early Coronavirus Missteps’. In: *The Wall Street Journal*. 6 March. <https://www.wsj.com/articles/how-it-all-started-chinas-early-coronavirus-missteps-11583508932>. [Accessed 17 February 2023].

<sup>9</sup> Doucleff, M. (2022). ‘Newly published evidence points to Wuhan seafood market as pandemic origin point’. In: *NPR*. 27 July (updated). <https://www.npr.org/sections/goatsandsoda/2022/03/03/1083751272/str...vidence-points-to-seafood-market-in-wuhan-as-pandemic-origin-point>. [Accessed 15 February 2023].

<sup>10</sup> Although the pandemic started over three years ago, scientists have still not been able to identify the origin of the SARS-CoV-2 virus – which causes Covid-19 – with certainty. An abundance of evidence suggests an origin story similar to that of the Severe Acute Respiratory Syndrome (SARS), namely that the virus jumped from wild animals to humans and then spread. The evidence also points to this occurring at stalls in the southwestern section of the Huanan Seafood Wholesale Market. According to this story, two distinct lineages of the novel coronavirus jumped to humans within a few weeks of each other, in late November and/or December 2019. And when Ms. Wei was infected, there were estimated to be around 10 people already infected yet un-

As will be explored in the pages that follow, OSH failures around the world during the Covid-19 pandemic exposed countless other workers to unnecessary illness and death. And the economic consequences of the pandemic – and measures to control it – led to the destitution of worker livelihoods. As will be set out in further detail at the end of the Introduction, this essay is about the fight that workers have had to wage to defend their lives and livelihoods, and – in particular – how they used the law to do it.

## Death and Destruction

As the Huanan Seafood Wholesale Market vendors and their contacts started arriving in hospital, healthcare workers then had to confront this viral occupational hazard. Indeed, in one case a sole patient is believed to have infected 14 medical workers.<sup>11</sup> As in these early days next to nothing was known about this mysterious virus, doctors scrambled to understand what it was while trying to keep each other safe. At the end of December, Dr. Li Wenliang at the Wuhan Central hospital, messaged a group of his medical-school classmates to warn them, saying ‘7 [Severe Acute Respiratory Syndrome (SARS)] cases confirmed at Hua’nan Seafood Market’ and telling them patients had been quarantined. ‘Don’t leak it,’ he cautioned. ‘Tell your family and relatives to take care.’ Similarly, Dr. Ai Fen, the head of Wuhan Central’s emergency department, ordered her staff to wear masks as a precautionary measure.<sup>12</sup> And in a foreshadowing of similar treatment of healthcare workers around the world in the years to come,

identified. For more on this, see: Doucleff, M. (2022). ‘Newly published evidence points to Wuhan seafood market as pandemic origin point’. In: *NPR*. 27 July (updated). <https://www.npr.org/sections/goatsandso-da/2022/03/03/1083751272/str...vidence-points-to-seafood-market-in-wuhan-as-pandemic-origin-point>. [Accessed 15 February 2023]. However, the most prominent alternative theory of the virus’s origin is that it started by accident – or for the more eccentric thinkers out there, by design – in a leak from the Wuhan Institute of Virology, by scientists studying coronaviruses; Lenharo, M. & Wolf, L. (2023). ‘US COVID-origins hearing renews debate over lab-leak hypothesis’. In: *Nature*. 9 March. <https://www.nature.com/articles/d41586-023-00701-1>. [Accessed 11 March 2023]. Whether the virus infected the first human at an unhygienic market or in a lab with insufficient biosafety protocols, insufficient OSH measures were still the issue.

<sup>11</sup> Page, J., Fan, W. & Khan, N. (2020). ‘How It All Started: China’s Early Coronavirus Missteps’. In: *The Wall Street Journal*. 6 March. <https://www.wsj.com/articles/how-it-all-started-chinas-early-coronavirus-missteps-11583508932>. [Accessed 17 February 2023].

<sup>12</sup> Page, J., Fan, W. & Khan, N. (2020). ‘How It All Started: China’s Early Coronavirus Missteps’. In: *The Wall Street Journal*. 6 March. <https://www.wsj.com/articles/how-it-all-started-chinas-early-coronavirus-missteps-11583508932>. [Accessed 17 February 2023].

these workers were silenced and unsupported. The police forced Dr. Li to sign a statement in which he admitted to ‘illegal behaviour’.<sup>13</sup> The next month he died from Covid. And the hospital’s discipline department reprimanded Dr. Ai for ‘spreading rumours’, causing panic, and damaging the stability of the city. The hospital also prohibited staff from talking about the disease in public.<sup>14</sup>

From these first two workplace outbreaks, the virus then spread like wildfire. By mid-January 2020, Thailand had reported the first confirmed Covid-19 case outside of China<sup>15</sup> and by early March the virus had infected over 100,000 people around the world.<sup>16</sup> In the months and years that followed the world witnessed scenes reminiscent of science fiction horror movies as the disease destroyed lives. Patients gasping for breath as they desperately tried to fill their lungs with oxygen<sup>17</sup> and hospitals having to set up makeshift tents outside as they were too full to provide a bed for every sick person.<sup>18</sup> ‘Sick patients are just waiting for new deaths so they can even have a

<sup>13</sup> Buckley, C. & Lee Myers, S. (2020). ‘As New Coronavirus Spread, China’s Old Habits Delayed Fight’. In: *The New York Times*. 7 February. <https://www.nytimes.com/2020/02/01/world/asia/china-coronavirus.html>. [Accessed 17 February 2023].

<sup>14</sup> Page, J., Fan, W. & Khan, N. (2020). ‘How It All Started: China’s Early Coronavirus Missteps’. In: *The Wall Street Journal*. 6 March. <https://www.wsj.com/articles/how-it-all-started-chinas-early-coronavirus-missteps-11583508932>. [Accessed 17 February 2023].

<sup>15</sup> Buckley, C. & Lee Myers, S. (2020). ‘As New Coronavirus Spread, China’s Old Habits Delayed Fight’. In: *The New York Times*. 7 February. <https://www.nytimes.com/2020/02/01/world/asia/china-coronavirus.html>. [Accessed 17 February 2023].

<sup>16</sup> Page, J., Fan, W. & Khan, N. (2020). ‘How It All Started: China’s Early Coronavirus Missteps’. In: *The Wall Street Journal*. 6 March. <https://www.wsj.com/articles/how-it-all-started-chinas-early-coronavirus-missteps-11583508932>. [Accessed 17 February 2023]. The World Health Organization declared Covid-19 to be a public health emergency of international concern (PHEIC) on 30 January 2020 and a pandemic on 11 March 2020; see: Fagbayibo, B. & Ndidiama Owie, U. (2021). ‘Crisis as Opportunity: Exploring the African Union’s Response to COVID-19 and the Implications for its Aspirational Supranational Powers’. In: *Journal of African Law*, Vol. 65, No. S2: 181–208. Citation at pp181–182.

<sup>17</sup> For example, see: ICU Nurse. (2021). ‘It’s bizarre to see a Covid patient deny Covid exists while gasping for breath’. In: *The Guardian*. 17 October. <https://www.theguardian.com/commentisfree/2021/oct/18/its-bizarre-to-see-a-covid-patient-deny-covid-exists-while-gasping-for-breath>. [Accessed 18 February 2023].

<sup>18</sup> For example, see: Hope. (2021). ‘Hospitals are overflowing as second COVID-19 wave worsens in Indonesia, yet to reach its peak’. In: *Relief Web*. 8 July. <https://reliefweb.int/report/indonesia/hospitals-are-overflowing-second-covid-19-wave-worsens-indonesia-yet-reach-its-peak>. [Accessed 18 February 2023].

chance of making it inside a hospital,' reported one humanitarian worker from Indonesia.<sup>19</sup> And the bodies piled high. New York City dug up trenches on Hart Island and buried bodies in mass graves.<sup>20</sup> At one point, newspapers reported the city might even resort to burying the dead in Central Park (the city later clarified it would not).<sup>21</sup> And in a city in Brazil's Amazon region, hospitals had to store bodies in refrigerated containers as the cemeteries couldn't bury people as fast as they were dying.<sup>22</sup> And in India, as the writer Arundhati Roy described it:

Crematoriums in Delhi have run out of firewood. The forest department has had to give special permission for the felling of city trees. Desperate people are using whatever kindling they can find. Parks and car parks are being turned into cremation grounds.<sup>23</sup>

In the first two years alone, the pandemic killed an estimated 15 million people.<sup>24</sup> And for those patients who sur-

<sup>19</sup> Quoted in: Hope. (2021). 'Hospitals are overflowing as second COVID-19 wave worsens in Indonesia, yet to reach its peak'. In: *Relief Web*. 8 July. <https://reliefweb.int/report/indonesia/hospitals-are-overflowing-second-covid-19-wave-worsens-indonesia-yet-reach-its-peak>. [Accessed 18 February 2023].

<sup>20</sup> Hennigan, W.J. (2020). 'Lost in the Pandemic: Inside New York City's Mass Graveyard on Hart Island'. In: *Time*. 18 November. <https://time.com/5913151/hart-island-covid/>. [Accessed 18 February 2023].

<sup>21</sup> Gabbatt, A. (2020). 'Why coronavirus burials are just the latest chapter in New York's plague history'. In: *The Guardian*. 12 April. <https://www.theguardian.com/us-news/2020/apr/12/new-york-city-burials-parks-coronavirus-plague>. [Accessed 18 February 2023].

<sup>22</sup> Reuters. (2021). 'Hospitals in Peru and Bolivia overflow as COVID-19 cases rise'. In: *Al Jazeera*. 6 January. <https://www.aljazeera.com/news/2021/1/6/hospitals-in-peru-and-bolivia-overflow-as-covid-19-cases-rise>. [Accessed 18 February 2023].

<sup>23</sup> Roy, A. (2021). 'We are witnessing a crime against humanity': Arundhati Roy on India's Covid catastrophe'. In: *The Guardian*. 28 April. <https://www.theguardian.com/news/2021/apr/28/crime-against-humanity-arundhati-roy-india-covid-catastrophe>. [Accessed 18 February 2023].

<sup>24</sup> This is based on the World Health Organization's estimated number of 'excess deaths', meaning an estimated 15 million more people died than otherwise would have. Some of these people were killed by the indirect effects of the pandemic. See: Mueller, B. & Nolen, S. (2022). 'W.H.O. Finds Covid Deaths Vastly Higher'. In: *The New York Times*. 6 May. At ppA1 & A13. The W.H.O. estimate was important (and in some cases contentious) because many countries had undercounted deaths caused by the pandemic. Indeed, the W.H.O. has suggested that 90% of deaths in Africa and 60% of deaths globally are not registered. See: Nolen, S. & Deep Singh, K. (2022). 'Virus Death Toll 9 Million Higher'. In: *The New York Times*. 17 April. At pp1 and 12.

vived, they were not necessarily able to return to healthy life. Tens of millions have been left with 'long covid',<sup>25</sup> i.e., a whole host lingering symptoms ranging from fatigue and shortness of breath,<sup>26</sup> to cognitive decline<sup>27</sup> and mental health issues,<sup>28</sup> to erectile dysfunction.<sup>29</sup>

The pandemic did not affect all people equally. Beyond the medical/biological factors such as age and pre-existing conditions, social factors such as poverty, inequality, and systemic racism also increased the risk that someone would become very ill or die from Covid-19. For example, in the United States, Black people – after adjusting for age – are 2.1 times as likely to be hospitalised, and 1.6 times as likely to die, from Covid-19 as white people.<sup>30</sup> Similar-

<sup>25</sup> Adhanom Ghebreyesus, T. (2022). 'The data is clear: long Covid is devastating people's lives and livelihoods'. In: *The Guardian*. 12 October. <https://www.theguardian.com/society/2022/oct/12/long-covid-who-director-general-oped-tedros-adhanom-ghebreyesus>. [Accessed 17 October 2022].

<sup>26</sup> Gregory, A. (2022). 'WHO chief urges immediate action to tackle 'devastating' long Covid'. In: *The Guardian*. 12 October. <https://www.theguardian.com/society/2022/oct/12/long-covid-who-tedros-adhanom-ghebreyesus>. [Accessed 14 October 2022].

<sup>27</sup> As the *Financial Times* reported in May 2022:

The cognitive impairment caused by severe Covid-19 is comparable with the decline that takes place between the ages of 50 and 70, according to a recent study by Cambridge university and Imperial College London.

Researchers said the degeneration was equivalent to losing 10 IQ points.

See: Neville, S., Barnes, O. & Bott, I. (2022). 'Covid-19's effect on brain raises fears of long-term global health burden'. In: *Financial Times*. 19 May. At p3.

<sup>28</sup> Schreiber, M. (2022). 'Covid infection increases risk of mental health disorders, study finds'. In: *The Guardian*. 18 February. <https://www.theguardian.com/world/2022/feb/18/covid-infection-increases-risk-mental-health-disorder-study>. [Accessed 21 February 2022].

<sup>29</sup> See: Caryn Rabin, R. (2022). 'Global Studies Tie Covid To Erectile Dysfunction'. In: *The New York Times*. 6 May. At pA18.

<sup>30</sup> CDC. (2022). 'Risk for COVID-19 Infection, Hospitalization, and Death by Race/Ethnicity'. In: *CDC*. 28 December (updated). <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html>. [Accessed 18 February 2023]. For more on race/ethnicity and Covid-19 in the US, see: Johnson, A. & Keating, D. (2022). 'Whites now more likely to die from covid than Blacks: Why the pandemic shifted'. In: *The Washington Post*. 19 October. <https://www.washingtonpost.com/health/2022/10/19/covid-deaths-us-race/>. [Accessed 12 November 2022]. The widespread use of pulse oximeters – used to measure oxygen levels – provides but one instance of systemic racism in US healthcare which has affected Covid-19 outcomes. Studies have indicated that pulse oximeters

ly, in Aotearoa New Zealand, Covid-19 disproportionately devastated the Māori people. As Judge Damian Hohepa Stone, of the Waitangi Tribunal,<sup>31</sup> wrote to then Covid-19 Minister Christopher Hipkins<sup>32</sup>:

As at 13 December 2021, although Maaori comprised 15.6 per cent of the population, Maaori comprised over 50 per cent of the Delta cases, 38.6 per cent of Delta hospitalisations, and 45 per cent of associated deaths. The statistics speak for themselves.<sup>33</sup>

The pandemic has also brought out people's basest impulses. In Guangdong province, China, people subjected Africans to racist attacks, while in the US hate crimes against Asian Americans surged.<sup>34</sup> Also in the US, one study even showed that white people who were aware of the racial disparities in Covid outcomes were less likely to support public health measures or take precautions themselves.<sup>35</sup>

In the Global South, under-resourced healthcare systems, inadequate diagnostic tools, and unequal access to vaccines and treatments, have disproportionately hampered

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overestimate oxygen levels in people with darker skin, leading in some cases to white people being more likely to receive supplemental oxygen than people of colour. On this, see: Howard, J. (2022). 'Scientists are searching for solutions after studies show pulse oximeters don't work as well for people of color'. In: *CNN*. 11 July. <https://edition.cnn.com/2022/07/11/health/pulse-oximeters-dark-skin-study/index.html>. [Accessed 13 July 2022].

<sup>31</sup> The Waitangi Tribunal is a standing commission of inquiry which investigates alleged breaches by the New Zealand government of the Treaty of Waitangi, which was made between the British Crown and the Māori people in 1840. See: New Zealand Government. (2022; last updated). 'Waitangi Tribunal'. 12 September (last updated). <https://waitangitribunal.govt.nz>. [Accessed 18 February 2023].

<sup>32</sup> At the time of writing, Christopher Hipkins was Prime Minister.

<sup>33</sup> *Haumaru: The COVID-19 Priority Report*, [2021] Wai 2575 at pXVIII.

<sup>34</sup> Fagbayibo, B. & Ndidiamaka Owie, U. (2021). 'Crisis as Opportunity: Exploring the African Union's Response to COVID-19 and the Implications for its Aspirational Supranational Powers'. In: *Journal of African Law*, Vol. 65, No. S2: 181-208. Citation at p193; and Associated Press. (2021). 'More Than 9,000 Anti-Asian Incidents Have Been Reported Since The Pandemic Began'. In: *NPR*. 12 August. <https://www.npr.org/2021/08/12/1027236499/anti-asian-hate-crimes-assaults-pandemic-incidents-aapi>. [Accessed 21 February 2023].

<sup>35</sup> Skinner-Dorkenoo, A.L. et al. (2022). 'Highlighting COVID-19 racial disparities can reduce support for safety precautions among White U.S. residents'. In: *Social Science & Medicine*, Vol. 301 (May). <https://doi.org/10.1016/j.socscimed.2022.114951>.

countries' abilities to cope with cases. As the World Health Organisation's special envoy for Covid-19 in West Africa wrote in early 2022:

Living with COVID-19 is only possible if a large percentage of the population has some form of protection against the disease, and if health systems are able to cope with a steady number of patients with COVID-19. Neither of these preconditions currently exist in Mali, or in any number of similarly disadvantaged countries.<sup>36</sup>

## Grappling Governments

In mid-April 2020, the Rupert Murdoch-owned Sunday Times – a UK paper normally friendly to that country's

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<sup>36</sup> Sow, S.O. (2022). 'Global South cannot just live with COVID-19'. In: *Nature Human Behaviour* **6**, 170. <https://doi.org/10.1038/s41562-022-01296-9>. [Accessed 18 February 2023]. Similarly, as Professors Babatunde Fagbayibo and Udoka Ndidiamaka Owie recount in the *Journal of African Law* (at p206):

The director of the Africa CDC, John Nkengasong, has also highlighted the acute shortage of human and material resources needed to combat the pandemic. He noted that the continent needs 6,000 epidemiologists but only 1,900 are available. He further noted that, while the continent requires 25,000 frontline responders, only 5,000 are available.

Despite all of these considerable constraints to effectively managing cases, Africa does not appear to have been hit as hard by the pandemic as would have been expected. A whole host of explanations have been offered for this, including: cases have simply been undercounted, the continent's much younger population (the median age is under 20) was less susceptible to the virus, and the hot climate conducive to life outdoors, among others. However, as the Professors point out in their article (at pp183-184; footnotes omitted):

In all these permutations, scant regard is given to Africa's preparedness to battle the virus or the agency of Africa, its institutions and experts to deal with the pandemic; these are critical factors that must be incorporated into narratives about Africa and COVID-19. Without pre-empting the unknown nature of the COVID-19 virus, due consideration must be given to the experience gained and capacity built (at national, sub-regional and continental levels) from dealing with other viral epidemics, such as HIV/AIDS, Ebola, yellow fever and Lassa fever, with which some African countries are having to contend in tandem with COVID-19.

Fagbayibo, B. & Ndidiamaka Owie, U. (2021). 'Crisis as Opportunity: Exploring the African Union's Response to COVID-19 and the Implications for its Aspirational Supranational Powers'. In: *Journal of African Law*, Vol. 65, No. S2: 181-208.

Conservative Party -- ran an article entitled: Coronavirus: 38 days when Britain sleep-walked into disaster. In it they detailed how the government, and in particular Boris Johnson - then Prime Minister - failed to take necessary measures to save lives. Johnson skipped multiple national crisis committee meetings and found time to take a retreat in the countryside and boast about Brexit instead. The government failed to replenish depleted stocks of personal protective equipment (PPE) for hospitals or acquire ventilators and tests to deal with the oncoming onslaught of cases.<sup>37</sup>

Boris Johnson is not the only political leader whose overconfidence cost lives. When countries in the Global North were dealing with the second wave of cases, Indian Prime Minister Narendra Modi gave a speech saying:

Friends, I have brought the message of confidence, positivity and hope from 1.3 billion Indians amid these times of apprehension ... In a country which is home to 18% of the world population, that country has saved humanity from a big disaster by containing corona effectively.<sup>38</sup>

It was only months later that the deadly wave of Delta cases engulfed India, leading to the scenes of mass cremations alluded to above.<sup>39</sup>

Meanwhile in the Americas, US President Donald Trump and Brazilian President Jair Bolsonaro appeared to take

<sup>37</sup> Calvert, J., Arbuthnott, G. & Leake, J. (2020). 'Coronavirus: 38 days when Britain sleep-walked into disaster'. In: *Sunday Times*. 19 April. <https://www.thetimes.co.uk/article/coronavirus-38-days-when-britain-sleepwalked-into-disaster-hq3b9tlgh>. [Accessed 20 February 2023]. Meanwhile, and by contrast, Malawi declared a state of disaster and closed schools and colleges before the country even recorded its first case; see: *The President ex parte Steven Mponda*, Judicial Review No. 13 of 2020, at [2.1].

<sup>38</sup> Quoted in: Roy, A. (2021). 'We are witnessing a crime against humanity': Arundhati Roy on India's Covid catastrophe'. In: *The Guardian*. 28 April. <https://www.theguardian.com/news/2021/apr/28/crime-against-humanity-arundhati-roy-india-covid-catastrophe>. [Accessed 18 February 2023].

<sup>39</sup> For a damning indictment of Narendra Modi's - and his Bharatiya Janata Party's - handling of the pandemic, see: Roy, A. (2021). 'We are witnessing a crime against humanity': Arundhati Roy on India's Covid catastrophe'. In: *The Guardian*. 28 April. <https://www.theguardian.com/news/2021/apr/28/crime-against-humanity-arundhati-roy-india-covid-catastrophe>. [Accessed 18 February 2023].

pride in proactively undermining public health efforts.<sup>40</sup> Both of them downplayed the threat of the virus<sup>41</sup> - Bolsonaro even referred to it as a 'little cold'.<sup>42</sup> They publicly fought with state governors who tried to impose strict health measures,<sup>43</sup> and they touted medical quackery, such as using hydroxychloroquine to cure Covid<sup>44</sup> and - in Trump's case - even floating the possibility of people injecting household cleaners.<sup>45</sup> To top it off, Trump cut off funding for the World Health Organization.<sup>46,47</sup>

Other countries did a better job. For example, South Korea surged testing at the earliest stages of the pandemic, deployed a highly effective contact tracing system to mi-

<sup>40</sup> For the example of Trump talking down masks, see: Felsen, M. (2020). 'Mr. President, when did protecting others become unmanly?' In: *The Hill*. 14 October. <https://thehill.com/opinion/white-house/520956-mr-president-when-did-protecting-others-become-unmanly/>. [Accessed 29 March 2023].

<sup>41</sup> For a recap of Donald Trump's greatest hits, see: Moyer-Lee, J. (2022). 'America going maskless is nothing to celebrate'. In: *Al Jazeera*. 29 April. <https://www.aljazeera.com/opinions/2022/4/29/america-going-maskless-is-nothing-to-celebrate>. [Accessed 20 February 2023].

<sup>42</sup> BBC. (2020). '2 momentos em que Bolsonaro chamou covid-19 de 'gripezinha', o que agora nega'. In: *BBC*. 27 November. <https://www.bbc.com/portuguese/brasil-55107536>. [Accessed 20 February 2023].

<sup>43</sup> For the case of Brazil, see: Phillips, T. (2020). 'Bolsonaro says he 'wouldn't feel anything' if infected with Covid-19 and attacks state lockdowns'. In: *The Guardian*. 25 March. <https://www.theguardian.com/world/2020/mar/25/bolsonaro-brazil-wouldnt-feel-anything-covid-19-attack-state-lockdowns>. [Accessed 20 February 2023]. For the case of the US, see: Breuninger, K. (2020). 'Trump attacks Cuomo again on coronavirus response: 'Andrew, keep politics out of it''. In: *CNN*. 16 March. <https://www.cnn.com/2020/03/16/trump-and-cuomo-fight-over-coronavirus-response.html>. [Accessed 20 February 2023].

<sup>44</sup> Milman, O. (2020). 'Trump touts hydroxychloroquine as a cure for Covid-19. Don't believe the hype'. In: *The Guardian*. 6 April. <https://www.theguardian.com/science/2020/apr/06/coronavirus-cure-fact-check-hydroxychloroquine-trump>. [Accessed 20 February 2023]; Brito, J. & Darlington, S. (2021). 'How Brazil gambled on unproven drugs to fight Covid-19'. In: *CNN*. 14 February (updated). <https://edition.cnn.com/2021/02/14/americas/brazil-hydroxychloroquine-evidence-intl/index.html>. [Accessed 20 February 2023].

<sup>45</sup> Moyer-Lee, J. (2022). 'America going maskless is nothing to celebrate'. In: *Al Jazeera*. 29 April. <https://www.aljazeera.com/opinions/2022/4/29/america-going-maskless-is-nothing-to-celebrate>. [Accessed 20 February 2023].

<sup>46</sup> Fagbayibo, B. & Ndiemaka Owie, U. (2021). 'Crisis as Opportunity: Exploring the African Union's Response to COVID-19 and the Implications for its Aspirational Supranational Powers'. In: *Journal of African Law*, Vol. 65, No. S2: 181-208. Citation at p203.

<sup>47</sup> For the reader who has picked up on the fact that Johnson, Modi, Trump, and Bolsonaro were all right-wing reactionaries: no, it's not a coincidence.

nimise spread,<sup>48</sup> and adopted social distancing and masking (among other measures),<sup>49</sup> enabling it to manage the pandemic without requiring strict lockdowns.<sup>50</sup> Similarly, Aotearoa New Zealand – which had the ideal conditions of being a small, rich, island state with a progressive government – effectively used border closures and lockdowns to keep the virus at bay, even eliminating it from the country for some time.<sup>51</sup> And at the international level, the African Union – as one author put it – ‘played an important role in providing coordination, expertise and technical support to its member states, engaging in advocacy, and mobilizing resources.’<sup>52</sup>

Although at first China showed more interest in suppressing information about, rather than the existence of, Covid-19, it soon changed tack.<sup>53</sup> It adopted a ‘zero Covid’

<sup>48</sup> Scott, D. & Park, J.M. (2021). ‘South Korea’s Covid-19 success story started with failure’. In: *Vox*. 19 April. <https://www.vox.com/22380161/south-korea-covid-19-coronavirus-pandemic-contact-tracing-testing>. [Accessed 20 February 2023].

<sup>49</sup> Korea Herald. (2023). ‘3 years under Covid-19: Korea Herald’. In: *Straits Times*. 25 January (updated). <https://www.straitstimes.com/asia/east-asia/3-years-under-covid-19-korea-herald>. [Accessed 27 January 2023].

<sup>50</sup> Yun, A. (2022). ‘When Precarity Encounters COVID-19: A Critical Analysis of Korean Policy Responses’. In: *International Journal of Comparative Labour Law and Industrial Relations* 38, no. 4.: 487-504. At p1.

<sup>51</sup> Although note that – as alluded to above and as will be discussed further below – when the virus did hit New Zealanders, it did not hit them equally. As the Waitangi Tribunal stated in *Haumaru: The COVID-19 Priority Report* [2021] Wai 2575 (at pp106-107; footnotes omitted):

Aotearoa New Zealand’s overall statistics, and even the specific hospitalisation and mortality numbers for Māori, may compare favourably with other countries, as Dr Ashley Bloomfield acknowledged. However, infection, hospitalisation, and death have enormous direct impacts on individual whānau and on tight-knit, contiguous Māori communities. More importantly from a Treaty and equity perspective, international comparisons mean little.

<sup>52</sup> Witt, A. (2020). ‘An island of internationalism: The African Union’s fight against Coronavirus’. In: *Peace Research Institute*. 7 April. <https://blog.prif.org/2020/04/07/an-island-of-internationalism-the-african-unions-fight-against-corona/>; quoted in: Fagbayibo, B. & Ndidiamaka Owie, U. (2021). ‘Crisis as Opportunity: Exploring the African Union’s Response to COVID-19 and the Implications for its Aspirational Supranational Powers’. In: *Journal of African Law*, Vol. 65, No. S2: 181-208. Citation at p203.

<sup>53</sup> Buckley, C. & Lee Myers, S. (2020). ‘As New Coronavirus Spread, China’s Old Habits Delayed Fight’. In: *The New York Times*. 7 February. <https://www.nytimes.com/2020/02/07/world/asia/china-coronavirus.html>. [Accessed 17 February 2023]; Page, J., Fan, W. & Khan, N. (2020). ‘How It All Started: China’s Early Coronavirus Missteps’. In: *The Wall*

policy, consisting of mass testing, and severe lockdowns and quarantine measures.<sup>54,55</sup> Although the measures are more extreme than what most democracies could tolerate, they appear to have proved effective at controlling the virus. How effective is hard to say as the official data is not particularly trustworthy.

Once vaccines arrived on the scene and proved – especially in the case of the mRNA vaccines made by Pfizer and Moderna – highly effective at reducing hospitalisations and deaths,<sup>56</sup> many countries changed policy gears in order to rely less on non-pharmaceutical interventions such as masking and social distancing. However, politics heavily fettered the degree to which the world could vaccinate its way out of the pandemic, as can be seen in the fol-

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*Street Journal*. 6 March. <https://www.wsj.com/articles/how-it-all-started-chinas-early-coronavirus-missteps-11583508932>. [Accessed 17 February 2023].

<sup>54</sup> As *Agence France-Presse* (AFP) reported: ‘Under China’s stringent zero-Covid approach, all positive cases are isolated and close contacts – often including the entire building or community where they live – are made to quarantine’. AFP. (2022). ‘Shanghai to lock down 2.7 million, a week after easing Covid restrictions’. In: *The Guardian*. 9 June. <https://www.theguardian.com/world/2022/jun/09/shanghai-to-lock-down-27-million-a-week-after-easing-covid-restrictions>. [Accessed 10 June 2022]. In one instance, after a couple hundred cases were found to be linked to a 24-hour bar in Beijing, the government tracked down around 10,000 close contacts of people who had gone to the bar, and then put their residential buildings under lockdown. Reuters. (2022). ‘Beijing tests millions, isolates thousands over Covid-19 cluster at 24-hour bar’. In: *The Straits Times*. 13 June. [https://www.straitstimes.com/asia/east-asia/beijing-tests-millions-...ates+thousands+over+Covid-19+bar+cluster&utm\\_content=13%2F06%2F2022](https://www.straitstimes.com/asia/east-asia/beijing-tests-millions-...ates+thousands+over+Covid-19+bar+cluster&utm_content=13%2F06%2F2022). [Accessed 14 June 2022].

<sup>55</sup> This all-or-nothing approach is reminiscent of the former ruler of China Mao Zedong’s campaign against sparrows, which he deemed to be grain-eating pests. He decreed they should all be killed and the country rallied to the cause, downing millions of them. This proved a pyrrhic victory however as in addition to grain, the sparrows also ate the insects that ate the crops. Without the sparrows the insects flourished and negatively impacted agriculture. See: McCarthy, M. (2010). ‘Nature Studies by Michael McCarthy: The sparrow that survived Mao’s purge’. In: *The Independent*. 3 September. <https://www.independent.co.uk/climate-change/news/nature-studies-by-michael-mccarthy-the-sparrow-that-survived-mao-s-purge-2068993.html>. [Accessed 20 February 2023].

<sup>56</sup> CDC. (2022). ‘Effectiveness of mRNA Vaccination in Preventing COVID-19-Associated Invasive Mechanical Ventilation and Death – United States, March 2021 – January 2022’. In: *CDC*. 25 March. <https://www.cdc.gov/mmwr/volumes/71/wr/mm7112e1.htm>. [Accessed 20 February 2023]. According to one study vaccines were responsible for more than halving the total global (excluding China) death toll from Covid-19 in the first year after their introduction; see: Teo, J. (2022). ‘Vaccinations more than halved potential global Covid-19 death toll: Lancet study’. In: *The Straits Times*. 24 June. <https://www.straitstimes.com/singapore/health/vaccinations-more-than-halved-potential-global-covid-19-death-toll-lancet-study>. [Accessed 24 June 2022].

lowing examples. Rich countries hoarded vaccines<sup>57</sup> and then ganged together to protect pharmaceutical company profits by denying patent waivers<sup>58</sup> that would have helped the vaccine drives in other parts of the world.<sup>59</sup> China chose not to accept the more effective mRNA vaccines<sup>60</sup> and in any case struggled to vaccinate its elderly population.<sup>61</sup> After taking power in a coup the military junta running Myanmar effectively killed the country's vaccine programme and arrested its head.<sup>62</sup> And the anti-vax movement found a particularly hospitable home in the US Republican Party.<sup>63</sup> The vaccine companies also took nearly two years to update their vaccines to better protect

<sup>57</sup> The WHO called the lack of solidarity a 'catastrophic moral failure'; see: Fagbayibo, B. & Ndidiamaka Owie, U. (2021). 'Crisis as Opportunity: Exploring the African Union's Response to COVID-19 and the Implications for its Aspirational Supranational Powers'. In: *Journal of African Law*, Vol. 65, No. S2: 181-208. Citation at p195.

<sup>58</sup> More specifically, a Trade-Related Aspects of Intellectual Property Rights (TRIPS) waiver.

<sup>59</sup> Furlong, A. & Moens, B. (2022). 'Vaccine bad blood troubles EU's Africa reset'. In: *Politico*. 18 February. <https://www.politico.eu/article/vaccine-trouble-eu-africa-summet-reset/>. [Accessed 18 February 2022]. The multilateral initiatives to vaccinate people in lower-income countries also did not suffice. As Professors Babatunde Fagbayibo and Udoka Ndidiamaka Owie write in the *Journal of African Law* (at p194; footnotes omitted):

Although the WHO and its partners established a global partnership (the Access to COVID-19 Tools Accelerator) with a vaccine arm (COVAX) to ensure fair and equitable access to vaccines for every country in the world, the COVAX facility can only provide vaccines to cover 20 per cent of the populations of lower-income countries.

Fagbayibo, B. & Ndidiamaka Owie, U. (2021). 'Crisis as Opportunity: Exploring the African Union's Response to COVID-19 and the Implications for its Aspirational Supranational Powers'. In: *Journal of African Law*, Vol. 65, No. S2: 181-208.

<sup>60</sup> Cheong, D. (2022). 'China's decision not to import mRNA vaccines leaves it in a bind'. In: *The Straits Times*. 8 December (updated). <https://www.straitstimes.com/asia/east-asia/china-s-decision-not-to-import-mrna-vaccines-leaves-it-in-a-bind>. [Accessed 10 December 2022].

<sup>61</sup> Bradsher, K. (2022). 'Beijing Begins Testing Most Residents in Hopes of Avoiding Lockdown'. In: *The New York Times*. 27 April. At pA6.

<sup>62</sup> BBC. (2022). 'Myanmar coup: The doctors and nurses defying the military'. In: *BBC*. 7 January. <https://www.bbc.com/news/world-asia-59649006>. [Accessed 8 February 2023].

<sup>63</sup> Tayag, Y. (2022). 'How Many Republicans Died Because the GOP Turned Against Vaccines?'. In: *The Atlantic*. 24 December. <https://www.theatlantic.com/health/archive/2022/12/covid-deaths-anti-vaccine-republican-voters/672575/>. [Accessed 20 February 2023].

against evolved variants.<sup>64</sup>

Whether through their failure to control the spread of the virus, the economic impacts of the control measures they did adopt, or their reliance on vaccination, the varied government approaches contain one common denominator: their impact on the world of work.

## The Pandemic Ravages the World of Work

The workers on the frontlines of the crisis were exposed to the biggest health and safety risks. This is particularly the case for healthcare workers, who were working overtime to tend to sick patients, often without proper precautions and personal protective equipment (PPE). For example, by November 2020, 300,000 healthcare workers had been infected globally; over 52,000 infections had occurred in Spain alone by July.<sup>65</sup> Within a year at least 17,000 healthcare workers are believed to have died.<sup>66</sup> A report outlining some of the reasons for the UK situation could apply equally to healthcare settings in many other countries:

Inconsistent use of masks and other personal protective equipment (PPE); lack of access to testing; lack of physical distancing between staff and patients, not just on wards but also in corridors, offices and canteens; environmental and hygiene problems, including disinfection of surfaces and ventilation; difficulties in avoiding mixing infected and uninfected patients; rotation of staff between different locations; and inadequate surveillance systems both to investigate individual infections and wider outbreaks.<sup>67</sup>

Importantly, it was not just exposure to Covid-19 which

<sup>64</sup> Smith, D.G. (2023). 'Who Should Get a Covid Booster Now? New Data Offers Some Clarity'. In: *The New York Times*. 13 February. <https://www.nytimes.com/2023/02/02/well/live/covid-bivalent-booster-omicron.html>. [Accessed 20 February 2023].

<sup>65</sup> Purkayastha, D. et al. (2021). *Work, health and Covid-19: a literature review*. Report 2021.03. European Trade Union Institute: Brussels. At p17.

<sup>66</sup> UNI Global Union. (2022). *Safer Jobs & Stronger Unions: Building worker power through health & safety*. At p7.

<sup>67</sup> Report by Data Evaluation and Learning for Viral Epidemics (DELVE), cited in Purkayastha, D. et al. (2021). *Work, health and Covid-19: a literature review*. Report 2021.03. European Trade Union Institute: Brussels. At p17.



Sanitation operations to combat Covid at the Top Glove Factory in Seremban, Malaysia. Photo © tok anas / Shutterstock

posed an occupational safety and health (OSH) risk to healthcare workers; the emotional exhaustion and other psychosocial risk factors associated with working in healthcare during such trying times also led to extraordinary levels of burnout.<sup>68</sup>

Of course, it was not just healthcare workers who faced severe threats to their lives; employers often treated other key workers – frequently low paid and working under poor conditions even before the pandemic – as cannon fodder in the quest to meet production targets.<sup>69</sup> This was the case, for example, of the predominantly migrant workforce producing medical gloves for Top Glove in Malaysia. As Professor Noraida Endut writes (this collection):

By the end of November [2020], more than 4,000 cases were linked to 28 out of 41 Top Glove's factories in the country. Due to the outbreak, the Ministry of Human Resources conducted a raid on the workers' living quarters and it found that hundreds of migrant workers were living in metal shipping con-

<sup>68</sup> Ibrahim, F. et al. (2022). 'The Prevalence and Work-Related Factors of Burnout Among Public Health Workforce During the COVID-19 Pandemic'. In: *Journal of Occupational and Environmental Medicine*, Vol. 64, No. 1 (January): pp e20-e27. In the case of healthcare workers in Finland, see: Malinen, F. (2021). 'Looking beyond Finland's pandemic success story'. In: *HesaMag*, **24** (Autumn): 39-41.

<sup>69</sup> For the case of garment workers in Myanmar, see: ILO. (2021). *COVID-19 and Occupational Safety and Health in the garment global supply chain in Myanmar*. International Labour Office – Geneva.

tainers in squalid conditions. News media featured workers' grave accounts of poorly maintained and overcrowded dormitories where the outbreaks occurred. Descriptions of the living and working conditions include "modern slavery", "violated Malaysian law on workers accommodation standards" and "could cause the spread of infectious diseases". The Malaysian authority ordered the factories to shut down for seven days.<sup>70</sup>

By 11 March 2021 neighbouring Singapore had reported the highest Covid-19 infection rate in Asia. And migrant workers – often surviving in the glitzy metropolis on only US\$ 370 to US\$ 740 per month<sup>71</sup> – made up 90.7% of these cases.<sup>72</sup> As the BBC reported: '...life in the [migrant workers'] dormitory typically means sharing a room with up to 30 people and dividing your bathroom, cooking and recreational space with hundreds more.'<sup>73</sup>

<sup>70</sup> At p3; footnotes omitted.

<sup>71</sup> AFP. (2021). 'Like prison: Singapore migrant workers suffer under Covid curbs'. In: *France 24*. 18 November. <https://www.france24.com/en/live-news/20211113-like-prison-singapore-migrant-workers-suffer-under-covid-curbs>. [Accessed 10 January 2022].

<sup>72</sup> Yi, H. (2021). 'Struggling against COVID-19 and Suffering from Despair: Time for Inclusive Protection of Migrant Workers'. In: *Perry World House*. Spring. At pp1-2.

<sup>73</sup> Marsh, N. (2021). 'Singapore migrant workers are still living in Covid lockdown'. In: *BBC*. 24 September. <https://www.bbc.com/news/world-asia-58580337>. [Accessed 10 January 2022].

And entire sectors that were not previously thought of as particularly dangerous overnight became high risk. As a report by UNI Global Union pointed out: 'We traditionally associate dangerous work with mining, fishing, farming and manufacturing, but service sector jobs now rank among the most dangerous in the world.'<sup>74,75</sup>

Other workers were gravely affected by the measures put in place to mitigate the spread of the virus and their resultant shocks to the economy and labour markets. In European Union (EU) countries alone, nearly 6 million people lost their jobs in the first year of the pandemic.<sup>76</sup> China's strict lockdowns on the other hand are estimated by some to have caused millions of job losses. And for those who did not lose their jobs, they still faced stark choices. As The New York Times reported in May 2022:

Delivery workers, some of the only laborers allowed to continue working, had to choose between forgoing income or risking being locked out of their homes. Others took high-risk jobs building or staffing isolation facilities, only to become infected themselves.<sup>77</sup>

These measures often drove workers to despair. As the China Labour Bulletin reported:

In one incredibly alarming incident, a fang-cang worker committed suicide...in Shanghai after not being paid wages, contracting Covid-19, receiving charges for his own iso-

<sup>74</sup> UNI Global Union. (2022). *Safer Jobs & Stronger Unions: Building worker power through health & safety*. At p6.

<sup>75</sup> For a discussion of categories of workers and the economic sectors most affected in the early stages of the pandemic, see: ILO. (2021). *A Global Trend Analysis on the Role of Trade Unions in Times of COVID-19: A Summary of Key Findings*. International Labour Office: Geneva. This ILO report lists the most affected workers as: healthcare workers, informal economy workers, migrant workers, self-employed workers and casual workers, and Micro, Small and Medium-Size Enterprises workers. The report also lists the tourism, transport, construction, commerce, hospitality, entertainment, and manufacturing sectors as particularly hard-hit. The report further notes that young people and women are overrepresented in some of the sectors/workforces most affected.

<sup>76</sup> More specifically, by early February, 2021; Weber, T. (2021). 'Two worlds of income support during COVID-19'. In: *Eurofund*. 9 February. <https://www.eurofund.europa.eu/publications/blog/two-worlds-of-income-support-during-covid-19>. [Accessed 11 February 2023].

<sup>77</sup> Wang, V. (2022). 'Millions Lose Jobs as China Locks Down'. In: *The New York Times*. 6 May. At ppB1, B4. Citation at pB4.

lation, and then being beaten for challenging the situation.<sup>78</sup>

The economic shutdowns hit workers in certain sectors particularly hard; in Vietnam, for instance, 98 percent of workers in the tourism sector were suspended or retrenched in the pandemic's first few months.<sup>79</sup> In India, in response to the Government's announcement of a strict national lockdown at only four hours' notice,<sup>80</sup> millions of migrant workers and their families left the cities for their villages in the largest mass migration in the country since partition.<sup>81</sup> As The Guardian reported:

With trains and most buses suspended and taxis unaffordable, walking was the only option for many, and the sides of the highways were soon lined with people, bags slung over their shoulders, many with nothing but flip-flops on their feet. More than 20 migrant labourers have died over the past few days as they try to walk back home.<sup>82</sup>

Indeed, throughout the world, migrant workers bore particular hardship during the worst of the Covid-19 crises. For example, as The New York Times reported on the case of China's roughly 280 million (internal) migrant workers:

...though they form the backbone of the country's economy, [they] have always eked out precarious livelihoods. They earn meagre wages and have almost no labor protections or benefits, circumstances made worse by

<sup>78</sup> CLB. (2022). 'Pandemic prevention measures lead to variety of worker protests'. In: *China Labour Bulletin*. 16 June. <https://www.clb.org.hk/content/pandemic-prevention-measures-lead-variety-worker-protests>. [Accessed 15 July 2022].

<sup>79</sup> Ford, M. & Ward, K. (2021). 'COVID-19 in Southeast Asia: Implications for workers and unions'. In: *Journal of Industrial Relations*, Vol. 63, No.3: 432-450. Citation at p438.

<sup>80</sup> Roy, A. (2021). "We are witnessing a crime against humanity": Arundhati Roy on India's Covid catastrophe'. In: *The Guardian*. 28 April. <https://www.theguardian.com/news/2021/apr/28/crime-against-humanity-arundhati-roy-india-covid-catastrophe>. [Accessed 18 February 2023].

<sup>81</sup> Ellis-Petersen, H. & Chaurasia, M. (2020). 'India racked by greatest exodus since partition due to coronavirus'. In: *The Guardian*. 30 March. <https://www.theguardian.com/world/2020/mar/30/india-wracked-by-greatest-exodus-since-partition-due-to-coronavirus>. [Accessed 21 February 2023].

<sup>82</sup> *Ibid.*

the pandemic.

Workers often live in company dormitories or cheap temporary accommodations, but when factories shut down, many could no longer afford rent or became trapped on their work sites, according to Chinese news reports and social media posts. Some slept under bridges or in phone booths.<sup>83</sup>

The pandemic also hit informal sector workers extremely hard.<sup>84</sup> Across lower-middle and low-income countries they lost 82% of their income in April 2020 alone.<sup>85</sup> As Amy Tekie and Maggie Mthombeni write on the case of domestic workers in South Africa (this collection):

With many being summarily dismissed or put on unpaid leave, hundreds of thousands of families faced hunger and evictions. Already working for wages below the poverty line, most did not have savings to fall back on. Mothers did not have money to feed their children, and families were being evicted from their homes.<sup>86</sup>

Trade unions have been key protagonists in managing the fall-out, stepping in to support workers where governments and companies were absent. And although many governments and employers proactively worked with trade unions to agree to health and safety protocols and economic measures to minimise the damage to workers' lives and livelihoods,<sup>87</sup> many others did not. Indeed,

<sup>83</sup> Wang, V. (2022). 'Millions Lose Jobs as China Locks Down'. In: *The New York Times*. 6 May. At ppB1, B4. Citation at pB4. The impact of migrant worker job losses is felt not just by the workers themselves but also by the families and local economies to whom they send money in the form of remittances; see ILO. (2021). *A Global Trend Analysis on the Role of Trade Unions in Times of COVID-19: A Summary of Key Findings*. International Labour Office: Geneva. At p4.

<sup>84</sup> Informal sector work accounts for around 90% of employment in the Global South; Chen, M. et al. (forthcoming). 'COVID-19 and informal work: Evidence from 11 cities'. Doi:10.1111/ilr.12221. At p2.

<sup>85</sup> *Ibid.* At p2

<sup>86</sup> At p1.

<sup>87</sup> For example, a 2021 report from the ILO notes that:

According to the information received from trade unions all over the world, a majority of countries and territories – 108 out of 133, or 81 per cent – used social dialogue, whether tripartite or bipartite, either singly or

multiple governments and companies around the world retaliated against workers and trade unionists – in particular in the healthcare sector – who spoke out on insufficient OSH measures and/or compensation. An Amnesty International report recorded 'cases where health workers who raise safety concerns in the context of the COVID-19 response have faced retaliation, ranging from arrest and detention to threats and dismissal.' Egyptian healthcare workers who had criticised the government were detained for 'spreading false news' and 'terrorism'; in Malaysia picketing hospital cleaners were arrested for participating in an 'unauthorized gathering'; and in Russia a doctor was charged under 'fake news' laws after raising concerns about insufficient PPE, among other examples. As one Egyptian doctor put it: 'Many [doctors] are preferring to pay for their own personal equipment to avoid this exhausting back and forth. [The authorities] are forcing doctors to choose between death and jail.'<sup>88</sup> In a particularly extreme example of harsh conditions, the coup in Myanmar effectively drove the healthcare system underground as workers staged their 'white coat revolution' and boycotted state-run hospitals.<sup>89</sup> And companies also took

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together, as part of their response to the COVID-19 crisis. While the extent of social dialogue varied considerably between countries and regions, social dialogue helped in most countries to achieve a consensus on targeted measures to protect workers and enterprises particularly hard hit by the crisis...

ILO. (2021). *A Global Trend Analysis on the Role of Trade Unions in Times of COVID-19: A Summary of Key Findings*. International Labour Office: Geneva. At p8. For another comprehensive ILO report on the role of trade unions during the pandemic, see: ILO. (2021). *Research Brief: Social dialogue one year after the outbreak of the Covid-19 pandemic: Spotlight on outcomes*.

<sup>88</sup> Amnesty International. (2020). 'Global: Health workers silenced, exposed and attacked'. 13 July. <https://www.amnesty.org/en/latest/news/2020/07/health-workers-rights-covid-report/>. [Accessed 11 January 2022]. On retaliation against healthcare workers in Sub-Saharan Africa, see: ILAW. (n.d.). *Trends on Strike actions in the Health Sector amidst COVID-19 Pandemic: The case of Sub-Saharan Africa*. Incredibly, in at least one case of industrial action in South Africa, one of the demands was that 'Workers who tested positive for COVID-19 must not be forced to work until such a time that they have recovered'. In another case, in Sierra Leone, doctors went on strike in response to 'a female junior doctor who had been allegedly assaulted by government minister in Freetown. The assault happened during a protest over poor hygiene standards.'

<sup>89</sup> BBC. (2022). 'Myanmar coup: The doctors and nurses defying the military'. In: *BBC*. 7 January. <https://www.bbc.com/news/world-asia-59649006>. [Accessed 8 February 2023]. As that BBC article reported:

The World Health Organization noted that, by July, half of the 500 attacks on health workers it recorded around

advantage of the economic crisis to fire workers, withhold their pay,<sup>90</sup> and gouge consumers with inflated prices.<sup>91</sup> In response, workers and trade unions have waged a fierce resistance, campaigning, protesting, striking,<sup>92</sup> and - as

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the world had occurred in Myanmar.

A similar project at Manchester University reported that in the same period 25 medical workers had been killed in Myanmar, 190 arrested, and 55 hospitals occupied by the military.

<sup>90</sup> The Georgian Trade Union Confederation's list of 'especially frequent' violations of labour rights during the pandemic in Georgia is equally applicable in many other countries:

- Dismissal without any notice, often even without written or oral informing;
- Coercion of employees to request termination of employment on the basis of personal statement;
- Refusal to provide employees with salary due to them and compensation provided by the law at the time of dismissal;
- "Letting go" on a leave without a pay or on a paid leave unilaterally, without taking into account the will of employee;
- Unilateral change of substantive terms of agreement, related to remuneration, working hours or workload;
- Refusing employees to work remotely, while their job description allowed it;
- Refusing to pay in the period of temporary incapacity, including, quarantine or self-isolation;
- Refusing to provide with transportation by employer in the terms of stop of public transport;
- Refusing to negotiate in regards with working conditions by the employer;
- Rejecting remuneration for idle time, while, this was caused by the employer's fault;
- Discriminatory treatment against employees based on different characteristics (sex, age, trade union membership, [] etc.) Incompliance with labour safety standards in the terms of COVID-19[.]

Tchanturidze, G. & Surmava, T. (2021). *Impact of the Pandemic on the Labour Market and Employees Positions*. July. Georgia Trade Union Confederation. At p3.

<sup>91</sup> Unite the Union. (2022). *Unite Investigates: Corporate profiteering and the cost of living crisis*. Commissioned by Sharon Graham. June.

<sup>92</sup> In just the first few months of the pandemic, Amnesty International documented 'reports of strikes, threatened strikes, or protests, by health and essential workers as a result of unsafe working conditions' in over 30 countries. Amnesty International. (2020). 'Global: Health workers silenced, exposed and attacked'. 13 July. <https://www.amnesty.org/en/latest/news/2020/07/health-workers-rights-covid-report/>. [Accessed 11 January 2022]. For the case of healthcare workers in North Carolina, USA, see: Jaffe, S. (2021). 'The healthcare workers who can't afford health insurance'. In: *HesaMag*, **24** (Autumn): 42-44. For examples of worker resistance in China, see: CLB. (2022). 'Pandemic prevention measures lead to variety of worker protests'. In: *China Labour Bulletin*. 16 June. <https://www.clb.org.hk/content/pandemic-prevention-measures-lead-variety-worker-protests>. [Accessed 15 July 2022].

will be seen throughout this report - deploying the law. Gunjan Sing's description (this collection) of Indian trade unions' response to the pandemic is illustrative:

During Covid, trade unions sprang into action: distributing relief measures like food, health kits, and securing shelter, arranging transportation for migrating workers, filing claim petitions for pending wages and against mass retrenchments, organizing protests against the suspension of labor laws, and intervening before the High Courts in different states and the Supreme Court of India. On account of pandemic-imposed constraints, they adopted strategies of writing a memorandum of appeals and protests, demanded dialogue with the government, and sought the intervention of ILO. ... Country-wide protests by the trade unions forced the central government to caution state governments against suspension of labor laws and disregarding ILO conventions. Unions organized country-wide protests against Labor Codes and demanded its rollback. They also organized country-wide protests against government's failure providing sufficient relief measures to workers.<sup>93,94</sup>

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Schools have also been the scene of major industrial disputes, often in reaction to insufficient government protocols to manage the spread of the virus. For the example of striking teachers shutting down schools across France, see: BBC. (2022). 'Covid: Schools in France close as unions say 75% of teachers strike'. In: *BBC*. 14 January. <https://www.bbc.com/news/world-europa-59978138>. [Accessed 20 January 2022]. For examples from the care and commerce sectors in Europe, Asia and the Americas, see: UNI Global Union. (2022). *Safer Jobs & Stronger Unions: Building worker power through health & safety*.

For the case of unions in South-East Asia, see: Ford, M. & Ward, K. (2021). 'South-East Asian unions respond to the pressure of COVID-19'. In: *International Journal of Labour Research*, Vol. 10, No. 1-2: 82-90. And for examples from Australia, see: Forsyth, A. (n.d.). 'The Critical Importance of Voice Through Unions: Worker Participation in Health and Safety During the Covid-19 Pandemic in Australia'. In: *Comparative Labour Law & Policy Journal*, Special Issue: 'Worker Voice in the Pandemic'.

<sup>93</sup> India Case Study, this collection. At p3. Footnotes omitted.

<sup>94</sup> The Uni report mentioned above, draws attention to five successful approaches trade unions adopted:

1. Emphasizing OSH in collective bargaining with employers,
2. Pressuring government leaders to enact reforms,
3. Engaging in collaborative action with community organizations.
4. Turning OSH committees into organizing catalysts, and

The trade union resistance has been nothing less than a fight for lives and livelihoods.

## A Legal Land Not Sown

Given all of the social upheaval described above, it is perhaps unsurprising that the law, too, has been hard at work during the pandemic. For as an Israeli Supreme Court Justice put it:

From a legal standpoint the epidemic leads us through a land not sown [Jeremiah 2:2], to legal and constitutional places and paths not imagined by our predecessors, nor even predicted by prophets of doom.<sup>95</sup>

Indeed, country parliaments and executives issued new laws to institute public health measures and economic relief programmes to deal with the fallout. And people and organisations have brought all manner of legal challenges; challenging governments for having done too much, or not enough, to manage the situation. Lawyers have petitioned courts for everything from proper health and safety protections for prisoners,<sup>96</sup> to punishment for pandemic corruption,<sup>97</sup> to literally changing the months of

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5. Defining mental health issues as equal in value to physical health.

UNI Global Union. (2022). *Safer Jobs & Stronger Unions: Building worker power through health & safety*. At p3.

<sup>95</sup> Justice I. Amit in *Yedidya Loewenthal, Adv. v Prime Minister* HCJ 2435/20 at [1].

<sup>96</sup> For instance, see the US Supreme Court cases of: *Valentine v. Collier*, 140 S. Ct. 1598 and *Barnes v. Ahlman*, 140 S. Ct. 2620.

<sup>97</sup> Given the amount of money flowing around to procure tests, PPE, and other materials, as well as to prop up economies battered by the pandemic, corruption has been rife. For example, in Malaysia, the anti-corruption body arrested 133 company owners or directors in connection with pandemic corruption in 2022 (FMT Reporters. (2023). 'MACC's No 2 slams 'culture of greed' over pandemic aid'. In: *Free Malaysia Today*. 26 January. <https://www.freemalaysiatoday.com/category/nation/2023/01/26/maccs-no-2-slams-culture-of-greed-over-pandemic-aid/>. [Accessed 28 January 2023]) and froze the accounts of the main opposition party (which ran the government during some of the pandemic) on allegations of misappropriation of Covid-19 stimulus funds. Povera, A. & Mat Arif, Z. (2023). 'Bersatu accounts frozen [Updated]'. In: *New Straits Times*. 1 February. <https://www.nst.com.my/news/politics/2023/02/875525/bersatu-accounts-frozen-updated>. [Accessed 21 February 2023]. In Vietnam as well, various officials have been arrested and accused of covid-related corruption (including the health minister and Hanoi mayor); AFP. (2022). 'Vietnam arrests health minister, Hanoi mayor over Covid test-kit scandal'. In: *New Straits Times*. 7 June. <https://www.nst.com.my/world/2022/06/803080/viet->

the calendar.<sup>98</sup> In Myanmar, violating Covid laws was even one of the rationales the military provided for arresting the President during its coup in 2021.<sup>99</sup>

In this ILAW Special Report we are interested in the nexus between workers, the pandemic, and the law. Included in the report are eleven case studies, from around the world and written by experts in their fields, on how governments, workers, and/or trade unions used the law to protect workers from the effects of the pandemic, establishing enduring improvements as a result. These contributed essays cover health and safety<sup>100</sup> as well as pay and conditions.<sup>101</sup> In the present analysis we discuss the challenges workers have faced and how they have used the law to overcome them. This essay does not purport to comprehensively cover every aspect of difficulty workers have encountered; much less does it review every relevant legal case. Rather, we focus on occupational safety and health (lives) and income and job protection (livelihoods). We draw on a selection of judicial decisions, as well as the contributed essays, to provide illustrative examples of the challenges and the victories.

In the next section we shall discuss how Covid-19 and the pandemic more broadly have been classified in different contexts, and the resultant implications for workers' rights. Then we will turn to the use of the law to protect lives. The section on protecting livelihoods follows. Then we will conclude by highlighting what lessons can be learned.

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[nam-arrests-health-minister-hanoi-mayor-over-covid-test-kit-scandal](#). [Accessed 9 June 2022].

<sup>98</sup> In one case, lawyers petitioned the Israeli Supreme Court to order the Knesset (Israeli parliament), Government, and the Chief Rabbinate to 'immediately and urgently declare a leap year, such that a second Hebrew month of Adar be established' so as to allow sufficient time to celebrate the Passover holiday. The petition was rejected as non-justiciable. *Meshulami v Chief Rabbinate of Israel & Ors* HCJ 2152/20.

<sup>99</sup> Noel, T. *Unconstitutionality of the 2021 Military Coup in Myanmar*. Constitution Brief Interregnum Series. Institute for Democracy and Electoral Assistance. DOI: <https://doi.org/10.31752/idea.2022.16>.

<sup>100</sup> The US Case Study (Amazon workers), France Case Study (Amazon workers), UK Case Study ('gig economy' workers), Spain Case Study (remote workers), Argentina Case Study (occupational disease), Malaysia Case Study (Top Glove workers), Ukraine Case Study (remote work).

<sup>101</sup> South Africa Case Study (income support for domestic workers), India Case Study (workers' rights), Seafarers Case Study, Mexico Case Study (wage reductions).

# Classifying Covid and the Pandemic

The starting point for any analysis of Covid-19 and the law is how the law has classified the disease and the pandemic more broadly. For the legal label ascribed to it leads to rights and obligations. In this section we will look at the labels courts have given the pandemic emergency, the 'debate' over whether Covid-19 is a public health or an occupational health threat, and the classification of Covid-19 as a disability and occupational disease.

## Security Threats, Public Emergencies, and Natural Disasters

In the Indian Case Study (this collection) Gunjan Sing writes on how the State of Gujarat invoked section 5 of the Factories Act, 1948 to suspend various labour laws, on the grounds that the pandemic was a 'public emergency'. The trade union Gujarat Mazdoor Sabha challenged that premise before the Indian Supreme Court in the case of *Gujarat Mazdoor Sabha v State of Gujarat (GMS)*.<sup>102</sup> As Sing explains:

The government defended the notification on the ground that Covid has caused extreme financial exigencies, therefore, it is a public emergency within the meaning of section 5 of the Act. The court explained the meaning of the term "public emergency" in section 5 and held that the power under section 5 of the Act can only be used where there is a grave emergency implicating an actual threat to the security of the state. The court concluded that Covid does not threaten the security of the state, therefore, it is not a public emergency. Rejecting the state's economic loss argument, the court held:

Unless the threshold of an economic hardship is so extreme

<sup>102</sup> (2020) 10 SCC 459.

that it leads to disruption of public order and threatens the security of India or of a part of its territory, recourse cannot be taken to such emergency powers which are to be used sparingly under the law.<sup>103</sup>

Similarly, in the Israeli Supreme Court case of *Ben Meir & Ors v Prime Minister & Ors*,<sup>104</sup> the Union of Journalists in Israel (along with other petitioners) challenged the Israeli government's use of the Israel Security Agency (ISA) to perform contact tracing in the early days of the pandemic.<sup>105</sup> The case turned, in part, on whether the coronavirus crisis constituted a 'national security' threat.<sup>106</sup> The Court defined such a threat as 'a severe, imminent danger to the citizens and residents of the State or its regime' and held that the pandemic crisis indeed met the definition. However, the Court allowed a special dispensation for journalists in which an alternative contact tracing scheme allowed them to avoid tracing by the ISA.

Also in the US, a fracking company in Texas unsuccessfully argued before the federal Court of Appeals for the

<sup>103</sup> At p7; footnotes omitted.

<sup>104</sup> HCl 2109/20; HCl/2135/20; HCl 2141/20.

<sup>105</sup> Under the scheme (Government Decision No. 4950), when a person tested positive, the ISA was allowed to 'receive, collect, and process technological information' to identify the people with whom the person had come into contact in the previous 14 days. The ISA then provided this information to the Ministry of Health so the contacts could be notified. As E. Hayut, the Court's President, noted (at [38]): according to information at the time, 'the apparatus employed in Israel that will be used to locate contacts with validated patients is carried out with the aid of the preventive security organ, is exceptional on the international landscape'. The interest of the journalists' union lay in the threat to freedom of press. As they argued, if their sources knew that the ISA could become aware that they had been close contacts of journalists, this could have 'a chilling effect upon sources' (at [11]).

<sup>106</sup> Pursuant to section 7(b)(6) of the Israel Security Agency Law, 5762-2002.

5<sup>th</sup> Circuit<sup>107</sup> that the pandemic was a ‘natural disaster’ so as to qualify for an exemption to the requirement to provide employees notice before terminating them under the Worker Adjustment and Retraining Notification Act (WARN Act).<sup>108</sup>

Governments have also invoked emergency classifications for more positive purposes. For example, in the US the federal government’s declaration of the pandemic as a ‘public health emergency’<sup>109</sup> has been used to expand healthcare benefits for people.<sup>110</sup> However, as these examples demonstrate, workers and unions have had to present arguments on just what sort of catastrophe Covid was, in order to protect their rights.

### Covid as Occupational Hazard: To Be or Not to Be?

Trying to divide public health and occupational health into two hermetically sealed compartments is kind of like trying to shove toothpaste back into the tube; you may be able to do it a little bit but most likely you’ll just make a massive mess of things. Incredibly – given the exposition of Covid-19’s impact on workers above – some courts have entertained the notion that Covid-19 is only a public – and not an occupational – health matter.<sup>111</sup> A selection of cases from the US, UK, and South Africa illustrate the point.

<sup>107</sup> *Easom et al. v. US Well Services, Incorporated*, 37 F.4<sup>th</sup> 238 (5<sup>th</sup> Cir. 2022).

<sup>108</sup> The WARN Act’s natural disaster exemption states ‘[n]o notice under this chapter shall be required if the plant closing or mass layoff is due to any form of natural disaster, such as a flood, earthquake, or the drought currently ravaging the farmlands of the United States.’ 29 U.S.C. § 2102(b)(2)(B). In Malawi, the High Court also considered whether the pandemic could be classed as a ‘widespread natural disaster’, pursuant to Section 45(3) of the Constitution. It held it could not. *The President ex parte Steven Mponda*, Judicial Review No. 13 of 2020.

<sup>109</sup> Pursuant to Section 319 of the Public Health Service Act.

<sup>110</sup> The government used a variety of other emergency declarations for similar purposes; see: Cubanski, J. et al. (2023). ‘What Happens When COVID-19 Emergency Declarations End? Implications for Coverage, Costs, and Access’. In: *Kaiser Family Foundation*. 31 January. <https://www.kff.org/coronavirus-covid-19/issue-brief/what-happens-when-emergency-declarations-end-implications-for-coverage-costs-and-access/>. [Accessed 8 February 2023].

<sup>111</sup> For an iteration of the converse of this, see Frank Kearn’s discussion in the US Case Study (this collection) of Amazon workers’ attempt to use ‘public nuisance’ litigation to improve occupational safety and health standards.

In *National Federation of Independent Business v. Department of Labor*<sup>112</sup> the US Supreme Court considered a challenge to an emergency temporary standard (ETS)<sup>113</sup> issued by the (federal) Occupational Safety and Health Administration (OSHA).<sup>114</sup> Among other things, the ETS required large employers to compel employees to get vaccinated against Covid-19 or, alternatively, to mask at work and test weekly. The Court’s right-wing supermajority granted a stay of the ETS, holding applicants were likely to succeed on the merits, on the basis that Covid-19 was a matter of public health, not an occupational hazard. As the majority (per curiam) opinion stated:

Although COVID-19 is a risk that occurs in many workplaces, it is not an occupational hazard in most. COVID-19 can and does spread at home, in schools, during sporting events, and everywhere else that people gather. That kind of universal risk is no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases. Permitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks ... while on the clock—would significantly expand OSHA’s regulatory authority without clear congressional authorization.<sup>115</sup>

To quote Prinsloo J of the South African Labour Court: ‘common sense is not a flower that grows in every garden.’<sup>116</sup>

<sup>112</sup> 2022 U.S. LEXIS 496.

<sup>113</sup> The Secretary of Labor may promulgate an emergency temporary standard – thereby bypassing normally mandatory notice and comment requirements – only when toxic or physically harmful substances or agents, or new hazards, expose employees to grave danger and the ETS is necessary to protect the employees from such danger; Occupational Safety and Health Act, §655(c)(1).

<sup>114</sup> Federal OSHA is housed within the US Department of Labor. Although technically the application before the Court was for a stay of the ETS pending substantive review in the courts below, the Supreme Court’s decision – in practical terms – served as a pronouncement on the merits.

<sup>115</sup> At p4. The Court emphasized later on that it did not foreclose all workplace regulation of Covid-19, but that such regulation must be targeted; ‘Where the virus poses a special danger because of the particular features of an employee’s job or workplace, targeted regulations are plainly permissible.’ (At p4).

<sup>116</sup> *Macsteel Service Centres SA (Pty) Ltd v National Union of Metal*

The Court of Appeal of England and Wales, addressing a similar issue in a different statutory context, appears – at first glance – to have come to the opposite conclusion. In the case of *Rodgers v Leeds Laser Cutting Limited*,<sup>117</sup> the Court considered an unfair dismissal claim by a worker who had refused to return to work out of fear that the virus posed an ‘imminent danger’.<sup>118</sup> The Employment Tribunal below had concluded (at [37]) that:

...the Claimant's decision to stay off work entirely was not directly linked to his working conditions; rather, his concerns about the virus were general ones, which were not directly attributable to the workplace. ...it was clear he was concerned as to the virus in general, he referred to his own home as being the safest place and he told the Tribunal that he chose to self-isolate ‘until the virus calms down’.<sup>119</sup>

The appeal turned on whether the Employment Judge had erred in law by holding that, because the Claimant believed

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*Workers of South Africa* (Case no: J483/20) at [87].

<sup>117</sup> [2022] EWCA Civ 1659.

<sup>118</sup> More specifically, the worker alleged the dismissal was automatically unfair, pursuant to Section 100(1)(d) of the Employment Rights Act 1996 (ERA), which states (quoted at [2]):

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that –

...

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

...

This provision of the ERA was introduced to give effect to the underlying EU Council Directive 89/391 on the introduction of measures to encourage improvements in the safety and health of workers at work, Article 8.4 of which states (quoted at [16]):

Workers who, in the event of serious, imminent and unavoidable danger, leave their workstation and/or a dangerous area may not be placed at any disadvantage because of their action and must be protected against any harmful and unjustified consequences, in accordance with national laws and/or practices.

<sup>119</sup> Quoted at [29] of the Court of Appeal judgement.

Covid-19 posed a serious and imminent danger in general, he could not have believed that it posed such a danger at work. Lord Justice Underhill held that the Employment Judge had not relied on such a proposition but had made a factual finding that the Claimant did not believe the workplace posed such a threat. As a result, the appeal failed. However, holding that the tribunal would have erred in law had it relied on such a proposition, Underhill LJ added (at [59]):

... I can see nothing in the language of section 100 (1) (d) that requires that the danger should be exclusive to the workplace. All that matters is that the employee reasonably believes that there is a serious and imminent danger in the workplace. If that is the case, it is the policy of the statute that they should be protected from dismissal if they absent themselves in order to avoid that danger. It is immaterial that the same danger may be present outside the workplace – for example, on the bus or in the supermarket.

On the face of it the preceding paragraph is the polar opposite of that of the US Supreme Court quoted above. However, the Court of Appeal's decision was not faithful to this reasoning. It is difficult to see how, as a matter of logic, a worker can be found to have self-isolated because he genuinely feared the dangers of Covid-19 in general and yet he had not proved that the reason he abstained from work was because he feared such dangers.

The Labour Court of South Africa provided the best answer to this issue in the case of *Association of Mineworkers and Construction Union (AMCU) v Minister of Mineral Resources and Energy & Ors*.<sup>120</sup> In that case AMCU brought legal action to compel the Chief Inspector of Mining to issue a legally binding standard to protect mineworkers from Covid-19. The government resisted – in part – by arguing that Covid was a public health and not an occupational health issue. Van Niekerk J said this (at [28]) in response:

[T]he Covid-19 pandemic presents both a public health concern and an occupational health concern. It is a risk for the entire nation. But it presents particular risks, and requires particular responses in workplaces

<sup>120</sup> Case No: J 427/2020.

generally, and in mines in particular. It is the occupational health element of the pandemic that AMCU seeks to compel the chief inspector to address. The fact that other responses are also required to address the other public health aspects of the pandemic, does not exclude the need for an occupational health response to the position on mines.

## Disabilities and Occupational Diseases

Regardless of where a worker may catch Covid-19, one question that arises when they do catch it is if the employer is required to do anything in particular to accommodate them. This may turn on whether or not the worker has a disability; many countries prohibit discrimination against people with disabilities and require employers to make reasonable changes to the work so the worker can keep working.<sup>121</sup> Indeed, workers have fought for, and employers have resisted, this classification. For example, in one case in the US, a certified nursing assistant brought various claims against her former employer - including under the Americans with Disabilities Act (ADA)<sup>122</sup> - after the employer dismissed her on the 13<sup>th</sup> day of her 14-day isolation period for repeatedly refusing orders to come into work to take another Covid-19 test. At the time she was suffering from - as the federal district court recorded<sup>123</sup> - 'severe weakness, fatigue, brain fog, high blood pressure, cough, difficulty breathing, fever, and swollen eyes'. One of the issues which came before the district court<sup>124</sup> was whether the plaintiff had sufficiently pleaded a prima fa-

<sup>121</sup> For example, Article 5 of the European Union's Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation provides:

In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

<sup>122</sup> 42 U.S.C. § 12101 et seq.

<sup>123</sup> *Brown v. Roanoke Rehab. & Healthcare Ctr.*, 586 F.Supp.3d 1171, at p4.

<sup>124</sup> On a motion to dismiss the claim pursuant to Rule 12(b)(6).

cie case that she had 'a physical or mental impairment that substantially limits one or more major life activities', as required by the ADA.<sup>125</sup> The Court (rightly) held she had, and denied the motion to dismiss.<sup>126</sup>

Not all disability discrimination statutes define 'disability' as liberally as the ADA. For example, in Great Britain, subject to certain exceptions, which are not relevant here, to qualify as a disability under the Equality Act 2010, it must be shown that a worker has 'a physical or mental impairment' that 'has a substantial...adverse effect on [their] ability to carry out normal day to day activities' and that such effect is 'long term'.<sup>127</sup> 'Long term' in this context means

<sup>125</sup> 42 U.S.C. § 12102(1). The ADA provides that such activities

include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

42 U.S.C. § 12102(2)(A).

It is worth noting that one can also qualify for some protections under the ADA if they are 'regarded as' having the impairment (even if they do not actually have it); 42 U.S.C. § 12102(3)(A). 'Regarded as' claims fail however if the impairment is 'transitory and minor' (§ 12102(3)(B)) with transitory in this context meaning 'an actual or expected duration of 6 months or less'; *Brown v. Roanoke Rehab. & Healthcare Ctr.*, 586 F.Supp.3d 1171 at p8. The Court also denied the motion to dismiss the plaintiff's 'regarded as' claim.

<sup>126</sup> *Brown v. Roanoke Rehab. & Healthcare Ctr.*, 586 F.Supp.3d 1171. This does not mean however that all workers with Covid-19 are likely to succeed in establishing a disability under the ADA. A plaintiff must still make the causal connection between the Covid-19 symptoms and the impact on major life activities; *McCone v. Exela Techs., Inc.*, 2022 U.S. Dist. LEXIS 45734 (M.D. Fla. Jan. 14, 2022). And the mere requirement of self-isolation does not necessarily mean major life activities have been impaired; *Champion v. Mannington Mills, Inc.*, 538 F. Supp. 3d 1344, 1349 (M.D. Ga. May 10, 2021). In yet another federal district court case, the plaintiff failed to sufficiently plead an impairment, with the judge holding in part (at p4; internal references omitted):

The fact that his COVID symptoms limited his ability to work might support a disability finding, but [the plaintiff] has offered no specific...facts that describe the severity of his symptoms or the difficulty he experienced in performing specific work activities. ... [The plaintiff's] claim that he was unable to work due to a lack of energy caused by COVID, devoid of any other details about what work activities were substantially limited and how they were limited, does not raise an inference that his illness was an actual disability that substantially limited a major life activity.

*Worrall v. River Shack LLC*, 2022 U.S. Dist. LEXIS 146077.

<sup>127</sup> Section 6(1).

the impairment ‘has lasted for at least 12 months, is likely to last for at least 12 months or is likely to last for the rest of the life of the person affected.’<sup>128</sup> On this definition therefore, a time-limited bout of (even extreme) Covid-19 symptoms is unlikely to qualify as a disability. This is not the case however for Long Covid. Indeed, in the Employment Tribunal case of *Matthews v Razors Edge Group Limited & Anor*<sup>129</sup> a hair stylist suffered from recurring symptoms weeks after her initial Covid-19 diagnosis. These symptoms included ‘chronic fatigue, poor blood circulation, low iron levels and asthma’<sup>130</sup> as well as – as her doctor noted – ‘recurrent episodes of chest pain, shortness of breath, tingling in hands and fingers, headaches and also intermittent problems with swelling in the groin.’<sup>131</sup> She also struggled to lift shopping bags, do housework, cook, or even stand for long periods of time.<sup>132</sup> Part of the challenge for the Tribunal though was that Long Covid was still a relatively new phenomenon. Its adverse impact on the claimant was clear, but how long it was likely to last was less certain. However, on the basis that the symptoms ‘could well last longer than 12 months’, the Tribunal held the worker’s condition qualified as a disability.<sup>133</sup>

In addition to protection from discrimination, another challenge that many workers who contract Covid-19 face is obtaining compensation to cover lost wages, medical bills, and support costs. The availability of such compen-

<sup>128</sup> Schedule 1, paragraph 1(i). Although note that the case law has interpreted ‘likely to last’ as meaning ‘could well’ last; see: *Matthews v Razors Edge Group Limited & Anor* [2022] 2409756/2020.

<sup>129</sup> Case number: [2022] 2409756/2020.

<sup>130</sup> At [15].

<sup>131</sup> At [18].

<sup>132</sup> At [17].

<sup>133</sup> At [55]-[56]. For another UK case in which an Employment Tribunal held Long Covid to be a disability within the meaning of the Equality Act 2010, see: *Burke v Turning Point Scotland* [2022] Case No: 4112457/2021. In that case the worker suffered from ‘severe headaches and symptoms of fatigue’ (at [16]), joint pain, and a loss of appetite (at [17]), and struggled with walking, showering, dressing, standing for long periods, and concentrating, among other things (at [17]). Indeed, the Claimant was unable to return to work from the time he got Covid-19 until his dismissal (at [15]).

The need for reasonable adjustments for Long Covid sufferers is widespread. In a recent survey of workers with Long Covid in the UK, two thirds of respondents reported unfair treatment at work; see: Stewart, H. (2023). ‘Two-thirds of UK workers with long Covid have faced unfair treatment, says report’. In: *The Guardian*. 27 March. <https://www.theguardian.com/society/2023/mar/27/long-covid-two-thirds-workers-unfair-treatment-report>. [Accessed 28 March 2023].

sation often hinges on whether the government classifies Covid-19 as an occupational disease.<sup>134</sup> In a report entitled *COVID-19: An Occupational Disease. Where Frontline Workers Are Best Protected*, the International Trade Union Confederation (ITUC) and UNI Global Union conducted an assessment of 181 national and regional responses to this issue, using data up to April 2021.<sup>135</sup> The report found that:

Only 31 countries have formally recognized COVID-19 as an occupational disease, and 16 other countries already had systems in place to support workers impacted by the pandemic. In the U.S., 34 states passed laws or changed policies to allow for workers’ compensation claims. In Canada, ten provinces and territories made clear guidance for workers’ compensation claims, and in Australia, the states and territories also provided recognition for claims through workers’ compensation.

Only ten jurisdictions (5.5%) received top ratings indicating good or very good provisions for wage replacement, medical treatment, sick pay, and death benefits. Fifty-five jurisdictions received average ratings showing that workers have limited access to benefits. We could only confirm that sick pay was available in 104 jurisdictions, meaning that almost 43% of workers had no access to paid sick leave.<sup>136</sup>

<sup>134</sup> ITUC & UNI Global Union. (n.d.). *COVID-19: An Occupational Disease. Where Frontline Workers Are Best Protected*. At p3.

<sup>135</sup> At p3.

<sup>136</sup> At p4, internal citations omitted. Also, by mid-May 2022 the majority of European Union (EU) member states had reported recognizing Covid-19 as an occupational disease or accident; see: Advisory Committee on Safety and Health at Work. (2022). *Opinion: Update of Commission Recommendation 2003/670/EC concerning the European schedule of occupational diseases to include COVID-19*. Adopted on 18/05/2022. Doc. 007-2022. For example, see LV-2020-23/1472 in Latvia. Of particular interest, the classification here was largely a result of the advocacy of the Trade Union of Health and Social Care Employees of Latvia; Karnitis, K. & Eurofund. (2020). *COVID-19 recognised as an occupational disease, measure LV-2020-23/1472 (measure in Latvia)*. EU PolicyWatch, Dublin. [https://static.eurofund.europa.eu/covid19db/cases/LV-2020-23\\_1472.html](https://static.eurofund.europa.eu/covid19db/cases/LV-2020-23_1472.html). [Accessed 9 February 2023]. For the recognition of Covid-19 as a work injury in Denmark, see: Eurofund. (2020). *COVID-19 recognised as a work injury, measure DK-2020-17/786 (measures in Denmark)*. EU PolicyWatch, Dublin. [https://static.eurofund.europa.eu/covid19db/cases/DK-2020-17\\_786.html](https://static.eurofund.europa.eu/covid19db/cases/DK-2020-17_786.html). [Accessed 9 February 2023].

Even in jurisdictions that classed Covid-19 as an occupational disease, the classification was many times limited to certain occupations. A further challenge for workers is the ability to prove – if required – that they contracted Covid-19 at work. As Diego Zang points out in the Argentina Case Study (this collection):

[W]e are dealing with an invisible and highly transmittable virus...This could make it extremely difficult, if not impossible, to prove the precise moment when the worker encountered a person or thing carrying the virus.<sup>137</sup>

A pair of cases illustrate the difficulty – even in the case of essential workers – in proving that contagion occurred at work. In British Columbia, Canada, a flight attendant who worked on international flights at the end of March 2020 and caught Covid-19 was able to establish before the Workers' Compensation Board (operating as WorkSafe BC) that she was entitled to compensation (pursuant to Section 136 of the Workers Compensation Act) on the basis that the work was of 'causative significance' in her contracting the disease. Indeed, several people on these same flights, including two of her co-workers, had also contracted Covid-19. However, the employer applied for review, arguing that the worker did not in fact catch Covid at work, submitting as evidence a study showing the risk of contagion on planes was relatively low. WorkSafe BC's Review Division<sup>138</sup> held:

Turning to the criteria outlined in policy C4-28.00, I do not consider that the nature of the employment created for the worker a risk of contracting a kind of disease to which the public at large is not normally exposed. A state of emergency was declared in British Columbia on March 18, 2020 and continues to be in effect at the time of this decision. As of April 3, 2020, just prior to the worker's positive COVID test, there were 1174 cases in the province, as reported on the CDC website. As of today, there are over 56,000. This was not a type of disease that the general public would not be exposed to.

<sup>137</sup> At pp10-11.

<sup>138</sup> Review Reference #: R0267763.

However, I am satisfied that the nature of the worker's employment created for her a risk of contracting COVID-19 significantly greater than the ordinary exposure risk of the public at large, and she meets the second criterion in policy.<sup>139</sup>

Although the worker was ultimately successful, she still had to go through two proceedings to establish this, and – on the criteria outlined above – would most likely not have been successful if the risk of contagion at work was similar to the risk of contagion in the community at large, even if the worker had caught Covid at work.<sup>140</sup>

In another case, in Wales, a Coroner concluded that a 65-year-old nurse with Type 2 diabetes, who worked long shifts in hospital at the height of the pandemic in early 2020 – on the balance of probabilities – contracted the disease from colleagues at work. The worker died from the disease. And yet the hospital resisted the Coroner's ultimate conclusion that Covid-19 was an industrial disease, a classification which the worker's union urged via instructed counsel. This is believed to be the first such recognition of Covid-19 as an industrial disease in the UK.<sup>141</sup> Again, whilst this case was ultimately successful, it was not without the support of a trade union and the involvement of counsel, even in the non-adversarial forum of the Coroner's Court.

All of this highlights the importance of a presumption that workers – or at least workers in certain sectors – contracted the disease at work.<sup>142</sup> But, as the ITUC and Uni report notes:

Only 6% of the studied jurisdictions had presumptive rules, regulations, laws or policies

<sup>139</sup> At p4.

<sup>140</sup> Note, however, that British Columbia – after the facts of this case occurred – amended the regime to provide for a presumption of workplace contagion for communicable viral pathogens under certain circumstances.

<sup>141</sup> Doughty Street Chambers. (2023). 'Coroner rules that Covid-19 is an Industrial Disease, in first case of its kind'. 16 January. <https://www.doughtystreet.co.uk/news/coroner-rules-covid-19-industrial-disease-first-case-its-kind>. [Accessed 30 January 2023]; Author Interview with Matthew Turner. 14 February 2023.

<sup>142</sup> For more on this issue in the US context, see: Felsen, M. (2020). 'Essential Workers Need Better Safety Net'. In: *The Progressive*. 15 June. <https://progressive.org/op-eds/essential-workers-safe-net-felsen-200615/>. [Accessed 29 March 2023].

that give automatic access without proof to medical treatment and wage replacement for all workers through social security, workers' compensation schemes or other public programmes. However, when considering healthcare workers this percentage rose to 17%.<sup>143</sup>

In his case study in this collection, Diego Zang argues that Argentina was obliged – by virtue of its ratification of the ILO's Occupational Safety and Health Convention, 1981 (No. 155) and Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187) – 'to unconditionally recognize Covid-19 as occupational in nature and origin'.<sup>144</sup> Zang explains the bipartite structure of Argentina's Law 24.557, Article 6 of which provides (ma-

<sup>143</sup> At p4.

<sup>144</sup> At p8. In a similar vein, the ITUC and Uni report points out (at p5) that according to the ILO's List of Occupational Diseases Recommendation, 2002 (No. 194), 'diseases caused by biological agents at work not directly mentioned in the list (which is the case for COVID-19) can be recognized as occupational where a direct link is established between work and the workplace.'

Similarly, in its opinion arguing for the specific inclusion of Covid-19 in (European Union) Commission Recommendation 2003/670/EC, the EU Advisory Committee on Safety and Health at Work states (footnotes omitted):

Recommendation 2003/670/EC has an annex of causal agents and occupational diseases directly linked to relevant occupations (Annex I). Item 407 in this annex can be considered to include COVID-19 as an occupational disease. However, this inclusion may not be sufficiently clear and the update of the Recommendation should make the inclusion of COVID-19 more explicit.

(Item 407 states: 'Other infectious diseases caused by work in disease prevention, health care, domiciliary assistance and other comparable activities for which a risk of infection has been proven'); Advisory Committee on Safety and Health at Work. (2022). *Opinion: Update of Commission Recommendation 2003/670/EC concerning the European schedule of occupational disease to include COVID-19*. Adopted on 18/05/2022. Doc. 007-2022.

Likewise, in some countries the broad coverage of infectious diseases as occupational meant that no specific listing of Covid-19 was required. As the ITUC and Uni report states (at p5):

In Germany and the Nordic countries, existing legislation on infectious diseases means that workers who contract COVID-19 have automatic access to sick leave, wage replacement and medical care. No formal change was needed to the legislation to support workers. This is one of the best examples of how a country could prepare for future pandemics.

Ibid.

terially) for two types of occupational disease: i) those contained in a list maintained by the Executive; and ii) diseases not on the list but which are 'caused directly and immediately by work'.<sup>145</sup> In the context of the pandemic lockdowns:

With some delay, considering that covid appeared in our country in mid-March 2020, the national government issued the [Decree of National Urgency (DNU)] 367 (B.O. 13/04/20) which, briefly, established that workers who contract covid in activities exempted from confinement (ASPO) - those defined as "essential" - benefit from the consideration that the disease is occupational but not included in the list of diseases recognized a priori as occupational provided for in section 2b of article 6 of law 24.557 referred to above. It is therefore a non-listed disease and, consequently, workers must go through the evidentiary procedure in administrative proceedings aimed at proving the direct and immediate causality of work before the Central Medical Commission.

Furthermore, in these cases, the Labor Risk Insurance Companies (ART, for their acronym in Spanish) could not reject the complaints and were obliged to grant medical and monetary benefits. The affected workers could also benefit from an 'evidentiary advantage' consisting of the reversal of the burden of proof of causality, if there were sufficient objective indications of possible infection, including the performance of work.

This last rule differentiated health personnel from other workers in essential activities by stating that if they contracted the virus, it was considered to have a direct and immediate causal relationship with their work and therefore it should be treated as an occupational disease, unless the ART itself proved otherwise.<sup>146</sup>

As Argentina's lockdown provisions changed so too did its

<sup>145</sup> At p8.

<sup>146</sup> At p9.

occupational disease regimen. For most of 2021, Covid-19 was treated as an occupational disease for all (formal) workers going into work.<sup>147</sup> However, from 1 January 2022, Covid-19 ceased being classified as an occupational disease for all workers, except for those in healthcare and performing service in the security forces.<sup>148</sup> Whilst on the whole Zang approves of the Argentine government's approach, he flags concerns about the exclusion of workers not classed as employees<sup>149</sup> as well as the fact that non-healthcare workers still had to go through the 'tortuous process' of demonstrating the disease was contracted at work.<sup>150</sup>

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<sup>147</sup> Starting with DNU 39/2021 and ending with DNU 413/21; at p9.

<sup>148</sup> At pp9-10. Although note that workers could still receive compensation and medical expenses under a different system, under which Covid-19 was treated as an 'incurable disease', i.e., not related to work; at p10.

<sup>149</sup> At p10.

<sup>150</sup> At p11.

# Fighting for Lives

In 1713, the physician Bernardo Ramazzini published his book *Diseases of Workers*. In it he offered prescient advice to his medical colleagues:

There are many things ... for so runs the oracle of our inspired teacher: "when you come to a patient's house, you should ask him what sort of pains he has, what caused them, how many days he has been ill, whether his bowels are working and what sort of food he eats." So says Hippocrates in his work *Affections*. I may venture to add one more question: What occupation does he follow?<sup>151</sup>

The answer to this last question has largely determined the nature and severity of OSH risks workers have faced during the pandemic, and not always in the way one might expect. For example, whilst key workers were more likely to succumb to the virus than non-key workers, within the key worker group, it was transport workers – and not healthcare workers – who had the highest mortality rates.<sup>152</sup> In this section, we look first at the connection between public health measures and OSH, followed by a discussion on how workers have tried to compel employers to protect them. We end with examples of how unions have pushed for more OSH protections in international law.

## Lockdowns and Other Public Health Measures

Lockdowns were perhaps one of the most ubiquitous public health measures in response to the pandemic. Indeed,

<sup>151</sup> Ramazzini, B. (1713). *Diseases of Workers*. Reprinted (1940) by Univ. of Chicago Press, Chicago. Quoted in: Abrams, H.K. (2001). 'A Short History of Occupational Health'. In: *Journal of Public Health Policy*, Vol. 22, No. 1: 34-80. At p78.

<sup>152</sup> ILO. (2023). *World Employment and Social Outlook 2023: The value of essential work (Executive Summary)*. At p2.

by the end of March 2020, four out of five people globally lived in a country where workplaces had been ordered to close.<sup>153</sup> In the Argentina Case Study (this collection) Diego Zang describes – in language that could apply to many other countries – that nation's lockdown:

[T]he Argentine government initially opted for what was called Preventive and Compulsory Social Isolation (ASPO, for its acronym in Spanish), which basically meant that all inhabitants of the country, without any distinction whatsoever, would remain in their homes, including not going abroad. There were very few and very well-founded exceptions which were evaluated with extremely restrictive criteria, and which were mainly related to: a) situations related to food, care of the elderly or health care; and b) work in essential activities that the [legislative] branch itself defined in a thorough manner.<sup>154</sup>

Whilst lockdowns and other measures to manage the pandemic may have been designed to protect public health, they had a major impact on worker safety and health. This is a matter of which workers and trade unionists were keenly aware. To take just one example, the Independent Workers' Union of Great Britain (IWGB) sought to intervene in a legal challenge to the government's lockdown measures before the High Court.<sup>155</sup> The union wished to argue that the lockdown measures were required by the obligation to protect the right to life enshrined in Article 2 of the European Convention on Human Rights (ECHR), as well as the obligation to protect the right to life equally (when tak-

<sup>153</sup> ILO. (2023). *World Employment and Social Outlook 2023: The value of essential work (Executive Summary)*. At p1.

<sup>154</sup> At p3.

<sup>155</sup> *R (on the application of Dolan) v Secretary of State for Health and Social Care & Anor*. This case is discussed further below. The union did not ultimately intervene.

en with Article 14 ECHR), given the disproportionate impact of the pandemic on workers of colour. As the union's president submitted in a witness statement<sup>156</sup> (at [38]):

It is the Union's view that without the lockdown measures the impact on the low paid, and in particular, Black, Asian and other Minority Ethnic, workers who have been hit so hard by this virus, would have been much worse. Our view is that the lockdown should have been brought in earlier than it was, and that it is currently being lifted prematurely. As a matter of fact, workers who are asked to return to work following the ease of the lockdown are voicing fears about being exposed again to the virus having to go back to taking crowded public transports to reach workplaces where keeping social distance is not enforced by the employer and in the absence of adequate PPE.<sup>157</sup>

Also in England, teachers' unions fought the government to prevent schools from reopening before they were safe and then to stop teachers having to make up for the closures by doing more work in less time. The Conservative government was not particularly receptive to the unions' concerns. '[W]hat a bunch of absolute arses the teaching unions are,' Health Secretary Matt Hancock messaged Education Secretary Gavin Williamson. To be fair, the topic of total arseness – unlike public health – was well within the Secretary's expertise. 'I know they really really do just hate work,' Williamson messaged back.<sup>158</sup> In a separate

<sup>156</sup> *R (on the application of Dolan) v Secretary of State for Health and Social Care & Anor*, Written Witness Statement of Henry Chango Lopez.

<sup>157</sup> Similarly, a study commissioned by Transport for London on the very high bus driver deaths in the early stages of the pandemic, found that 'lockdown was the main factor that saved bus drivers' lives' and that 'had it occurred earlier, it would have saved more lives'. Institute of Health Equity (UCL). (2020). 'Independent review into the deaths of London bus drivers from Covid-19 suggests earlier lockdown would have saved lives'. 27 July. <http://www.instituteofhealthequity.org/in-the-news/press-releases-...rs-from-covid-19-suggests-earlier-lockdown-would-have-saved-lives>. [Accessed 15 January 2021]. Quote from Professor Sir Michael Marmot, Director, UCL Institute of Health Equity.

<sup>158</sup> Quotes from: Elgot, J. (2023). 'Gavin Williamson said teaching unions 'just hate work' during Covid pandemic'. In: *The Guardian*. 1 March. [https://www.theguardian.com/world/2023/mar/01/leaked-messages-boris-johnson-bemoaning-face-masks-uturn?utm\\_term=6400496bdcd2e2b12a5108586f49ba60&utm\\_campaign=FirstEdition&utm\\_source=esp&utm\\_medium=Email&CMP=firstedition\\_email](https://www.theguardian.com/world/2023/mar/01/leaked-messages-boris-johnson-bemoaning-face-masks-uturn?utm_term=6400496bdcd2e2b12a5108586f49ba60&utm_campaign=FirstEdition&utm_source=esp&utm_medium=Email&CMP=firstedition_email). [Accessed 4 March 2023]. The trove of leaked

exchange between the two honourable gentlemen, Williamson asked Hancock for help getting PPE to schools 'basically as a last resort so they can't use it as a reason not to open. All of them will,' he added, 'but some will just want to say they can't so they have an excuse to avoid having to teach, what joys!!!'<sup>159</sup>

Other public health measures – such as the requirement to mask on public transport – also provide substantial protection for workers. This is not to suggest that public health measures have been uniformly positive or popular. They have not.<sup>160</sup> As alluded to above, they have at times had devastating economic consequences for workers, a matter to which we shall return below. And some enforcement authorities certainly overplayed their hand; in South Africa for instance, soldiers patrolling the streets ordered misbehaving citizens to roll on the ground and pump out sets of push-ups as punishment.<sup>161</sup> At worst, lockdowns have been implemented in a discriminatory or stigmatising manner<sup>162</sup> and/or as a pretext to suppress

messages also revealed that at times Hancock was indeed pushing for schools to remain closed, against Williamson's resistance. However, a general animus for the teachers' unions' Covid concerns appears to have united them.

<sup>159</sup> Quotes from: Elgot, J. (2023). 'Gavin Williamson said teaching unions 'just hate work' during Covid pandemic'. In: *The Guardian*. 1 March. [https://www.theguardian.com/world/2023/mar/01/leaked-messages-boris-johnson-bemoaning-face-masks-uturn?utm\\_term=6400496bdcd2e2b12a5108586f49ba60&utm\\_campaign=FirstEdition&utm\\_source=esp&utm\\_medium=Email&CMP=firstedition\\_email](https://www.theguardian.com/world/2023/mar/01/leaked-messages-boris-johnson-bemoaning-face-masks-uturn?utm_term=6400496bdcd2e2b12a5108586f49ba60&utm_campaign=FirstEdition&utm_source=esp&utm_medium=Email&CMP=firstedition_email). [Accessed 4 March 2023].

<sup>160</sup> Indeed, some legal challenges have been brought by workers. For instance, a Canadian worker who had briefly crossed the border into the US for work was put in mandatory quarantine upon his return. Aggrieved by the fact that the quarantine interfered with his ability to do his job (and arguing that he had been deprived of his liberty), he (unsuccessfully) challenged the quarantine order before the Federal Court; *Flores Monsanto v Minister of Health & Anor* 2020 FC 1053.

<sup>161</sup> Manga Mokofe, W. & van Eck, S. (2022). 'COVID-19 at the workplace: What lessons are to be gained from early case law? In: *De Jure Law Journal*: 155-172. <http://dx.doi.org/10.17159/2225-7160/2022/v55a10>. Citation at p163.

<sup>162</sup> For example, Singapore instituted one of the longest lockdowns in the world, but just for the migrant workers living in dormitories, a situation so severe it led to reported suicide attempts. Although some restrictions were eventually eased, these workers' movement was restricted in some way for the first three years of the pandemic. See: *COVID-19 (Temporary Measures) (Foreign Employee Dormitories – Control Order) Regulations 2020*; Ministry of Health. (2020). 'Measures to Contain the COVID-19 Outbreak in Migrant Worker Dormitories'. 14 December. <https://www.moh.gov.sg/news-highlights/details/measures-to-contain-the-covid-19-outbreak-in-migrant-worker-dormitories>. [Accessed 8 January 2022]; Marsh, N. (2021). 'Singapore migrant workers are still living in Covid lockdown'. In: *BBC*. 24 September. <https://>

workers' rights. But the baby shan't be thrown out with the bath water; many public health measures have also saved workers' lives.

## Deference to the Executive

Given the public health measures' severe restrictions on – in many countries constitutionally protected – rights and liberties, it is no surprise that people have challenged the measures in courts right, left, and centre.<sup>163</sup> In one review of such cases<sup>164</sup> – decided between 1 March and end of August 2020 – the authors were able to include 64 judicial opinions from 23 countries.<sup>165</sup> Of these, 39 'had at least 1 ruling that required a change (amending, stopping, invalidating, or imposing a new measure)! Notwithstanding these statistics, in plenty of cases the courts have proved – whilst respectful of the plaintiffs – largely deferential to the executive's use of extraordinary measures in extraordinary times. Courts have repeatedly – and it should be

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[www.bbc.com/news/world-asia-58580337](http://www.bbc.com/news/world-asia-58580337). [Accessed 10 January 2022]; Telling, O. (2022). 'Migrant workers suffer in Singapore's hidden lockdown'. In: *Financial Times*. 6 June. <https://www.ft.com/content/4c-63dea0-9ebd-4170-b978-5dce0c5e7f99>. [Accessed 14 June 2022] (though note that the government refuted some of the claims made in the *Financial Times* article; Rahim, N. (2022). 'No migrant worker barred from leaving dorm: S'pore High Commissioner to UK responds to FT article'. In: *Straits Times*. 13 June. [https://www.straitstimes.com/singapore/no-migrant-worker-barred-f...missioner+to+UK+responds+to+FT+article&utm\\_content=14%2F06%2F2022](https://www.straitstimes.com/singapore/no-migrant-worker-barred-f...missioner+to+UK+responds+to+FT+article&utm_content=14%2F06%2F2022). [Accessed 14 June 2022]; Qing, A. (2023). 'No masks on public transport, free vaccines: 6 things you need to know as S'pore lifts Covid-19 rules'. In: *Straits Times*. 9 February (updated). <https://www.straitstimes.com/singapore/no-masks-on-public-transport-free-vaccines-6-things-you-need-to-know-as-s-pore-lifts-covid-19-rules>. [Accessed 11 February 2023];

Also, see the Israeli case of *Yedidya Loewenthal, Adv. v Prime Minister HCJ 2435/20*, where petitioners (unsuccessfully) challenged the decision to quarantine the largely ultra-orthodox municipality of Bnei Brak.

<sup>163</sup> For example, in a creative yet ultimately futile attempt to challenge some of Aotearoa New Zealand's lockdown and movement control measures, a pair of plaintiffs argued that these constituted unlawful detention and sought writs of habeas corpus under the Habeas Corpus Act 2001. The High Court declined to issue the writs (*A v Ardern* [2020] NZHC 796; *B v Ardern* [2020] NZHC 814) and the Court of Appeal upheld the decision; *Nottingham v Ardern* [2020] NZCA 144. For a similar rubbishing of the 'lockdown is the same as house arrest' argument, see the Court of Appeal judgment in the English lockdown case: *R(on the application of Dolan & Ors) v Secretary of State for Health and Social Care & Anor* [2020] EWCA Civ 1605 at [92]-[94].

<sup>164</sup> Clodfelter, C.G. et al. (2022). 'Global Judicial Opinions Regarding Government-Issued COVID-19 Mitigation Measures'. In: *Health Security*, Vol. 20, No. 2: 97-108. DOI: 10.1089/hs.2021.0123.

<sup>165</sup> Although note that the included cases concerned various aspects of government responses to the pandemic, not just lockdowns.

said, quite rightly – rejected arguments that such measures were made ultra vires the enabling legislation<sup>166</sup> or via unlawful delegation (from one part of the Executive to another),<sup>167</sup> are irrational,<sup>168</sup> and/or that their impingement on fundamental rights is not proportionate,<sup>169</sup> among oth-

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<sup>166</sup> For example, in the Aotearoa New Zealand Court of Appeal case of *Borrowdale v Director-General of Health* [2021] NZCA 520, the plaintiff argued (in part) that the country's Director General of Health had made public health orders *ultra vires* the enabling Health Act 1956. The orders were not insignificant; they required the closure of most premises, prohibited people from congregating outdoors unless they socially distanced, and forced people to remain at home except for permitted exceptions. The plaintiff argued (at [123]) that such measures 'could have been implemented but only with the authority of bespoke legislation, such as the COVID-19 Public Health Response Act.' The Court rejected the appeal, holding that the relevant provisions of the Health Act 1956 were 'broad enough' to authorise the orders (at [163]). Although note that the plaintiff had succeeded in an aspect of the case before the High Court below (*Borrowdale v Director-General of Health* [2020] NZHC 2090). The High Court held in effect that the Prime Minister and other officials had unlawfully ordered people to stay at home – with the threat of enforcement action – before the orders in issue even required it. This holding was not (cross) appealed and as such was not in issue before the Court of Appeal (at [11]).

In the England lockdown case – *R (on the application of Dolan & Ors) v Secretary of State for Health and Social Care & Anor* [2020] EWCA Civ 1605 – the Court of Appeal of England and Wales similarly rejected an *ultra vires* argument.

<sup>167</sup> For example, in the case challenging the lockdown in Aotearoa New Zealand, the plaintiff argued that the Director-General of Health had unlawfully delegated to others within the government the ability to decide which businesses could remain open; *Borrowdale v Director-General of Health* [2021] NZCA 520.

<sup>168</sup> For example, in a case in Hong Kong ([2022] HKEC 4622) the Court of First Instance rejected irrationality and *ultra vires* challenges – argued in part on the basis that the Covid-19 epidemic supposedly no longer existed – to Hong Kong's pandemic measures. In the England lockdown case – *R (on the application of Dolan & Ors) v Secretary of State for Health and Social Care & Anor* [2020] EWCA Civ 1605 – the Court of Appeal of England and Wales unanimously scorned the notion that irrationality was even arguable (at [90]):

We find it impossible to accept that a court could possibly intervene in this context by way of judicial review on the ground of irrationality. There were powerfully expressed conflicting views about many of the measures taken by the Government and how various balances should be struck. This was quintessentially a matter of political judgement for the Government, which is accountable to Parliament, and is not suited to determination by the courts.

<sup>169</sup> In many cases, the fact that the measures impinged upon fundamental rights was self-evident, hence the focus of the analysis on whether such impingement was proportionate. The Court of Appeal of Aotearoa New Zealand, for instance, noted in *Borrowdale v Director-General of Health* [2021] NZCA 520 at [157]:

...the stark reality that when Parliament enacted s 70(1)(f) and (m) of the [Health] Act [1956], it deliberately intended to authorise the issuance of orders that would curtail the rights of New Zealand citizens to



A Covid testing site at the Western Wall in Jerusalem. Photo © Nuki - stock.adobe.com

ers. As an Israeli Supreme Court justice summed up the matter:

In normal times, such means would be summarily rejected as manifestly unlawful, but these are not normal times, and due to the “need of the hour”..., there is no alternative but to punish the public, although it did not sin and is not worthy of punishment.<sup>170</sup>

A case from the High Court of Malawi is illustrative. In *The President ex parte Steven Mponda*,<sup>171</sup> four law students at the University of Malawi (Chancellor College) argued that the President’s state of disaster declaration – which led to the closure of their university – was unlawful and violated their constitutional right to education. The Malawian Constitution required the Court to conduct a proportionality assessment.<sup>172</sup> The Court proceeded to hold that the re-

engage in peaceful assembly, association and freedom of movement.

<sup>170</sup> Justice I. Amit in *Yedidya Loewenthal, Adv. v Prime Minister* HCl 2435/20 at [1].

<sup>171</sup> Judicial Review No. 13 of 2020.

<sup>172</sup> Specifically, Sections 44(1)-(2) of the Constitution state:

1. No restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society.

strictions were indeed proportionate (at [3.22]):

The Court having reviewed the state of disaster declaration noted that it was prescribed by law, that is, the [Disaster Preparedness and Relief Act (DPR)]. Furthermore, this Court does not find it unreasonable that where the world has declared a pandemic and cases continue to rise, a school shall consider closure so as to safeguard the lives of the students it caters for. Furthermore, this Court on examining the city of Zomba wishes to point out that apart from Chancellor College, Zomba has the highest number of institutions hosting large numbers of people, all within 10 to 20 km from Chancellor College like the two army barracks, police training school, Zomba Central Hospital, Zomba Maximum Prison, Zomba Mental Hospital, Zomba Market, Secondary schools like Mulunguzi, St Mary’s, Masongola, Police and Zomba Catholic to name a few as well as numerous primary schools. The potential risk of spread if not considered would be catastrophic. Thirdly, the Court noted that the declaration was recognized by international human rights standards as neighbouring countries like Zambia, Mozam-

2. Laws prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question, and shall be of general application.

bique and Tanzania had similarly done the same. Lastly, the limitation was necessary in a democratic and open society which was balancing the right to life versus the right to education.<sup>173</sup>

The Court therefore denied the application for leave for judicial review.<sup>174</sup> But it ordered the University of Malawi to find alternative means of providing education to students, ordered the Executive to (at [4.2.1]) ‘make a detailed legislative agenda...and develop necessary principal and subsidiary legislation which is consistent with the Constitution to safeguard people’s lives’, and the Legislature to ([4.2.3]):

...undertake the necessary steps to ensure that the proposed principal and subsidiary legislation is vetted and promulgated according to Malawian law so that they avoid further legal challenges especially in this time of COVID – 19 when all measures should be geared at safeguarding lives.

Finally, the Judge had some closing words for the law students who brought the case (at [4.3]):

Turning to the four (4) Applicants, let me say as follows, it is commendable that you are taking your future seriously including the right to ensure your rights are protected. However, it should be stated and underscored that it is a future that you are working to protect, the question is what future will it be if you are not there to see it or others in your college are not there to see it. It is therefore imperative that when we look at ourselves, we also do not forget others in the same boat as you who may have compromised immune systems who can easily catch COVID-19 and furthermore, the surrounding communities which Chancellor College has. The spirit of umunthu although not a legal one, has a major bearing on human rights especially where as Malawians and notably Africans as per the Af-

rican Charter on Human and Peoples Rights, that we have underscored that human rights must be enjoyed with responsibilities. It is my hope that you all stay safe and healthy in your homes so that you appear in years to come as lawyers before my bench.

## For God and Congress

In some cases, courts – and in particular the US Supreme Court – have sought to pay deference to an even higher authority than a state or country Executive. For example, in a series of challenges to California’s public health measures – which restricted religious (as well as secular) activity – the US Supreme Court granted injunctive relief under the Free Exercise Clause of the First Amendment to the US Constitution. This was on the basis that ‘comparable’ secular activity was treated more favourably – i.e., restricted less – than religious activity. In one such case,<sup>175</sup> Justice Elena Kagan – with whom the two other progressive justices joined – summed up this problematic approach in a stinging dissent, writing (in part):

Justices of this Court are not scientists. Nor do we know much about public health policy. Yet today the Court displaces the judgments of experts about how to respond to a raging pandemic. The Court orders California to weaken its restrictions on public gatherings by making a special exception for worship services. The majority does so even though the State’s policies treat worship just as favorably as secular activities (including political assemblies) that, according to medical evidence, pose the same risk of COVID transmission. Under the Court’s injunction, the State must instead treat worship services like secular activities that pose a much lesser danger. That mandate defies our caselaw, exceeds our judicial role, and risks worsening the pandemic.<sup>176</sup>

...

In...the worst public health crisis in a century, this foray into armchair epidemiology cannot end well.<sup>177</sup>

<sup>173</sup> Although the Court also noted (at [3.25]) that the directives the President issued to close the schools were not actually law but rather ‘instructions or recommendations’ which the Council of the University of Malawi proceeded to implement.

<sup>174</sup> At [4.1].

<sup>175</sup> *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716.

<sup>176</sup> At p4.

<sup>177</sup> At p6.

Courts in the US, led by the apex court, have also deployed the major questions doctrine – i.e., the idea that Congress must speak clearly (via legislation) when it chooses to authorise an executive agency ‘to exercise powers of vast economic and political significance’<sup>178</sup> – to strike down federal government pandemic measures. The major questions doctrine functions as a sort of ultra vires doctrine on steroids. For example, the Supreme Court blocked a Centers for Disease Control and Prevention (CDC) nationwide moratorium on tenant evictions<sup>179</sup> on this basis.<sup>180</sup> Similarly, a federal district court in Florida blocked a CDC mandate requiring masking on public transportation.<sup>181</sup> As I wrote of that case at the time:

In her 59-page decision, [Judge] Mizelle – who was appointed by former Republican President Donald Trump – waxed lyrical on the minutiae of dictionary entries from the 1940s. She held that a law that enabled the Centers for Disease Control and Prevention (CDC) to enforce “sanitation” and “other measures” in order to “prevent the ... spread of communicable diseases”, did not allow the CDC to mandate mask use on public transportation to limit the spread of COVID-19.

While Judge Mizelle was indulging in an exercise of extreme legal pedantry, nearly one million people had already died from COVID in the US alone – fiddling while Rome burned would have been a more productive pastime.<sup>182</sup>

<sup>178</sup> *Alabama Association of Realtors v. HHS*, 141 S. Ct. 2485 (per curiam).

<sup>179</sup> The moratorium applied to tenants living in a county with a particular level of Covid-19 transmission and who made declarations of financial need.

<sup>180</sup> *Alabama Association of Realtors v. HHS*, 141 S. Ct. 2485. Though note that the Supreme Court didn’t seem concerned by the doctrine when it came to the Trump-era CDC’s (Title 42) orders dramatically restricting immigration into the US. The Court stayed a lower court ruling setting aside the policy (even though the Biden Administration didn’t even wish to continue enforcing the policy); see: *Arizona et al. v. Alejandro Mayorkas* 598 U.S. \_\_\_ (2022).

<sup>181</sup> *Health Freedom Def. Fund, Inc. v. Biden*, 2022 U.S. Dist. LEXIS 71206.

<sup>182</sup> Moyer-Lee, J. (2022). ‘America going maskless is nothing to celebrate’. In: *Al Jazeera*. 29 April. <https://www.aljazeera.com/opinions/2022/4/29/america-going-maskless-is-nothing-to-celebrate>. [Accessed 23 February 2023].

Indeed, the only major question that these cases provoke is how such poverty of reasoning could become the law of the land.

## The ‘Essential’ Designation: What’s in a Name?

As seen above, essential services – and the workers providing them – were generally exempted from strict lockdown measures.<sup>183</sup> After all, if these workers didn’t work then no one would be able to eat, turn on the lights, use the internet, or go to the doctor. Much therefore turned on who and what was designated as essential. Given this, it is rather extraordinary that some countries did not clearly define who, and what, was ‘essential’. For example, Yasmine Mouhib writes in the case of France (this collection):

[T]he [government has refused] to say what constituted and what didn’t constitute “essential activities”, delegating at the same time to private players, primarily companies, the task of doing so. Admittedly, there have been references here and there to sectors that fall into this category. However, no formal and comprehensive list has been provided by the government. The ambiguity of this silence is in contrast with the government’s announcement that the main priority of its action is to protect everyone. The justice system has therefore made up for the lack of a definition from the government.<sup>184</sup>

Relatedly, in a case brought by a trade union, a state court in Bavaria, Germany temporarily enjoined a decree relaxing provisions of the Working Hours Law<sup>185</sup> for critical infrastructure businesses – in part – on the basis that it was unclear which businesses constituted critical infrastructure.<sup>186</sup>

<sup>183</sup> Although note that in some cases general workplaces were left open, even during lockdowns. For example, in England, whilst certain industries were closed down entirely, and workers were instructed to work from home where possible, everyone else was allowed to continue going in to work if the work could not be done from home; see: *R (on the application of Dolan & Ors) v Secretary of State for Health and Social Care & Anor* [2020] EWCA Civ 1605 at [6], [19].

<sup>184</sup> At p14; footnotes omitted.

<sup>185</sup> Vorschriften des Arbeitszeitgesetzes.

<sup>186</sup> Case B10 S22.93; 15 February 2022; Berto, R. (2022). ‘Germany, Administrative Court of Bayreuth, 15 February 2022, B10 S22.93’. <https://www.covid19litigation.org/case-index/germany-administrative-court->

Whilst private businesses had a financial incentive to fall into the category as it constituted a licence to operate and hence generate profits, for workers the matter cut both ways. In some cases the label provided protection and in others it did not. For seafarers, who – at the height of the world's lockdowns and travel restrictions – were left stranded on ships, blocked from coming to shore, and unable to get home,<sup>187</sup> the designation might have eased the crisis. As Jonathan Warring writes in the Seafarers Case Study (this collection), the Special Tripartite Committee of the Maritime Labour Convention, 2006, the ILO's Governing Body, the United Nations Secretary General, and even the United Nations General Assembly, all called on states to declare seafarers key workers in an effort to end the 'crew crisis' and get them home safely.<sup>188</sup>

And in Nairobi the Kenya National Private Security Workers Union argued for its members to be classed as 'essential service providers' – in part – so as to access extra compensation.<sup>189</sup> Judge Nzioko Wa Makau, of the Employment & Labour Relations Court of Kenya, was sympathetic but constrained by the law<sup>190</sup> (at [8]):

The security guards we all encounter each day represented by the Petitioners are significantly at risk granted the ravages of the global pandemic that is Covid-19. They do not appear on the list of essential service providers but in my considered view ought to be so included as they are critical in security of installations, premises such as offices, factories, courts and residences. They are the ones at the front end of the attack by Covid-19 because they encounter and interact with people of all walks of life. They deal with doctors, nurses, fire fighters, coxswains, pilots, air traffic controllers, secretaries, farm-

[bayreuth-b10-s2293-2022-02-15](#). [Accessed 20 December 2022].

<sup>187</sup> Warrington, J. Seafarers Case Study, this collection.

<sup>188</sup> At pp7-8.

<sup>189</sup> *Kenya National Private Security Workers Union & 44 others v Cabinet Secretary Ministry of Health & 6 others* [2021] eKLR (Petition No. 122 of 2020; 17 March 2021). For a later decision in the same case and which – for present purposes – came to a similar conclusion, see the decision of 30 September 2021.

<sup>190</sup> Specifically, the Labour Relations Act, 2007, Section 81 of which defines 'essential service', and the 4<sup>th</sup> Schedule to which lists the essential service providers.

ers, teachers, drivers and every imaginable profession yet they are not included in the list of essential service providers. This is wrong. Does this therefore mean they are entitled to the COVID-19 Emergency Allowance[?] In my considered view, despite the fact that these Petitioners and their members play a very critical role and ought to be included in the list of essential service providers much the same way lawyers were included, they do not qualify for the COVID-19 Emergency Allowance. This allowance is for those front-line health workers directly involved in fighting the COVID-19 pandemic and of necessity includes those managing patients in health care facilities, those managing quarantine centres, those conducting surveillance and contact tracing, those managing mortuary services, those undertaking lab diagnosis and/or directly in contact with the COVID-19 patients for example through cleaning of the wards and providing meals etc. ...<sup>191</sup>

However, some employers have sought to rely on their designation as essential industries as part of their defence for having recklessly gambled with workers' lives. For instance, in the US, some workers who had become ill from Covid-19 – and the families of others who died from it – brought suits against the meatpacking giant Tyson Foods over the company's abhorrent safety procedures. The company tried to transfer the cases from the state courts to federal court – where it thought it would get a more favourable hearing – under the guise (in part) that its actions were at the direction of the federal government.<sup>192</sup>

<sup>191</sup> For an example of a similar issue concerning who is entitled to extra pay for working on the frontlines of the Covid-19 pandemic, see SI-2020-43/1677 in Slovenia. There – as Maja Breznik wrote in a note for Eurofund –

The measure has responded to critiques of the sixth COVID-19 law which has provided an allowance to doctors and nurses, but not to, for instance, cleaners who are working in places where COVID-19 patients are accommodated. Thus, the measure now expands the group of beneficiaries working with COVID-19 patients.

Eurofund. (2021). *Bonus for hazardous work, measure SI-2020-43/1677 (measures in Slovenia)*. EU PolicyWatch, Dublin. [https://static.eurofund.europea.ed/covid19db/cases/SI-2020-43\\_1677.html](https://static.eurofund.europea.ed/covid19db/cases/SI-2020-43_1677.html). [Accessed 9 February 2023].

<sup>192</sup> The purpose of the federal statute in question – as summarised by the federal Court of Appeals for the 5<sup>th</sup> Circuit (at

Both the federal Courts of Appeals for the 8<sup>th</sup> and the 5<sup>th</sup> Circuits dismissed this argument,<sup>193</sup> with the latter noting that whilst the government encouraged essential businesses to remain open, 'Tyson cannot transmogrify suggestion and concern into direction and control.'<sup>194</sup>

And in France, some unions have fought for a narrower designation in the interests of worker safety and health. Fewer workers going to work means less risk of workers falling ill (even if the US Supreme Court might be bamboozled by the simplicity of the proposition). As Yassine Mouhib writes (this collection), in the absence of a definition by the French state:

...the CGT [labour federation] has also drawn up an indicative list of essential activities. It mentions 35 areas qualified as "vital". However, the union is cautious to specify that this list cannot follow a "top-down" approach and be applied as is. The CGT invites us to engage in dialogue with employees based on this list, by asking them two questions: "Is our activity

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p3; footnotes and citations omitted) – highlights the absurdity of Tyson's argument:

Congress enacted the first "federal officer removal statute" during the War of 1812 to protect U.S. customs officials. New England states were generally opposed to the war, and shipowners from the region took to suing federal agents charged with enforcing the trade embargo against England. Congress responded by giving customs officials the right to remove state-court actions brought against them to federal court. Since that time Congress has given the right of removal to more and more federal officers. Today all federal officers as well as "any person acting under that officer" are eligible. While the scope of federal officer removal has broadened, its purpose remains the same: to give those who carry out federal policy a more favorable forum than they might find in state court.

<sup>193</sup> *Buljic v. Tyson Foods, Inc.*, 22 F.4<sup>th</sup> 730 (8<sup>th</sup> Circuit); *Glenn v. Tyson Foods, Inc.*, 40 F.4<sup>th</sup> 230 (5<sup>th</sup> Circuit).

<sup>194</sup> At p3. For a similar case – this time brought by the relatives of a nursing home resident who died from Covid-19 – see: *Saldana v. Glenhaven Healthcare LLC*, 27 F.4<sup>th</sup> 679. The US Court of Appeals for the 9<sup>th</sup> Circuit dismissed the nursing home's attempt to keep the matter in federal court. The Court later denied a petition for a panel rehearing and a rehearing *en banc* (*Saldana v. Healthcare LLC*, 2022 U.S. App. LEXIS 10365) and the Supreme Court refused permission to appeal (*Glenhaven Healthcare LLC v. Saldana*, 2022 U.S. LEXIS 5122).

essential?" and if so, "Are all products essential?" This clearly shows that the unions have understood the importance of defining what falls within or outside the scope of essential activities in order to protect the health of employees. Moreover, it also shows the concern to arrive at a definition that can reflect the voice of the employees.<sup>195</sup>

And a key aspect of the Amazon workers' legal victory in France – described in the France Case Study (this collection) – was the Court of Appeal's restriction of the company's activities to what it considered essential: 'the reception of goods, the preparation and shipment of orders for essential products or products indispensable for teleworking in particular, which the government intended to favor.'<sup>196</sup>

## Health and Safety in the Workplace

### All Hail the General Duty

In the US Case Study (this collection), Frank Kearn describes the situation of Amazon workers during the height of New York's lockdown in March 2020 (at p1; footnotes omitted):

The massive JFK8 facility continued to operate through the crisis, business as usual, with workers expected to maintain breakneck productivity standards while packed into enclosed spaces alongside thousands of other workers from all over the New York City metro region.

... Meanwhile, JFK8 managers had not notified the workforce about...positive cases nor made any visible efforts to increase sanitization practices, enforce social distancing rules, or provide personal protective equipment ("PPE"), such as face masks, gloves, or cleaning supplies, to employees.

Unfortunately, this description is all too representative of the failure of essential industries to protect essential workers. This is despite the fact that it is common in legal

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<sup>195</sup> At p16.

<sup>196</sup> Quoted in: Mouhib, Y. France Case Study (this collection). At p14.

jurisdictions around the world to have what is sometimes referred to as a 'general duty clause', which requires employers to take responsibility for the health and safety of their workers. For example, in EU law, Council Directive 89/391/EEC<sup>197</sup> provides (at Article 5(1)): 'The employer shall have a duty to ensure the safety and health of workers in every aspect related to the work.'<sup>198</sup> This general duty then subordinates the rest of a jurisdiction's legal framework for OSH, which may provide for specific employer obligations to manage certain – but certainly not all – hazards.<sup>199</sup>

In theory – when it comes to the legal obligation for employers to protect workers from Covid-19 – the general duty clause could be the start and end of the matter. As long as it is clear what measures are required to keep workers safe – e.g., masking, social distancing, etc. – employers must take them. It has not played out that way. Below we highlight several important challenges that

<sup>197</sup> Council Directive of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work.

<sup>198</sup> Although note that the requirement is not absolute; Article 5(4) states:

This Directive shall not restrict the option of Member States to provide for the exclusion or the limitation of employers' responsibility where occurrences are due to unusual and unforeseeable circumstances, beyond the employers' control, or to exceptional events, the consequences of which could not have been avoided despite the exercise of all due care.

Member States need not exercise the option referred to in the first subparagraph.

International law also places the onus of worker safety and health on the employer. Most importantly, the ILO's Occupational Safety and Health Convention, 1981 (No. 155) – which is now mandatory for all member states of the ILO by virtue of its inclusion as a 'core convention' (more on which below) – provides (at Article 16(1)): 'Employers shall be required to ensure that, so far as is reasonably practicable, the workplaces, machinery, equipment and processes under their control are safe and without risk to health'

For a discussion of the general duty clause in France, and the narrowing and widening of its scope through the evolution of jurisprudence, see: Mouhib, Y. France Case Study, this collection.

<sup>199</sup> For instance, despite the importance of psychosocial risk factors to occupational safety and health, there is no EU-level legislation which specifically addresses the same. Instead, it is Directive 89/391/EEC's general duty clause – referred to above – which obliges the employer to protect the worker from these risks. See: Cefaliello, A. (2021). 'Psychosocial Risks & Telework: The European Legal Background'. In: *Annual Conference: Occupational safety and health lessons learned from the pandemic*. 13 December. European Trade Union Institute: Brussels.

workers have had to overcome to make good the employer's duty to protect them.

### Ignoring and Silencing Worker Voice on OSH

Despite the fact that often the employer's general duty encompasses – explicitly or implicitly – the need to consult workers and trade unions,<sup>200</sup> employers have ignored too many worker voices during this pandemic. Indeed, this happened with the Amazon workers in France, and a major aspect of their ultimate victory lay in the recognition that the law required consultation. As Yassine Mouhib writes (this collection):

[T]his decision of the Court of Appeal of Versailles provides a methodology for employers wishing to properly fulfill their safety obligation during a health crisis. Three steps are to be distinguished. First, the central [Social and Economic Committee (CSE)] must be consulted on the modification of health and safety conditions in each of the company's sites. Secondly, even though the Labor Code only refers to the employer, the risk assessment must be performed jointly with the employees and their representatives so that it is as accurate as possible. Finally, the results of this assessment must be duly recorded in the [risk assessment document], which must be updated if necessary. It should be noted that the reform of occupational health law of August 2, 2021 takes note of the developments resulting from this decision. It further involves employees and staff representatives in the risk assessment process, and enhanc-

<sup>200</sup> For the case of Australia, see: Forsyth, A. (n.d.). 'The Critical Importance of Voice Through Unions: Worker Participation in Health and Safety During the Covid-19 Pandemic in Australia'. In: *Comparative Labour Law & Policy Journal*, Special Issue: 'Worker Voice in the Pandemic'. At pp4-5. As Professor Forsyth there notes (at p4): '[OSH] regulation represents a significant exception to the general absence of legal support for worker voice and participation mechanisms in Australian workplaces.' However, note that a legal duty to consult is certainly not universal; as the Labour Court of South Africa noted in a case in which a healthcare workers' union was demanding consultation in the context of the pandemic:

A refusal or failure to consult in these circumstances may be bad social partnership or human resources but the applicant could point to no legal norm that was breached, assuming these respondents had refused to consult it.

*NEHAWU v Minister of Health & Ors* (Case no: J 423-20) at [49].

es the [risk assessment document].<sup>201</sup>

Far too many governments and employers have done more than just ignore the workers and trade unions criticising their negligence and nonchalance. Indeed, as discussed in the Introduction, the castigation of whistle-blowers has been an all-too-common phenomenon. For example, at the Top Glove factory in Malaysia, as Professor Noraida Endut writes (this collection, at p4):

In May 2020, a Nepali worker, Yubaraj Khadka, took pictures of his co-workers in the factory where he worked to show that social distancing was not enforced in the workplace. He shared the pictures anonymously with a number of interested parties but Top Glove discovered his identity through a CCTV recording of workers entering the factory. On 23<sup>rd</sup> September Khadka was given a termination letter by Top Glove.

Nearby, in Singapore, the government refused to renew the work permit of a migrant worker activist for public comments he made about migrant workers' living and working conditions.<sup>202</sup> Indeed, migrant workers were in a particularly vulnerable position in terms of retaliation; they may depend on employers not just for jobs, but also for accommodation and visas. In Canada the Ontario Labour Relations Board (OLRB) correctly recognised this vulnerability in the case of Flores v Scotlynn Sweetpac Growers Inc.<sup>203</sup> There the employer had sacked Gabriel Flores – a seasonal migrant worker from Mexico who laboured for 60 hours per week at C\$14.18 (US\$ 10.57) an hour<sup>204</sup> – after he spoke on the horrid working and living conditions<sup>205</sup>

<sup>201</sup> At pp13-14; footnotes omitted; emphasis in original.

<sup>202</sup> Yufeng, K. (2022). 'Migrant worker advocate whose work pass was not renewed made misleading public posts: MOM'. In: *Straits Times*. 22 June. <https://www.straitstimes.com/singapore/migrant-worker-advocate-who...d-not-get-work-pass-renewed-made-misleading-false-public-posts-mom>. [Accessed 27 June 2022].

<sup>203</sup> [2020] OLRB Case No: 0987-20-UR.

<sup>204</sup> At [78]. US currency equivalent based on: Bank of Canada. (n.d.). *Annual exchange rates*. <https://www.bankofcanada.ca/rates/exchange/annual-average-exchange-rates/>. [Accessed 26 February 2023].

<sup>205</sup> As the Board noted (at [9]): 'Mr. Flores testified that the house was divided into 4 apartments, with each apartment housing approximately 13 people. He shared a bedroom with 3 other workers as well as common bathrooms.' And at [17]:

in relation to Covid-19. The employer's behaviour was particularly brutish. As the Board stated (at [23]):

Mr. Segundo and Mr. Flores testified that on the morning of June 21, 2020 Robert Biddle (the former owner) and Mr. Palomares came into their bunkhouse and stood in the kitchen. Mr. Biddle held up his cell phone and showed a video of a person speaking with the media. Apparently this video had been circulating on the internet as there had been significant media attention focused on Scotlynn. Through translation provided by Mr. Palomares, Mr. Biddle accused Mr. Flores of being in the video and then told Mr. Flores that he was being sent back to Mexico in the "wee hours of the night".

The Board held that Flores's speaking out was an indirect invocation of the general duty clause<sup>206</sup> and that the employer's actions were in contravention of Section 50 of the Occupational Health and Safety Act.<sup>207</sup> In awarding damages at the upper end of the spectrum, the Board held (at [94]):

The power imbalance between the employer and Mr. Flores, as a migrant worker who does not speak English and relies on the employer for wages, shelter and transportation, should have been more carefully managed since a reprisal can strike a far deeper wound than might otherwise occur in the traditional employment relationship. Mr. Flores was particularly vulnerable as a temporary worker from Mexico who did not speak the language. He did not have access to the resources to minimize the pain and suffering, nor was he able to abate the injury suffered because of [the

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Mr. Flores shared his living quarters with Juan Lopez Chaparro, another worker from Mexico. Mr. Flores noticed that Mr. Chaparro was not feeling well. He and several co-workers approached the supervisors to ask for help, which resulted in Mr. Chaparro being hospitalized for the COVID-19 illness. On June 20, 2020 Mr. Chaparro died from complications related to COVID-19.

<sup>206</sup> Specifically, Section 25(2)(h) of the *Occupational Health and Safety Act*, which – as the Board put it (at [66]) – 'requires the employer to take every precaution reasonable in the circumstances for the protection of the worker.'

<sup>207</sup> R.S.O. 1990, c. O.1, as amended.

employer's] reaction to his objections about health and safety at the farm.<sup>208</sup>

The US Case Study (this collection) provides another inspiring example of victory in the face of retaliation. At the Amazon JFK8 facility, as Frank Kearn writes:

When management failed to address the worker-organizers' concerns, those workers staged a walk-out and delivered a series of demands related to the Covid-19 crisis to several upper-level managers at JFK8 and other Amazon executives, including then-CEO Jeff Bezos. The protest received extensive press coverage, and Amazon immediately responded by terminating the leader of the organizing efforts, Christian Smalls. ...

... One week after Amazon fired Smalls, JFK8 employees staged another Covid-19-related protest outside the JFK8 facility, and Amazon again retaliated against the principal organizers, firing Gerald Bryson and issuing a final disciplinary write-up to Derrick Palmer.<sup>209</sup>

Although, as Kearn writes, the JFK8 repression resulted in a multitude of litigation – with varying degrees of success for the workers – the real response of the Amazon workers was to dig into their organising and win an awe-inspiring unionisation campaign. But the litigation and the campaigning went hand in hand:

As JFK8 worker-organizers and leaders coalesced into what later became the [Amazon Labor Union (ALU)], the [legal cases] validated worker-organizers' voices and helped maintain a focus on Amazon's dangerous Covid-19 policies among its workforce. The ALU used significant dates in the litigation process... to draw media attention to the JFK8 workers and their organizing efforts. The litigation and the organizing work ran on separate tracks,

<sup>208</sup> Although note that at just C\$ 5,000.00 (US\$ 3,727.18), the 'higher end of the spectrum' hardly constituted the material of deterrence. The Board was also somewhat constrained by the fact that the damages were meant to be compensatory rather than punitive (at [93]). (US currency equivalent based on: Bank of Canada. (n.d.). *Annual exchange rates*. <https://www.bankofcanada.ca/rates/exchange/annual-average-exchange-rates/>. [Accessed 26 February 2023]).

<sup>209</sup> At pp1-2; footnotes omitted.

but the constant communication between lawyers and organizers helped ensure that both sides could aid and amplify the efforts of the other.<sup>210</sup>

## Guidance

Governments' guidance on the science of contagion, and – relatedly – on what employers must do to prevent contagion at work, has often been misleading (whether intentionally or not). For instance, in the very early stages of the pandemic many governments did not recommend wide-spread mask usage.<sup>211</sup> And government guidance was often unforgivably slow off the mark in recognizing that the coronavirus was airborne.<sup>212</sup> Many employers embraced with open arms the emphasis on the more economical hand-washing and sanitising gel, to the detriment of HVAC system upgrades and HEPA filters.

In February 2021 the Institute of Employment Rights (IER) – the leading progressive employment law think tank in the UK – published a report entitled *HSE and Covid at work: a case of regulatory failure*.<sup>213</sup> In it, they excoriated the Health and Safety Executive, Britain's principal OSH regulator, for some of the failures outlined above:

In the face of clear evidence that work constitutes an important route through which the virus can be transmitted the UK government, the devolved administrations and the [Health and Safety Executive (HSE)] have all produced guidance on how to protect workers from the risks of infection. Both the UK government and HSE have chosen to issue guidance that is largely devoid of references to the extensive legal duties that are imposed on employers in respect of the protection of workers, as well as the penalties associated with a failure to comply with them. Fur-

<sup>210</sup> At p12.

<sup>211</sup> Molteni, M. & Rogers, A. (2020). 'How Masks Went from Don't-Wear to Must-Have'. In: *Wired*. 2 July. <https://www.wired.com/story/how-masks-went-from-dont-wear-to-must-have/>. [Accessed 11 March 2023].

<sup>212</sup> Lewis, D. (2022). 'Why the WHO took two years to say COVID is airborne'. In: *Nature*. 6 April. <https://www.nature.com/articles/d41586-022-00925-7>. [Accessed 11 March 2023].

<sup>213</sup> James, P. (Ed.) (2021). *HSE and Covid at work: a case of regulatory failure*. Institute of Employment Rights: Liverpool.

thermore, the HSE appears officially happy to accept that much of the prevailing guidance on face masks is 'legally compliant', notwithstanding that there are good grounds for questioning this. More particularly, both HSE and UK government appear content with guidance which states that PPE is unnecessary to protect workers from infection even though face masks have been mandated for use on public transport and in shops.<sup>214</sup>

The HSE was indeed particularly pathetic on this issue. In my (then) capacity as General Secretary of the IWGB union I met with a team from the HSE - including the people leading on the guidance - and questioned why they were not calling for masking at work. They defended their negligence not only on the basis that masks were unnecessary PPE, but also that they did not even constitute PPE at all. As masks were designed primarily to protect not the user but rather those in the user's vicinity - so their argument went - the masks could not be considered PPE.

In recognition of the fact that pre-existing OSH frameworks, coupled with inadequate government guidance, would not suffice to protect workers from Covid-19, workers and unions have pushed for new protective laws, with varying degrees of success. In the US, the federal Occupational Safety and Health Administration (OSHA) refused to issue an emergency temporary standard (ETS) to protect workers from infectious diseases (including Covid-19), a decision which the AFL-CIO labour federation was unable to overturn in a case before a federal Court of Appeals.<sup>215</sup> After President Biden succeeded President Trump, OSHA issued an emergency temporary standard (ETS) providing protection for healthcare workers.<sup>216</sup> But when OSHA

<sup>214</sup> At p21.

<sup>215</sup> *In re AFL-CIO, 2020 U.S. App. LEXIS 18562.*

<sup>216</sup> The US Court of Appeals for the District of Columbia Circuit later summarised some of the ETS's key provisions:

The Healthcare ETS requires, among other things, healthcare employers to "develop and implement a COVID-19 plan," as well as policies to implement the Centers for Disease Control and Prevention's "Guidelines for Isolation Precautions," "...; to screen patients for COVID-19 symptoms upon entry...; to provide for personal protective equipment and physical distancing...; to "limit the number of employees present during" procedures that generate aerosols...; to implement cleaning and ventilation protocols...; and to train employees on COVID-19...

refused to replace the ETS with a permanent standard, trade unions were again unable to force OSHA's hand via litigation.<sup>217</sup> However, plenty of governments did introduce Covid-specific OSH laws. For instance, in Namibia, Government Notice 110 of 2020<sup>218</sup> required employers (at [3(1)]) to 'put in place safety measures at the workplace that will assist with the prevention of the further spreading of COVID-19' and provided for the right of employees (at [3(2)-(3)]) to walk off the job (in certain circumstances) due to the dangers of Covid-19. Some laws provided protection for specific groups of workers. For instance, in Brazil Law no. 14.297 provided for certain protections for app-based workers.<sup>219</sup>

## PPE

Another challenge workers faced was governmental inability or unwillingness to procure the necessary PPE to keep them safe. As Judge Nzioki Wa Makau of the Employment & Labour Relations Court of Kenya held in the private security guards case<sup>220</sup> cited above (at [8]):

The other limb of the application was the provision of PPE. In the present circumstances, it would be cumbersome to lump the Government with an additional expense because as the COVID-19 mishandling of donations of PPE has shown, as well as the rampant misuse of resources, we cannot trust the Govern-

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*In re Nat'l Nurses United, 47 F.4<sup>th</sup> 746.* At p 8 (internal citations omitted).

<sup>217</sup> More specifically, the unions sought (in part) a writ of mandamus compelling OSHA 'to issue a permanent standard superseding the Healthcare ETS within 30 days of the writ's issuance' (at p7). One particular passage from the US Court of Appeals for the District of Columbia Circuit's opinion sums up the matter (at p11):

The Unions maintain that OSHA must issue a permanent standard because the agency has not withdrawn its findings that COVID-19 poses a grave danger and that a healthcare standard is necessary. The fact of these findings, which supported the Healthcare ETS, does not necessitate the issuance of a permanent standard. If it did, there would be little to be gained by undertaking the rulemaking process mandated by the Act.

*In re Nat'l Nurses United, 47 F.4<sup>th</sup> 746.*

<sup>218</sup> Published in Government Gazette no. 7195 on 29 April 2020.

<sup>219</sup> Lei No. 14.297, de 5 de Janeiro de 2022.

<sup>220</sup> *Kenya National Private Security Workers Union & 44 others v Cabinet Secretary Ministry of Health & 6 others* [2021] eKLR (Petition No. 122 of 2020; 17 March 2021).

ment to do right always as far as this disease is concerned. Corruption is playing its part and even if I ordered the Government to provide PPEs to Security Guards it would most probably not be done or would be an avenue for someone to get rich quick at the expense of the people of Kenya. While I have considerable sympathy for the Security Guards who are represented by the petitioners it seems like the rest of us we are quite on our own given what transpired last year regarding donations of PPE to the Government.

In South Africa the National Education Health & Allied Workers Union (NEHAWU) petitioned the Labour Court for relief in relation to the government's alleged failure to provide necessary PPE for healthcare workers (among other things). In what became the case of *NEHAWU v Minister of Health & Ors*,<sup>221</sup> the Court rejected the petition, in the main because it did not believe the alleged shortage was made out on the facts. But, more interestingly for present purposes, the Court also denied a request for it to interdict and declare unlawful any disciplinary action that might be taken against NEHAWU members for refusing to work without PPE, saying (at [56]):

No facts are cited regarding any employees who have been threatened with dismissals related to refusal to perform their duties due to a lack of PPE. The court cannot grant a global ruling that employers cannot take disciplinary action against NEHAWU's members who refuse to treat patients because in their opinion they do not have appropriate PPE. The relief sought is thus abstract and can be dismissed for this reason alone.

Healthcare workers in Guatemala had better luck. In a case which the Human Rights Ombudsman brought before the country's Constitutional Court,<sup>222</sup> the Court ordered the Minister of Public Health and Social Assistance to (at p7):

...in strict observance of the provisions of the State Procurement Law and other applicable regulations, carry out all effective procedures to provide, continuously and without delay,

<sup>221</sup> Case no: J 423-20.

<sup>222</sup> Expediente 1768-2020.

the medical protection equipment and other supplies that doctors, surgeons, paramedics, nurses, medical assistants and other health personnel who are providing their technical or professional services during the health crisis derived from the "coronavirus SARS-CoV-2 (COVID19)" pandemic in health care centres.<sup>223</sup>

## Enforcement

The level of OSH law enforcement required during the pandemic was not for the faint of heart. As an opinion by the European Union's Senior Labour Inspectors' Committee (SLIC)<sup>224</sup> stated (at [22]):

The ongoing relevance of...traditional risks is also clearly demonstrated by the COVID-19 outbreak. The availability of training and correct use of personal protective equipment (PPE) at the workplace, psychosocial risks for workers operating at the frontline such as healthcare workers, food industry and logistics, and organisational and ergonomic risk factors while working from home, are mostly issues that are known OSH challenges. However, it is the magnitude of the problem, which presents a challenge to the labour inspectors in times of pandemics.

And yet, political choices have exacerbated the problem. As the opinion further pointed out (at [31]): 'while labour inspectors are assigned with more extensive duties in a rapidly transforming environment, with few exceptions, its workforce is shrinking.'

Indeed, many state enforcement bodies proved unable or unwilling to crack down on errant employers. For example, in Great Britain, by late February 2021, despite over 3,500 known workplace outbreaks of Covid-19, the Health and Safety Executive had not shut down or prosecuted a single employer, instead opting for 'direct persuasion, advice, and reprimand'.<sup>225</sup> Even the Health Secretary – the same

<sup>223</sup> Author's translation.

<sup>224</sup> SLIC. (2020). *Opinion on future EU OSH Enforcement priorities contributing to a renewed EU OSH Strategy: A submission from the Senior Labour Inspectors' Committee (SLIC)*. 21 October.

<sup>225</sup> Moyer-Lee, J. (2021). 'After the Uber ruling, there's no excuse for government not to enforce workers' rights'. In: *The Guardian*. 20 February.

one who called the teachers' unions 'arses' - admitted his express purpose for getting into politics was to battle 'the over-burdensome intervention of health and safety officers.'<sup>226</sup> When a fox is given a ministerial mandate to guard the Great British Hen House, the results should surprise no one.

The case of Great Britain was not unique. As Frank Kearl writes in the case of the US (this collection), OSHA was under-resourced and unable to apply sufficient sanctions.<sup>227</sup> And workers and their organisations have struggled to litigate a change in behaviour. For example, workers at a meatpacking plant in Pennsylvania sought a writ of mandamus to compel the Labour Secretary - i.e., OSHA - to take action to address a situation of imminent danger at their workplace. OSHA refused, instead conducting its normal enforcement proceedings and in the end refusing to issue the company with a citation. In *Doe v. Scalia*<sup>228</sup> a federal court of appeals considered for the first time whether workers could seek a writ of mandamus in these circumstances. It held that although workers could obtain such a writ in certain circumstances, it could not do so once OSHA had completed its enforcement proceedings. And in *In re Nat'l Nurses United*<sup>229</sup> - the case referred to above regarding OSHA's Healthcare ETS - the Court of Appeals succinctly summarised the difficulty in using litigation to make governments enforce the law: 'We cannot compel OSHA to enforce the Healthcare ETS because its discretion over which standards to enforce and when is

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<https://www.theguardian.com/commentisfree/2021/feb/20/uber-ruling-government-workers-rights-conservatives-employers>. [Accessed 25 February 2023]. Or as the Institute of Employment Rights report - referred to above - put it (at pp31-32; footnotes omitted):

HSE has become a hollowed-out shell, a shadow of what a safety regulatory body needs to be. And paradoxically, its uselessness to workers and the public is what makes it so useful to a government that wants to be seen to be doing something about the pandemic, whilst carrying on 'business as usual'

James, P. (Ed.) (2021). *HSE and Covid at work: a case of regulatory failure*. Institute of Employment Rights: Liverpool.

<sup>226</sup> Quoted in: Moyer-Lee, J. (2021). 'Brexit gives the Tories a free hand to dismantle workers' rights'. In: *Al Jazeera*. 9 January. <https://www.aljazeera.com/opinions/2021/1/9/brexit-deal-tories-uk-workers-rights>. [Accessed 26 February 2023].

<sup>227</sup> At p3.

<sup>228</sup> 2023 U.S. App. LEXIS 2421.

<sup>229</sup> 47 F.4<sup>th</sup> 746.

the antithesis of a clear duty to act.'<sup>230</sup>

The Malaysia Case Study (this collection) provides a more positive instance of enforcement, as well as an interesting example of the interplay between enforcement and companies' public relations sensitivities. Professor Noraida Endut tells how - in response to the working and living conditions of Top Glove workers - US Customs and Border Protection (CBP) banned the imports of the company's products. The Malaysian government also acted:

Top Glove was investigated for 19 cases of failure to comply with the Workers' Minimum Standard of Housing and Amenities Act 1990 (Act 446) in relation to the COVID-19 outbreak in November 2020. However, to-date it has only been charged in court for 10 counts of breach of section 24D(1) of the Act for failure to provide workers' accommodation that was certified with a Certificate of Accommodation by the Labour Department.<sup>231</sup>

Top Glove moved to improve the situation and - following the report of external consultants to the effect that the company had indeed improved matters - the US CBP lifted the ban. Negative publicity was at the heart of this matter, providing a catalyst for government action and employer response. As Professor Endut sums up the point:

Top Glove's efforts are mostly triggered by international sanctions and critiques and the need to remain as a major global player. The government's interventions to workers' COVID-19 health conditions have also been significantly influenced by the external or international conditions put on the country's trade relations; and by media exposure.<sup>232</sup>

### OSH Protections Reserved for Employees

A worker's employment status - the 'primary portal through which the labourer enters the world of workers' rights'<sup>233</sup> - is often determinative of the extent of an em-

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<sup>230</sup> At pp12-13; internal citations omitted.

<sup>231</sup> At p12. Although Professor Endut argues that the Malaysian government could have gone much further (at p13).

<sup>232</sup> At p15.

<sup>233</sup> Moyer-Lee, J. & Kountouris, N. (2021). 'The "Gig Economy": Litigating the Cause of Labour'. In: *Taken for a Ride: Litigating the Digital Plat-*

ployer's OSH duties. Indeed, many jurisdictions reserve the coverage of OSH protection for 'employees'. When a worker works for an entity, and their occupational safety and health is gravely affected by the entity's decisions, but the worker is not an 'employee' in law, this poses a serious problem. This problem has heavily affected key workers, 49% of whom (globally) are estimated to be 'self-employed'.<sup>234</sup>

In the UK Case Study (this collection), Professor Alan Bogg tells how a trade union overcame this problem in the case of *R (on the application of the Independent Workers' Union of Great Britain) v The Secretary of State for Work and Pensions & Anor.*<sup>235</sup> In that case the issue was that the main OSH protections in Great Britain – and in particular, the general duty clause, the obligation on employers to provide PPE, and the ability of workers to refuse work in situations of imminent danger – were reserved for employees. However, UK employment law provides for three tiers of employment status: employees, independent contractors, and 'limb b workers'. Limb b workers are in a comparable position to employees – in particular in that they work as part of someone else's organisation rather than for themselves – and as such are entitled to most of the employment rights that employees have, including protection from discrimination and entitlement to minimum wage. The fact that OSH protections did not extend to limb b workers was odd. However, what transformed it from odd to unlawful was the fact that EU OSH law – which the UK was still bound to implement<sup>236</sup> – did require that these protections be extended to limb b workers. The IWGB argued therefore that the UK had unlawfully failed to properly implement EU law. The High Court agreed<sup>237</sup> and

form Model. ILAW Issue Brief: March. <https://www.ilawnetwork.com/wp-content/uploads/2021/03/Issue-Brief-TAKEN-FOR-A-RIDE-English.pdf>. [Accessed 27 February 2023]. At p8.

<sup>234</sup> ILO. (2023). *World Employment and Social Outlook 2023: The value of essential work (Executive Summary)*. At p4.

<sup>235</sup> [2020] EWHC 3050 (Admin).

<sup>236</sup> As Professor Bogg notes:

The case arose during the 'implementation period' of the European Union (Withdrawal Agreement) Act 2020. This period ended on 31<sup>st</sup> December 2020. Until that time, the court had the power to grant declarations as if the United Kingdom was still a member state.

<sup>237</sup> Except on the general duty clause argument. There, the Court accepted that the requirement to protect employees did not include limb b workers but found that EU law had nevertheless been properly implemented as the same obligation was effectively found in a different

as a result the government had to change the law. As Professor Bogg writes on the case's historical nature:

The importance of IWGB cannot be overstated. Yet it is both a milestone and a grave-stone. It represented probably the last time in which EU social law operated as an impetus to worker-protective reform of national law. In the post-Brexit era, the legal footholds for this kind of innovative employment status litigation are regrettably more scarce.<sup>238</sup>

## Remote Work

In the context of Covid-19, one of the most important public health measures that governments took, and arguably the most important OSH measure that employers took, was to require or encourage workers to work from home.<sup>239</sup> In most scenarios this reduces the number of people with whom a worker comes into contact during the day and hence the risk of contagion. Remote work<sup>240</sup>

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section of the Health and Safety at Work Act 1974.

<sup>238</sup> Bogg, A. UK Case Study (this collection). At p9.

<sup>239</sup> The case of Victoria, Australia is illustrative. As a study from La Trobe University recounts:

In March 2020 Australia went into its first COVID 19 lockdown which required people who could work at home to do so. By May many of the restrictions had been lifted although those who could work at home were encouraged to continue to do so. In July, Melbourne, Victoria, went into another lockdown, with strict movement restrictions and curfews in place, emerging 112 days later; at the end of the lockdown people were strongly encouraged to continue WAH. Most Victorian school students were able to return to onsite learning in October 2020 and by December 2020, the Victorian Chief Health Officer, finally announced a staged return of office workers.

Graham, M. et al. (2021). 'Working at Home: The Impacts of COVID-19 on Health, Family-Work-Life Conflict, Gender, and Parental Responsibilities'. In: *Journal of Occupational and Environmental Medicine*, Vol. 63, No. 11 (November): pp938-943. Citation at p938 (footnotes omitted).

<sup>240</sup> Unless otherwise specified, this section uses the terms 'remote work', 'telework', and 'work from home' interchangeably, all to denote a situation in which the worker does not have to leave home to keep working. However, various laws have distinguished the terms. For instance, as Inna Kudinska and George Sandul write of a Ukrainian law in the Ukraine Case Study (this collection, at p4):

The new law introduces two forms of telework - remote (or distant) work and home-based work. Working remotely, an employee independently chooses his/her workplace. It may be any place at the employee's

proved a remarkably popular phenomenon. For example, one study conducted in March 2021 found that over 60% of EU workers would like to continue teleworking in some form after the pandemic.<sup>241</sup> However, it was not without its challenges.

One of the biggest problems with working from home as an OSH measure is that it is simply impossible for many workers, particularly the low-paid.<sup>242</sup> And for those who could work remotely, this modality of work came with complications. In terms of OSH, although remote work has been associated with some health benefits beyond Covid-19, it also exacerbates certain risks. For example, ill-equipped home offices may pose ergonomic hazards,<sup>243</sup> and the working environment may increase psychosocial risk factors,<sup>244</sup> such as feelings of isolation, depression, longer working hours, and stress.<sup>245</sup> This was particularly

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discretion, using communication technologies. Home-based work is performed by an employee outside of the employer's premises but from a designated workplace (place of residence or other pre-selected premises). The workplace is fixed and cannot be changed at the employee's initiative without the employer's consent in the manner specified in an employment contract for home-based work.

<sup>241</sup> Eurofund, Living, working and COVID-19 survey, third wave, March 2021; cited in: Hedegaard Nielsen, N. 'Psychosocial risks in telework'. In: *Annual Conference: Occupational safety and health lessons learned from the pandemic*. 13 December. European Trade Union Institute: Brussels.

<sup>242</sup> This is true in countries of all income levels. However, limitations are exacerbated in lower income countries where internet and electricity access are not as widespread. As a recent ILAW presentation noted: '46% of Africans still lack access to electricity.' Wambui Wamai, J. (2023). *Teleworking in Africa*. ILAW.

<sup>243</sup> One study has found that: '[E]ven after adjustment, higher telework frequency was significantly associated with a higher prevalence of stiff shoulders, eyestrain, and low back pain among workers in Japan during the COVID-19 emergency declaration.' Tezuka, M. et al. (2022). 'Association Between Abrupt Change to Teleworking and Physical Symptoms During the Coronavirus Disease 2019 (COVID-19) Emergency Declaration in Japan'. In: *Journal of Occupational and Environmental Medicine*, Vol. 64, No. 1 (January): 1-5. At p3.

<sup>244</sup> Cefaliello, A. (2021). 'Psychosocial Risks & Telework: The European Legal Background'. In: *Annual Conference: Occupational safety and health lessons learned from the pandemic*. 13 December. European Trade Union Institute: Brussels.

<sup>245</sup> Hedegaard Nielsen, N. 'Psychosocial risks in telework'. In: *Annual Conference: Occupational safety and health lessons learned from the pandemic*. 13 December. European Trade Union Institute: Brussels; Tezuka, M. et al. (2022). 'Association Between Abrupt Change to Teleworking and Physical Symptoms During the Coronavirus Disease 2019 (COVID-19) Emergency Declaration in Japan'. In: *Journal of Occupational and Environmental Medicine*, Vol. 64, No. 1 (January): 1-5. At p1.

the case for women who shouldered the disproportionate burden of household and caring responsibilities, especially when children spent the days at home because schools were closed.<sup>246</sup> On the economic front, questions arose about who was to cover the cost of the home working materials and space. And from a trade union perspective, the atomisation of the working environment posed new challenges to collective organising and action. All of these problems were exacerbated by the fact that remote work was often imposed at short notice and with little preparation by anyone.<sup>247</sup> However, as Professor Francisco Trillo writes (this collection) in the case of Spain between March and October 2020:

The improvisation, the absence of training, the lack of necessary work tools, the non-observance of certain individual and collective rights, such as the effective protection of health and safety or the right to strike, were "accepted", at this early stage, by workers and their union representatives due to the social fear of contagion of the disease.<sup>248</sup>

Given all of the above, trade unions pushed for, and many governments adopted, progressive laws regulating remote work<sup>249</sup> and providing for such things as the 'right to dis-

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<sup>246</sup> As the La Trobe University study – referred to above – found:

Findings from this study suggest women experience greater frequency of pain and discomfort and rated their pain as more severe compared with men, and this effect remained after controlling for the presence of children. However, pain and discomfort were significantly reduced among women who were more satisfied with the division of household tasks. In Australia, like many countries across the world, the work of household chores disproportionately falls upon women and research suggests the gender inequality associated with household tasks continued during COVID 19 lockdowns.

Graham, M. et al. (2021). 'Working at Home: The Impacts of COVID-19 on Health, Family-Work-Life Conflict, Gender, and Parental Responsibilities'. In: *Journal of Occupational and Environmental Medicine*, Vol. 63, No. 11 (November): pp938-943. Citation at p942 (footnotes omitted).

<sup>247</sup> On the connection between the short notice of remote work and ergonomic risks, see: Bouziri, H. et al. (2020). 'Working from home in the time of COVID-19: how best to preserve occupational health?' In: *Occup Environ Med*, Vol. 77, No. 7 (July): 509.

<sup>248</sup> At p2.

<sup>249</sup> Carmen Bueno, in an ILO report, summarises some of these developments in 2020 in Latin America:

connect',<sup>250</sup> protection of worker privacy, reimbursement for home-office expenses,<sup>251</sup> as well as the voluntary nature of the arrangements,<sup>252</sup> among others. Law 10/2021

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Although some countries such as Colombia (2008), Brazil (2017), Costa Rica (2019) and Panama (2020) already had legislation on remote work and teleworking before the declaration of the pandemic, others concluded the regulatory processes that had already initiated, such as El Salvador and Chile, or directly promoted new laws, such as Argentina, Ecuador and Uruguay.

Bueno, C. (2020). *Desafíos, respuestas y oportunidades para la seguridad y salud en el trabajo en América Latina en tiempos del COVID-19*. (21 December). ILO. At p3. Author's translation.

For an overview of developments in the EU member states and Norway, see: Eurofund. (2022). *Telework in the EU: Regulatory frameworks and recent updates*. Publications Office of the European Union: Luxembourg.

Other countries have provided – or intend to provide – guidelines instead. For example, in Taiwan, government guidelines on the topic require employers to provide (remote) employees with training on mental and physical health. In Singapore, a tripartite body reportedly intends to introduce guidelines in 2024. See: Boo, K. (2022). 'Future of hybrid work in S'pore: Finding room for flexibility in remote working rules'. In: *Straits Times*. 4 July. <https://www.straitstimes.com/singapore/jobs/future-of-hybrid-work-in-spore-finding-room-for-flexibility-in-remote-working-rules>. [Accessed 9 July 2022].

<sup>250</sup> Bueno, C. (2020). *Desafíos, respuestas y oportunidades para la seguridad y salud en el trabajo en América Latina en tiempos del COVID-19*. (21 December). ILO. At p4.

<sup>251</sup> For the example of Panama's Law on Telework (No. 126 of 2020), see: IOE. (2021). 'Panama: outcomes of the tripartite Dialogue for Labour Economy and Development, including the regulation on telework'. In: *Industrial Relations and Labour Law Newsletter*. January. <https://ioewec.newsletter.ioe-emp.org/industrial-relations-and-labour...r-labour-economy-and-development-including-the-regulation-on-telework>. [Accessed 10 June 2022].

<sup>252</sup> For example, in Greece, Law 4808/2021 Government Gazette A' 101, 19.06.2021. As the law firm Platis – Anastassiadis & Associates has summarised the law's impact on teleworking:

[I]t is established that the employer may unilaterally impose teleworking, only for reasons of protection of public health, in those instances determined by a ministerial decision of the Minister of Health and the each time co-competent Minister and for the period that these reasons are present. On the contrary, the employee may unilaterally opt for teleworking, at his request, in the event of a documented risk to his health that shall be avoided if he provides his work through teleworking instead of at the employer's premises, and for as long as this risk lasts. In case the employer disagrees, the employee can request the resolution of the dispute by the Labor Inspectorate.

Platis – Anastassiadis & Associates. (2021). 'Law 4808/2021: Significant amendments in the labor legislation'. 25 June. <https://www.ey.com/en-gr/tax/tax-alerts/law-4808-2021-significant-amendments-in-the-la>

in Spain provides an excellent example of this.<sup>253</sup> The law is designed to ensure that remote work is not used as a mechanism for employers to transfer costs to workers,<sup>254</sup> and is protective of workers' safety and health in that it requires employers to conduct risk assessments – including by physical visitation if necessary – of the work environment.<sup>255</sup> And importantly, the law provides for collective rights. As Professor Trillo writes:

Specifically, the regulations refer to the exercise of the right to vote in elections for workers' representatives, to participation in activities organized by the representatives, and especially to attendance and participation in the workers' assembly. To achieve these objectives, it is foreseen that the workers' representatives are provided with the necessary technological means to maintain a relationship between representatives and represented. Therefore, they must have adequate access to the communications and electronic addresses of the workers used in the company, as well as the implementation of the virtual bulletin board. Lastly, we must note the obligation of the employer to guarantee the in-person participation of remote workers in the elections of workers' representatives.<sup>256</sup>

In sum, argues Professor Trillo, whilst not perfect, the law:

...represents a significant advance in the protection of the rights of remote workers and teleworkers; strengthens and reinforces the principle of equal treatment and opportunities and non-discrimination; progresses in the protection of the safety and health of remote and teleworkers; creates greater certainty and security in labor relations and establishes collective negotiation as transcendental when developing the principles and

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[bor-legislation](#). [Accessed 3 September 2022].

<sup>253</sup> For a discussion of the similar Royal Decree–Law 29/2020, of September 29, which covers Spain's public sector, see: Trillo, F. Spain Case Study (this collection). At pp7-8.

<sup>254</sup> Trillo, F. Spain Case Study (this collection). At pp5-6.

<sup>255</sup> Trillo, F. Spain Case Study (this collection). At p6.

<sup>256</sup> At pp6-7.

measures that derive from laws on remote work.<sup>257</sup>

Ukraine similarly legislated for various protections for remote workers during the pandemic. However, argue Inna Kudinska and George Sandul (this collection), the Nova Poshta Union – which represents workers at a major Ukrainian logistics and delivery company – were able to collectively bargain for improvements which went beyond the new laws. As the authors describe:

In December 2020, a new CBA was approved. It contained an innovative clause regarding remote work and relevant employer obligations. Under it, the employer is responsible for providing the employees working remotely with the means of production related to information and communication technologies the employee uses. The employer must also provide appropriate installation and maintenance and pay the associated costs. Further, the employer must provide an equipped workplace (laptop/desktop tower, screen, mouse, keyboard, Internet access), furniture, if necessary (desk, chair, shelves, etc.), and delivery of the relevant equipment to the location of remote work.

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The employer also agrees to ensure free access to drinking water, tea, coffee, and sugar for all employees of the company, and in the case of employees working remotely or at home, to ensure the delivery of drinking water, tea, coffee, and sugar to their remote workplaces.<sup>258</sup>

## No Jab, No Job

'Finding the smallpox to be spreading much and fearing that no precaution can prevent it from running through the whole of our Army,' General George Washington wrote to the Continental Army's Chief Physician, 'I have determined that the troops shall be inoculated.'<sup>259</sup> It was 1777

<sup>257</sup> At p8.

<sup>258</sup> At pp4–5. Although note that the employer suspended various provisions of the CBA, including on remote work, as a result of Russia's invasion.

<sup>259</sup> From George Washington to William Shippen, Jr., 6 February 1777," Founders Online, National Archives, <https://founders.archives.gov/>

and Washington – who would later become the first President of the United States – was leading troops in a war of independence against the British. Unlike the enemy forces – who hailed from a land where the disease was endemic and as such had some herd immunity – Washington's men were highly susceptible. But the cost-benefit analysis of vaccination was perhaps a bit trickier back then; small pox variolation – the inoculation method by which live pus was inserted in an incision and purposely infected the recipient, albeit with a usually milder case – had a fatality rate of between 5 and 10 per cent. For those who survived it, the recovery period was around one month.<sup>260</sup> But, as Washington wrote:

Necessity not only authorizes but seems to require the measure, for should the disorder infect the Army in the natural way and rage with its usual virulence we should have more to dread from it than from the Sword of the Enemy.<sup>261</sup>

As this little foray into pop history demonstrates, occupational vaccine mandates are nothing new. This is particularly the case in the healthcare sector.<sup>262</sup> However, they have become more prominent, and have covered many more sectors, during the Covid-19 Pandemic. For instance, the US federal government has attempted to in-

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[documents/Washington/03-08-02-0281](https://www.founders.archives.gov/documents/Washington/03-08-02-0281). [Original source: The Papers of George Washington, Revolutionary War Series, vol. 8, 6 January 1777–27 March 1777, ed. Frank E. Grizzard, Jr. Charlottesville: University Press of Virginia, 1998, p. 264.]; quoted in: Elliot, B.P. & Chambers, S. (2022). 'A historical analysis of vaccine mandates in the United States military and its application to the COVID-19 vaccine mandate'. Dec 5;40(51):7500-7504. doi: 10.1016/j.vaccine.2022.08.017. Epub 2022 Aug 15. PMID: 35989135; PMCID: PMC9376337.

<sup>260</sup> Roos, D. (2020). *How Crude Smallpox Inoculations Helped George Washington Win the War*. 18 May (updated). <https://www.history.com/news/smallpox-george-washington-revolutionary-war>. [Accessed 1 March 2023].

<sup>261</sup> From George Washington to William Shippen, Jr., 6 February 1777," Founders Online, National Archives, <https://founders.archives.gov/documents/Washington/03-08-02-0281>. [Original source: The Papers of George Washington, Revolutionary War Series, vol. 8, 6 January 1777–27 March 1777, ed. Frank E. Grizzard, Jr. Charlottesville: University Press of Virginia, 1998, p. 264.]; quoted in: Elliot, B.P. & Chambers, S. (2022). 'A historical analysis of vaccine mandates in the United States military and its application to the COVID-19 vaccine mandate'. Dec 5;40(51):7500-7504. doi: 10.1016/j.vaccine.2022.08.017. Epub 2022 Aug 15. PMID: 35989135; PMCID: PMC9376337.

<sup>262</sup> For examples from Australia, see: *Larter v Hazzard (No 2)* [2021] NSWSC 1451 at [35]. And for examples from the US, see: *Joseph R. Biden, Jr et al. v Missouri et al.* 595 U.S.\_\_(2020). At p7.

roduce mandates for federal public sector employees,<sup>263</sup> employees of entities that contract with the federal government,<sup>264</sup> employees of institutions that receive funding from the federal healthcare programmes Medicare and Medicaid,<sup>265</sup> and the military,<sup>266</sup> and has tried to introduce a requirement for nearly all large private sector companies to enforce vaccination or the alternative of regular testing and masking.<sup>267</sup> All of this was in addition to widespread state-level mandates for different sectors.<sup>268</sup> Some countries went further. For instance, Singapore instituted an economy-wide vaccine mandate for employees who do not work from home.<sup>269</sup> And beyond government mandates, many employers of their own volition have required staff to vaccinate.

Governments have justified the mandates not just as an OSH measure, but also on grounds of public health,<sup>270</sup> the

<sup>263</sup> Executive Order 14043. Note though that – although various courts have considered the lawfulness of the order – a federal district court in Texas enjoined its enforcement; *Feds v. Biden*, 2022 U.S. Dist. LEXIS 11145. The Court of Appeals for the 5<sup>th</sup> Circuit then overturned that decision; *Feds for Med. Freedom v. Biden*, 30 F.4<sup>th</sup> 503, 2022. But then the Circuit decided to rehear the case, *en banc*, with the effect that the original 5<sup>th</sup> Circuit decision was vacated, leaving intact the federal district court decision; *for Med. Freedom v. Biden*, 37 F.4<sup>th</sup> 1093.

<sup>264</sup> Executive Order 14042. Although note that various federal courts have enjoined enforcement of the Order, at least against the litigants; e.g., see: *Ga. v. President of the United States*, 46 F.4<sup>th</sup> 1283.

<sup>265</sup> In the form of an interim final rule issued by the Secretary of Health and Human Services; 86 Fed. Reg. 61561, 61616–61627.

<sup>266</sup> For example, see the US Supreme Court case of: *Austin v. United States Navy Seals*, 142 S. Ct. 1301.

<sup>267</sup> In the form of an emergency temporary standard (ETS) issued by the Occupational Safety and Health Administration (as discussed above); 86 Fed. Reg. 61402 (2021).

<sup>268</sup> Although note that some states passed laws prohibiting or restricting vaccine mandates; e.g., in the case of Florida, see: *Fla. Stat. § 112.0441* (for the public sector) and *Fla. Stat. § 381.00317* (private sector).

<sup>269</sup> Workforce Vaccination Measures (WVM) (with effect from 1 January 2022), contained in the Workplace Safety and Health (COVID-19 Safe Workplace) Regulations 2021. For a discussion on this, see: *Han Hui Hui & Ors v Attorney-General's Chambers* [2022] SGHC 141.

<sup>270</sup> For example, the Supreme Court of the Republic of Tatarstan (Russian Federation), upheld (on public health grounds) Resolution No. 7 (11 October 2021) of the Republic's Head Sanitary Officer, which required employee vaccination in certain circumstances and provided for the right of employers to suspend unvaccinated employees or move them to telework (*Case No. M-477/2021*, 14 December 2021); Shaburova, T. (n.d.). *Russian Federation, Supreme Court of the Republic of Tatarstan*, 14 December 2021, *Case No. M-477/2021*. <https://www.covid19litigation.org/case-index/russian-federation-supreme-court-republic-tatar>

effective provision of services to the public,<sup>271</sup> or even – in the case of the US federal contractor mandate – ‘economy and efficiency’. Often these categories blend together. As Adamson J wrote for the New South Wales Supreme Court in the (healthcare) case of *Larter v Hazzard* (No 2)<sup>272</sup> (at [85]):

...I reject [plaintiff lawyer's] emphasis on the distinction between public health risks (risks to patients) and health and safety risks (to the workers who provide health services). While there is clearly a distinction, the two concepts are related and there is a significant overlap. Where workers cannot work because of, say, being infected with the virus or having to self-isolate because of possible infection, this can inhibit NSW Health's capacity to care for and treat patients, which, in turn, creates a risk to public health.

Undoubtedly, fully vaccinated workforces create safer workplaces for everyone who works in them and reduce the extent of severe disease and death from Covid-19 in society (with the resultant benefit of providing a safer working environment for healthcare workers). Therefore, it is unsurprising that from early on workers and trade unions around the world rallied for quick and equitable access to vaccines and promoted vaccination among workers, including by calling for paid time off from work for the same. In Buenos Aires, Argentina, 11 trade unions representing port workers even went on strike to demand priority access to vaccines.<sup>273</sup> However, the issue of mandatory vaccination at work has proved incredibly contentious, dividing workers and trade unions, and at times pit-

[stan-case-no-m-4772021-2021-12-14](#). [Accessed 20 July 2022].

<sup>271</sup> Sometimes the justifications – and the primary legislation upon which they were based – had to evolve in order to keep up with events. An example of this can be seen in *Yardley & Ors v Minister for Workplace Relations and Safety & Ors* [2022] NZHC 291, a case challenging a national vaccine mandate for police and defence forces in Aotearoa New Zealand, at [7]–[8].

<sup>272</sup> [2021] NSWSC 1451.

<sup>273</sup> Reuters Staff. (2021). ‘Argentina port workers end strike after deal reached on vaccines’. In: *Reuters*. 27 May. <https://www.reuters.com/article/argentina-grains-strike-vaccines-idINL2N2ND36C>. [Accessed 2 March 2023]. For a similar strike in Nepal, this time by fuel tanker drivers, see: Agency. (2021). ‘Fuel Tanker Drivers Call Off Strike Following Deal on Vaccination’. In: *The Nepalese Voice*. 16 June. <https://nepalesevoice.com/nepal/fuel-tanker-drivers-call-off-strike-following-deal-on-vaccination/>. [Accessed 2 March 2023].

ting them against one another.<sup>274</sup>

Some unions, in particular ones representing healthcare workers, have welcomed requirements that everyone at work be vaccinated. This was the case, for instance, with National Nurses United (NNU), the largest registered nurses' trade union in the US. In reaction to the narrowly divided US Supreme Court decision upholding the healthcare worker vaccine mandate, NNU President Zenei Triunfo-Cortez, RN – in words which I fully endorse – stated (in part):

...we are gratified with today's 5-4 court decision that, frankly, should have been unanimous, to support one important safety measure — vaccination for health care workers — which must be part of the total program of infectious disease containment measures [National Nurses United] has long outlined[.]<sup>275</sup>

In other cases, unions brought legal challenges against mandates, at times becoming litigation bedfellows with conservative political forces and employers.<sup>276</sup> And sometimes when unions refused to become plaintiffs in

<sup>274</sup> For some extreme examples of this from Australia, see: Forsyth, A. (n.d.). 'The Critical Importance of Voice Through Unions: Worker Participation in Health and Safety During the Covid-19 Pandemic in Australia'. In: *Comparative Labour Law & Policy Journal*, Special Issue: 'Worker Voice in the Pandemic'. At pp11-12.

<sup>275</sup> Quoted in: National Nurses United. (2022). 'Nurses welcome Supreme Court order on health care workers, dismayed safety for other workers ignored'. In *National Nurses United*. 13 January. <https://www.nationalnursesunited.org/press/nurses-welcome-supreme-court-order-health-care-workers-dismayed-safety-other-workers-ignored>. [Accessed 2 March 2023]. For similar support for mandates from healthcare workers' unions in New South Wales, Australia, see: *Larter v Hazzard (No 2)* [2021] NSWSC 1451 at [42].

<sup>276</sup> For example, in *Nat'l Fedn. Of Indep. Bus. v. Dep't of Labor*, 2022 U.S. LEXIS 496, the US Supreme Court case considering OSHA's ETS requiring vaccination or regular testing and masking in the private sector. Here, at various stages of the litigation that culminated in this decision, the United Food and Commercial Workers International Union, and divisions of the Service Employees International Union and the Communication Workers of America, argued the same side of the issue as the Republican National Committee, the arch-Republican states of Texas and Mississippi, and the National Federation of Independent Business. See: *BST Holdings, L.L.C. v. OSHA*, 2021 U.S. App. LEXIS 33117, *BST Holdings, L.L.C. v. OSHA*, 2021 U.S. App. LEXIS 33698, *MCP No. 165 v. United States DOL*, 2021 U.S. App. LEXIS 37024, and *Mass. Bldg. Trades Council v. United States DOL (In re MCP No. 165)*, 2021 U.S. App. LEXIS 37349. And, ultimately, plaintiffs' victory relied on the votes of the six Supreme Court justices appointed by Republican presidents, over the dissent of the three appointed by (the more labour-friendly) Democrats.

such litigation, they ended up as defendants instead, in suits brought by workers over the unions' refusals. For example, in the case of *Tran c Institut professionnel de la fonction publique du Canada*,<sup>277</sup> Canada's Federal Public Sector Labour Relations and Employment Board considered a worker's allegation that the Institute – 'the largest Canadian union of scientists and professionals'<sup>278</sup> – had committed an unfair labour practice<sup>279</sup> by refusing to represent him and challenge the relevant vaccine mandate. The Board's summary of the Institute's actions (at [41]) reflect the tricky balancing of interests that trade unions must undertake:

The [union] concluded that it would not file a policy grievance against the vaccination policy but instead that it would consider individual grievances, case-by-case. When it made its decision, the [union] also felt that it was in all employees' best interests to take that position. In addition, it considered different stakeholders' perspectives, including the members who supported vaccination, those who did not, labour relations experts, and the legal advice mentioned earlier [to the effect that the vaccination policy could be upheld]. This included the significant health-and-safety benefits of a vaccinated workforce in the context of the COVID-19 pandemic.<sup>280</sup>

The Board held that the union had not failed to provide fair representation, and as such had not committed an unfair labour practice.<sup>281</sup>

<sup>277</sup> 2022 FPSLREB 101.

<sup>278</sup> At [35].

<sup>279</sup> Pursuant to Section 187 of the Federal Public Sector Labour Relations Act (S.C. 2003, c.22, s.2), which prohibits the union from acting 'in a manner that is arbitrary or discriminatory or that is in bad faith in the representation of any employee in the bargaining unit.'

<sup>280</sup> Note that the Board also stated its view (at [49]) that 'The policy would without doubt be upheld as reasonable at adjudication.'

<sup>281</sup> For a similar case against the same union, in which the union's defence of relying on legal advice was also upheld, see: *Musolino v. Professional Institute of the Public Service of Canada*, 2022 FPSLREB 46. The Canada Industrial Relations Board also dismissed a fair representation case against the Canadian Union of Public Employees (CUPE) by virtue of parallel reasoning: *Watson v. CUPE, Re (2022)*, 2022 CIRB 1002. In another case, the British Columbia Labour Relations Board also dismissed a legal challenge – this time pursuant to Section 12 of the Labour Relations Code ([RSBC 1996] Chapter 244) – over a union's refusal to grieve the Insurance Corporation of British Columbia's vac-



Municipal agency workers protest against a vaccination mandate in New York City. Photo © lev radin / Shutterstock

Those who launched legal attacks on workplace vaccine mandates often did so on traditional public law grounds, such as the ultra vires doctrine. For example, in the US the Supreme Court relied on this to grant a stay in the private sector test or tax case. As the justices did not consider Covid-19 an economy-wide OSH matter (as discussed above), power to regulate it could not be found in the OSH Act.<sup>282</sup> The same court came to the opposite conclusion however in the Medicare/Medicaid (healthcare) vaccine mandate case. There they held that the statutory powers of the Secretary of Health and Human Services to promulgate regulations for recipient institutions to protect patient health and safety included the power to mandate vaccination.<sup>283</sup> And when the Court stayed a lower court's preliminary injunction (against the government) in the Navy Seals vaccine mandate case, Justice Kavanaugh wrote that he concurred '...for a simple overarching reason: Under Article II of the Constitution, the President of the United States, not any federal judge, is the Commander in Chief of the Armed Forces.'<sup>284</sup> Courts have also consid-

cine policy; *Menekerios v Canadian Office and Professional Employees Union, Local 378*, 2022 BCLRB 143 (Leave for Reconsideration of 2022 BCLRB 96).

<sup>282</sup> *Nat'l Fedn. Of Indep. Bus. v. Dep't of Labor*, 2022 U.S. LEXIS 496. For more on the implications of this case, see: Felsen, M. (2022). 'Court Delivers Blow to Worker Safety'. In: *The Progressive*. 18 January. <https://progressive.org/op-eds/court-blow-worker-safety-felsen-220118/>. [Accessed 29 March 2023].

<sup>283</sup> *Joseph R. Biden, Jr et al. v Missouri et al.* 595 U.S.\_\_(2020).

<sup>284</sup> *Austin v. United States Navy Seals*, 142 S. Ct. 1301 (Kavanaugh, concurring) at p1.

ered irrationality/unreasonableness arguments.<sup>285</sup> For instance, in the Singapore High Court case of *Han Hui Hui & Ors v Attorney-General's Chambers*,<sup>286</sup> the plaintiff argued (in part) that an advisory issued by a tripartite body<sup>287</sup> – which stated that employers may dismiss unvaccinated workers in certain circumstances<sup>288</sup> – was irrational. The Court however held that as the advisory did not have legal

<sup>285</sup> In common law countries, a classic statement of the doctrine – known as *Wednesbury unreasonableness* – derives from the judgment of Lord Greene M.R. in *Associated Provincial Picture Houses, Limited v. Wednesbury Corporation* [1948] 1 KB 223: 'a conclusion so unreasonable that no reasonable authority could ever have come to it'.

<sup>286</sup> [2022] SGHC 141. This case also concerned a broader public health measure to incentivise vaccination. However, as this was not occupation-specific, and in the interest of space, it is a matter into which we shall not delve.

<sup>287</sup> The 'Tripartite Partners', which consisted of the Ministry of Manpower, the Singapore National Employers Federation, and the National Trade Unions Congress.

<sup>288</sup> Specifically, paragraph 7(c) of the Updated Advisory on COVID-19 Vaccination at the Workplace (23 October 2021). The advisory related to the Workforce Vaccination Measures (referred to above). Paragraph 7 provided that employers may redeploy unvaccinated workers to jobs they can do from home or (at (c)):

Place them on no-pay leave or, as a last resort, terminate their employment (with notice) in accordance with the employment contract. If termination of employment is due to employees' inability to be at the workplace to perform their contracted work, such termination of employment would not be considered as wrongful dismissal.

Quoted at [9] of the judgement.

force, it was not susceptible to judicial review.<sup>289</sup>

Plenty of plaintiffs have also urged fundamental rights arguments on courts. For example, they have argued the mandates violate the right to work<sup>290</sup> and the right to refuse medical treatment,<sup>291</sup> among others.<sup>292</sup> First among equals in this regard is freedom of religion. One common manifestation of the argument relies on the purported connection between aborted fetuses and the scientific research upon which the Covid-19 vaccines were based. If a person's anti-abortion views are based on their religion, the argument runs, then being compelled to take the vaccine in such circumstances interferes with their ability to practice. For example, in the Aotearoa New Zealand case of *Yardley v Minister for Workplace Relations and Safety*,<sup>293</sup> that country's High Court held (in part) that the vaccine mandate for Police and Defence Forces constituted an unlawful infringement upon the right to manifest religion or belief.<sup>294</sup> Perhaps the boldest iteration of the

<sup>289</sup> The case challenging the New South Wales (Australia) healthcare mandate was also challenged on unreasonableness grounds; *Larter v Hazzard (No 2)* [2021] NSWSC.

<sup>290</sup> For instance, Case No. M-477/2021 of the Supreme Court of the Republic of Tatarstan; see: Shaburova, T. (n.d.). *Russian Federation, Supreme Court of the Republic of Tatarstan, 14 December 2021, Case No. M-477/2021*. <https://www.covid19litigation.org/case-index/russian-federation-supreme-court-republic-tatarstan-case-no-m-4772021-2021-12-14>. [Accessed 20 July 2022].

<sup>291</sup> For example, see the Australian case of *Kassam v Hazzard* [2021] NSWSC 1320, in which Beech-Jones CJ, writing for the Supreme Court of New South Wales, said (at [63]):

So far as this case is concerned, a consent to a vaccination is not vitiated and a person's right to bodily integrity is not violated just because a person agrees to be vaccinated to avoid a general prohibition on movement or to obtain entry onto a construction site. Clauses 4.3 and 5.8 of Order (No 2) do not violate any person's right to bodily integrity any more than a provision requiring a person undergo a medical examination before commencing employment does.

<sup>292</sup> Note though that fundamental rights arguments have also been made *in favour* of mandates. For example, in the case of *Plata v. Newsom*, 2022 U.S. App. LEXIS 11163, the US federal Court of Appeals for the 9<sup>th</sup> Circuit considered an argument that the Eighth Amendment to the US Constitution – which among other things prohibits 'cruel and unusual punishments' – required prisons in the state of California to mandate vaccination for certain staff. The failure so to do, argued the plaintiffs, constituted 'deliberate indifference' to inmate health and safety. Although the argument had persuaded the lower court, the 9<sup>th</sup> Circuit overturned that decision on appeal.

<sup>293</sup> [2022] NZHC 291.

<sup>294</sup> More specifically, it was an infringement upon such right – set out

argument is the one which the more eccentric half of the US Supreme Court's right-wing majority makes. In *Doe v. Mills*,<sup>295</sup> Justice Gorsuch (with whom Justices Thomas and Alito joined in dissent) decried the unfairness in the fact that the State of Maine's healthcare worker mandate allowed for medical exemptions but not religious ones. Despite the fact that to qualify for an exemption a worker had to produce a 'written statement' from a doctor or other care provider stating the vaccine may be medically inadvisable, Gorsuch stated that:

...it seems Maine will respect even mere trepidation over vaccination as sufficient, but only so long as it is phrased in medical and not religious terms. That kind of double standard is enough to trigger at least a more searching (strict scrutiny) review.<sup>296</sup>

In other words, an exemption to the vaccine mandate for a worker based on medical advice that the vaccine may cause an adverse reaction should be treated on par with a fringe anti-abortion belief which religious leaders around the world have rejected.<sup>297</sup> To adopt the language of droll dismissiveness of Judge Dedar Sing Gill: The proposition has just to be stated for it to self-destruct.<sup>298</sup>

More compellingly, some have argued that – due to past

in Section 15 of the New Zealand Bill of Rights Act – and could not 'be demonstrably justified in a free and democratic society', as required by Section 5 of the Act.

<sup>295</sup> 142 S. Ct. 17.

<sup>296</sup> At p2; internal citations omitted; emphasis in original. For a similar case with a similar result, but regarding New York's healthcare worker vaccine mandate, see: *Dr. A. v. Hochul*, 142 S. Ct. 552 and *Dr A. v. Hochul*, 2022 U.S. LEXIS 3272.

<sup>297</sup> As one Baptist preacher at a mega-church in Texas put it:

There is no credible religious argument against the vaccines... Christians who are troubled by the use of a fetal cell line for the testing of the vaccines would also have to abstain from the use of Tylenol, Pepto Bismol, Ibuprofen, and other products that used the same cell line if they are sincere in their objection.

Quoted in: Smith, P. (2021). 'Many faith leaders say no to endorsing vaccine exemptions'. In: *AP News*. 18 September. <https://apnews.com/article/health-religion-united-states-coronavirus-pandemic-coronavirus-vaccine-9c947acecd6ba26b4c78827b7b87c185>. [Accessed 3 March 2023].

<sup>298</sup> *Han Hui Hui & Ors v Attorney-General's Chambers* [2022] SGHC 141 at [60].

and present systemic-racism-induced health inequities – certain minority ethnic workers may account for a disproportionate number of the penalised unvaccinated employees. Whether this is made out, however, is highly fact and context-specific. In Aotearoa New Zealand, for instance, the Waitangi Tribunal found that the Government's vaccine roll-out had breached the Treaty of Waitangi principles of active protection and equity, and was in large part to blame for lower Māori vaccination rates.<sup>299</sup> Relatedly, a pair of High Court decisions held unlawful the Ministry of Health's refusal to share Māori people's personal data with the Whanau Ora Commissioning Agency,<sup>300</sup> a Māori organisation desperately trying to push vaccination. However, in the High Court case of *Yardley v Minister for Workplace Relations and Safety*,<sup>301</sup> Cooke J rejected an argument that a vaccine mandate for Police and Defence Force personnel (indirectly) discriminated<sup>302</sup> against Māori workers (at [39]):

[T]he suggested disproportionate effect on Māori resulting from terminations arising from the Order is not to be made out on the evidence. I accept that the concerns arising out of the Crown's engagement with Māori throughout the health response as highlighted in the Waitangi Tribunal's report are important. But the relevant percentage dif-

<sup>299</sup> This was due, in particular, to the Government's failure to follow the advice it received and lower the age-eligibility rate for Māori people to account for the disproportionate severity that Covid-19 inflicted upon them; *Haumarū: The COVID-19 Priority Report*, [2021] Wai 2575 at p62.

<sup>300</sup> *Te Pou Matakana Ltd v Attorney-General* [2021] NZHC 2942 and *Te Pou Matakana Limited & Anor v Attorney General & Anor* [2021] NZHC 3319. In the latter case, Gwyn J summarised the various reasons why Māori vaccination rates lagged those of other groups (at [5]; footnotes omitted):

The parties agreed that the underlying reasons for that inequity included that there are significant barriers to Māori accessing primary healthcare services, including cost, access to services, poor service delivery, cultural barriers, poor communication by health providers, and different approaches and models to wellbeing. It was also accepted that one of the reasons why the Māori vaccination rate is lower than other groups of New Zealanders is a lack of trust by Māori in government institutions.

<sup>301</sup> [2022] NZHC 291.

<sup>302</sup> Pursuant to the Human Rights Act 1993 and Section 19 of the New Zealand Bill of Rights Act. In Aotearoa New Zealand, as elsewhere, indirect discrimination requires a demonstration of differential treatment; see: *Ngaronoa v Attorney-General* [2017] NZCA 351.

ferences that Ms Miller relied upon in oral submissions were very small, and well within what I would expect to be a margin for error for such an analysis, which in any event was not supported by any statistical evidence. I am not satisfied that the applicants have demonstrated a disproportionate impact on Māori arising from the Order.

Finally, various unions have challenged employer vaccine mandates over a lack of consultation before their introduction.<sup>303</sup> For instance, in the Australian case of *Construction, Forestry, Maritime, Mining and Energy Union & Howard v Mt Arthur Coal Pty Ltd T/A Mt Arthur Coal*,<sup>304</sup> a Full Bench of the Fair Work Commission considered whether an employer vaccine mandate for unionised mineworkers was a 'lawful and reasonable direction'. The Commission held (at [251]) that it was not, with the 'determinative consideration' being the lack of consultation.<sup>305</sup> Such consultation did 'not require that those consulted agree to the direction, or give them a power of veto'; the Commission explained, 'but...it should have provided the Employees with a reasonable opportunity to persuade the decision-maker[.]'<sup>306</sup> But for the consultation issue, the Commission recognised the employer had a strong health and safety rationale for mandating vaccination.<sup>307</sup> This case underscores a fundamental point: whilst the Covid-19 vaccines are endowed with extraordinary capabilities, immunising employers against their legal obligations is not one of them.

If there is a lesson to be learned from the vaccine cases discussed above, it is that there are extraordinarily complex competing interests that need to be considered. Whilst a vaccinated workforce is to be desired, by man-

<sup>303</sup> For a discussion of such cases in Australia, see: Forsyth, A. (n.d.). 'The Critical Importance of Voice Through Unions: Worker Participation in Health and Safety During the Covid-19 Pandemic in Australia'. In: *Comparative Labour Law & Policy Journal*, Special Issue: 'Worker Voice in the Pandemic'.

<sup>304</sup> [2021] FWCFB 6059. Also see the discussion of this case in: Forsyth, A. (n.d.). 'The Critical Importance of Voice Through Unions: Worker Participation in Health and Safety During the Covid-19 Pandemic in Australia'. In: *Comparative Labour Law & Policy Journal*, Special Issue: 'Worker Voice in the Pandemic'. At p14.

<sup>305</sup> As required by Sections 47 and 48 of the Worker Health and Safety Act 2011 (NSW).

<sup>306</sup> At [250]; footnotes omitted.

<sup>307</sup> At [252].

date if necessary, employers cannot disregard their legal obligations and should not disregard best practice on OSH – such as to consult workers and unions, whether or not it is required by law. Governments, employers, and unions too must ensure that mandates do not constitute unlawful discrimination, and unions must balance out the competing interests of members, whilst remaining democratic in how they address the controversial issue.

## Improving International OSH Law

Thus far our discussion has focussed on domestic laws. However, for some workers, international law is equally – or more – important to their occupational safety and health. This is the case for many seafarers. As Jonathan Warrington explains in the Seafarers Case Study (this collection), vessels are normally meant to follow the employment standards of the country to which they are registered. Often vessels have no link to that country other than registration; a handful of countries – including Liberia, Panama, and the Marshall Islands<sup>308</sup> – dominate the vessel-registration business. The more important of these ‘flags of convenience’ countries tend not to provide rights above and beyond the provisions of relevant international law, hence the workers’ reliance on the same.<sup>309</sup> These rights were not minimal. But Covid-19 would put them to the test. As Warrington writes:

<sup>308</sup> Together these three countries ‘cover more than forty percent of the world’s fleet by tonnage’ (at p5).

<sup>309</sup> At pp4-5. As is often the paradox in the world of work, the workers most urgently in need of rights are often those who least benefit from them. As Warrington sets out (at p10):

It is important also to note that seafarers are in a considerably more vulnerable position than many other workers. There are many factors contributing to this vulnerability including their nature as travelling workers away from their homes, language and cultural differences, and their dependence on their employer for food, fuel and support. Also contributing is the nature of international shipping and the flag of convenience system which encourages ambiguous corporate arrangements and a lack of transparency. It is a system in which a Filipino seafarer may work on a ship that is flagged in Panama, owned by a German company, managed by a Cypriot ship manager and trading between Europe and North America.

These factors leave seafarers in a state of isolation and susceptible to coercion by their employer. Coupled with the other factors such as fatigue and stress, which were exacerbated during the pandemic, seafarers were left open to exploitation.

At the height of the travel restrictions imposed during the Covid-19 pandemic, it was estimated that around 200,000 seafarers were trapped on the vessels that move the world’s cargo as they travelled around the world. Every month, around 100,000 crew members become due for replacement. Not only were they unable to come ashore to access the travel that would allow them to return home, but they were also denied the ability to come ashore to take leave (and in turn access to shore-based welfare facilities), medical care and, in many cases, even their wages. All of these are requirements under the Maritime Labour Convention, 2006, as amended (MLC), a convention ratified by 101 countries covering more than fifty percent of the world’s seafarers and three quarters of the world’s seagoing vessels.<sup>310</sup>

Countries invoked *force majeure* to justify ignoring the worker protections enshrined in the MLC. And they were largely able to get away with it.<sup>311</sup> The main problem was not with the lack of rights, argues Warrington, but rather with their nonenforcement:

In general, and while some fine tuning may be required (as evidenced by recent amendments), the MLC contains the necessary measures to protect seafarers. In the context of the pandemic, compliance with the convention was forgotten. Governments prioritised keeping trade routes open and protecting land-based citizens to the detriment of the rights and wellbeing of those at sea.

Seafarers have long been what might be called invisible workers and the pandemic has proved the extent to which the world’s governments are prepared to ignore their rights.<sup>312</sup>

The International Transport Workers’ Federation (ITF) – a

<sup>310</sup> At p1; footnotes omitted.

<sup>311</sup> However, as Warrington explains, by the end of 2020 the ILO’s Committee of Experts on the Application of Conventions and Recommendations (CEACR) issued a statement saying states could no longer rely on *force majeure* (at p8).

<sup>312</sup> At p11.

global union federation – led on the resistance to countries' violations of the MLC; advocating for seafarers' rights, providing casework support to the workers, and pushing (in large part, successfully) for amendments to the MLC (referred to in the passage above) to improve conditions. As Warrington writes:

The ITF was successful in that many of the proposed amendments were passed in some form. Seafarers must now be provided with personal protective equipment that fits; drinking water shall now be free of charge; Port and Flag states must take more action to repatriate abandoned seafarers; seafarers can no longer be denied medical care ashore on the pretext of "public health concerns"; manning agents must provide seafarers information on how to access assistance in the event the shipowner fails to meet their obligations.<sup>313</sup>

If the seafarers' saga proves a cautionary tale of the limits of international law in a crisis, the 110<sup>th</sup> session of the ILO's International Labour Conference (ILC) provides an inspirational illustration of crisis as opportunity. For it was there – in June 2022 – that trade unions' three-year campaign to upgrade the significance of OSH in international law was vindicated.<sup>314</sup> The ILC agreed to add 'a safe and healthy working environment' to the ILO's list of 'fundamental principles and rights at work'.<sup>315</sup> More specifically, the ILC designated as 'fundamental conventions' the Occupational Safety and Health Convention, 1981 (No. 155) and the Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187). The two conventions 'describe the core principles and rights in the field of occupational safety and health (OSH); the ILO has summarised, 'and serve as the basis for the more advanced

<sup>313</sup> At p9.

<sup>314</sup> ILO. (n.d.). *A safe and healthy working environment is a fundamental principle and right at work*. <https://www.ilo.org/global/topics/safety-and-health-at-work/areasofwork/fundamental-principle/lang-en/index.htm>. [Accessed 3 March 2023]; ITUC. (2022). *ILO: Major breakthrough on occupational health and safety*. 10 June. [https://www.ituc-csi.org/ILO-occupational-health-and-safety?msdyntid=po7s-rKSu2\\_7Gvty4EyzR\\_7zRR\\_xB\\_yN4Eb4z8mg73ps](https://www.ituc-csi.org/ILO-occupational-health-and-safety?msdyntid=po7s-rKSu2_7Gvty4EyzR_7zRR_xB_yN4Eb4z8mg73ps). [Accessed 11 June 2022].

<sup>315</sup> As set out in paragraph 2 of the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up*. [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/normativeinstrument/wcms\\_716594.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/normativeinstrument/wcms_716594.pdf). [Accessed 3 March 2023].

safety and health measures described in other OSH instruments'. The conventions' designation as fundamental renders them binding on all ILO member states, regardless of ratification.<sup>316</sup> This is significant; at the time of writing, only 76 countries had ratified Convention No. 155<sup>317</sup> and 59 had ratified No. 187.<sup>318</sup> Of course, this does not mean all remaining countries will suddenly enforce these conventions' provisions. Nor can the ILO make them.<sup>319</sup> But the impact of ILO standards ripples far beyond the institution's walls in Geneva. As Professor Keith Ewing has written:

One of the most notable developments in relation to the ILO for more than 20 years has been the reference to ILO standards in an increasingly diverse range of sources. These include corporate codes, global framework agreements, judicial decisions, the OECD Guidelines on Multinational Enterprises, and the UN Guiding Principles on Business and Human Rights, as well as bilateral and plurilateral free trade agreements and elsewhere.<sup>320</sup>

<sup>316</sup> ILO. (n.d.). *A safe and healthy working environment is a fundamental principle and right at work*. <https://www.ilo.org/global/topics/safety-and-health-at-work/areasofwork/fundamental-principle/lang-en/index.htm>. [Accessed 3 March 2023].

<sup>317</sup> ILO. (n.d.). *Ratifications of C155 – Occupational Safety and Health Convention, 1981 (No. 155)*. [https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312300](https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312300). [Accessed 3 March 2023].

<sup>318</sup> ILO. (n.d.). *Ratifications of C187 – Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187)*. [https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312332](https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312332). [Accessed 3 March 2023].

<sup>319</sup> As I have summarised elsewhere:

...pursuant to Article 37 of the ILO Constitution, binding decisions on convention interpretation may emanate solely from the International Court of Justice (ICJ) or from a 'tribunal'. However only one case in the history of the ILO has ever been decided by the ICJ and the 'tribunal' was never created.

Jason Moyer-Lee, *Taming the Beast: Making the "Gig Economy" Work for Workers* 86-107 (2021) (Australian Senate Select Committee on Job Security: Submission 229. Report commissioned by the International Transport Workers' Federation (ITF)), <https://www.aph.gov.au/DocumentStore.ashx?id=32cfc97b-7b83-4ef3-9b5c-77ff56a2d-20c&subId=719560>. At p22.

<sup>320</sup> Ewing, K.D. (2021). 'The EU-UK Trade and Cooperation Agreement: Implications for ILO Standards and the European Social Charter in the United Kingdom'. In: *King's Law Journal*, Vol. 32, No.2, pp306-343, citation at p306. For the example of the UK-EU Brexit treaty's incorpora-

In sum, the recognition of OSH as a fundamental right increases the opportunity for workers and unions to invoke the conventions' protective coverage, even if indirectly.

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tion of ILO standards, see: Moyer-Lee, J. (2021). 'Brexit gives the Tories a free hand to dismantle workers' rights'. In: *Al Jazeera*. 9 January. <https://www.aljazeera.com/opinions/2021/1/9/brexit-deal-tories-uk-workers-rights>. [Accessed 27 October 2021]. For a discussion of the significance of the ILO's fundamental rights and principles, see: Jason Moyer-Lee, *Taming the Beast: Making the "Gig Economy" Work for Workers* 86-107 (2021) (Australian Senate Select Committee on Job Security: Submission 229. Report commissioned by the International Transport Workers' Federation (ITF)), <https://www.aph.gov.au/DocumentStore.ashx?id=32cfc97b-7b83-4ef3-9b5c-77ff56a2d20c&subId=719560>. At pp21-27.

# Fighting for Livelihoods

In response to the effects of the pandemic, and the resultant public health measures, governments with the means to do so deployed extensive support to prop up economies. This took the form of fiscal stimulus, subsidies, and tax deferrals, among other measures. Often these included support for companies to keep workers employed and unemployment benefits for those workers who lost their jobs. For example, the Canada Emergency Response Benefit Act<sup>321</sup> (CERB) – as the Chief Justice of British Columbia’s Court of Appeal described it – was designed to:

...provide emergency aid to Canadian workers who lost all or a significant portion of their income for a variety of reasons related to the pandemic. This includes sickness, self-isolation or quarantine, caring for an elderly parent or sick family member, caring for children during school and daycare closures, or those who were furloughed or terminated because of COVID-19. The focus of CERB was on delivering aid in a rapid and simple way rather than on assessing eligibility[.]<sup>322</sup>

The CERB programme was indeed massive. According to Statistics Canada, in 2020:

Approximately one quarter (25.1%) of Canadian adults received income from [CERB]. [Among pandemic measures, it] provided the highest amount of benefits, with a median of \$8,000 per recipient.<sup>323</sup>

To be clear, income support during a pandemic is not just a

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<sup>321</sup> S.C. 2020, c. 5.

<sup>322</sup> *Yates v. Langley Motor Sport Centre Ltd.* [2022] BCCA 398 at [41].

<sup>323</sup> Statistics Canada. (2022). *The contribution of pandemic relief benefits to the incomes of Canadians in 2020*. 2 August. <https://www12.statcan.gc.ca/census-recensement/2021/as-sa/98-200-X/2021005/98-200-X2021005-eng.cfm>. [Accessed 14 April 2023].

matter of workers’ rights. It is also about public health. As the Supreme Court of Namibia – in the case of *President of the Republic of Namibia v Namibia Employers Federation*<sup>324</sup> – summarised the government’s submission justifying a requirement that employers pay workers during lockdown (at [17]):

The Government maintains that ‘lockdown’ was necessary to prevent the spread of COVID-19 and that for the lockdown to be effective, it was necessary to strictly control and reduce people’s movement. On the other hand, for people’s movement to be effectively controlled and restricted, it was necessary for employees to stay at home. For the employees to stay at home, they needed some support and, at least, the peace of mind of income until the end of lockdown. According to the Government, worker protection in the interim was an absolute necessity to prevent the spread of COVID-19.<sup>325</sup>

Of course, not all countries saw it this way. As Michelle Ford and Kristy Ward write in the case of Cambodia:

[T]he Ministry of Labour and Vocational Training...advised the Garment Manufacturers Association in Cambodia that factories that were suspended or closed due to COVID were not required to pay workers compensation and benefits guaranteed under the Labour Law... It also failed to step in when large-scale

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<sup>324</sup> (SA 53/2020) [2022] NASC.

<sup>325</sup> The High Court below accepted the employers’ argument that a constitutional provision empowering the President to make emergency orders during a state of emergency to manage the pandemic (e.g., lockdown), did not empower him to make orders to manage the consequences (i.e., to require employers to pay workers during lockdown). The Supreme Court rejected this argument (at [100]) but upheld the High Court’s decision that the orders were unlawful on other grounds (more on which below).

commercial sites reportedly failed to pay construction workers for several months[.]<sup>326</sup>

In the EU, all countries implemented some form of wage subsidy for workers' lost hours, although these rarely covered the entirety of the lost wages.<sup>327</sup> Indeed, worker support programmes often fell short. As Aeilim Yun has written in the case of South Korea:

As of January 2021, the total financial support for enterprises without any obligation to retain their employees amounted to KRW 91.2 trillion (approximately USD 80 billion), which accounted for around 4% of GDP (Gross Domestic Product). In contrast, income support for workers, which includes the Employment Retention Subsidy and the emergency employment security subsidy, amounted to KRW 4.7 trillion (approximately USD 4 billion), accounting for around 0.2% of GDP. This means the Korean Government spent twenty times more on supporting enterprises than supporting employment and labour income[.]<sup>328</sup>

In other cases, countries used the pandemic-induced economic situation to justify reducing workers' rights in the interest of 'job creation'. For instance, in October 2020 Indonesia's legislature passed the Omnibus Law on Job Creation,<sup>329</sup> which – among other things – removed re-

<sup>326</sup> Ford, M. & Ward, K. (2021). 'COVID-19 in Southeast Asia: Implications for workers and unions'. In: *Journal of Industrial Relations*, Vol. 63, No.3: 432-450. Citation at p441. For information on a major set of coordinated strategic litigations in India, Indonesia, Sri Lanka and Pakistan, spear-headed by the Asia Floor Wage Alliance (AFWA), in which it is argued that apparel brands are 'joint employers' of their suppliers' employees, and as such are liable for unpaid wages, see: AFWA. (2021). *Joint Employer Liability Legal Strategy: Holding Global Apparel Brands Legally Liable for Labour Rights Violations in their Supply Chains in Asia*. Legal Brief. July.

<sup>327</sup> Weber, T. (2021). 'Two worlds of income support during COVID-19'. In: *Eurofund*. 9 February. <https://www.eurofund.europa.eu/publications/blog/two-worlds-of-income-support-during-covid-19>. [Accessed 4 March 2023].

<sup>328</sup> Yun, A. (2022). 'When Precarity Encounters COVID-19: A Critical Analysis of Korean Policy Responses'. In: *International Journal of Comparative Labour Law and Industrial Relations*, 38 No. 4: 487-504. Citation at p492.

<sup>329</sup> Law no. 11/2020 on Job Creation (Undang-Undang no. 11/2020 tentang Cipta Kerja); Mahy, P. (2021). 'Indonesia's Omnibus Law on Job Creation: Reducing Labour Protections in a Time of COVID-19'. *Labour, Equality and Human Rights (LEAH) Research Group: Working Paper No. 23 (January)*. Monash University.

strictions on outsourcing<sup>330</sup> and on renewing fixed-term contracts,<sup>331</sup> and eliminated the requirement for employers to pay extra severance for certain categories of redundancies.<sup>332</sup>

Similarly, when the pandemic caused the tourism-dependent economies of Aruba, Sint Maarten, and Curaçao to crash,<sup>333</sup> the Netherlands saw an opportunity to impose its will on the Dutch Caribbean islands.<sup>334</sup> The Netherlands bailed out the economies with considerable liquidity and other financial support, but not without burdensome conditionalities over the course of the following years, for instance on budget deficits.<sup>335</sup> Left without much alter-

<sup>330</sup> At pp8-9.

<sup>331</sup> At p6.

<sup>332</sup> At p18. Although note that Indonesia also took some pro-worker initiatives, such as expanding a labour insurance programme to cover workers who lost their jobs due to the pandemic; Ford, M. & Ward, K. (2021). 'COVID-19 in Southeast Asia: Implications for workers and unions'. In: *Journal of Industrial Relations*, Vol. 63, No.3: 432-450. Citation at p443. Indonesia's Constitutional Court later ruled that the 'job creation' law had been passed with insufficient consultations and ordered Parliament to reconvene on the matter. However, the President responded by issuing an emergency decree on job creation instead; Reuters. (2023). 'Indonesian parliamentary body okays presidential decree on jobs'. In: *Reuters*. 15 February. <https://www.reuters.com/world/asia-pacific/indonesian-parliamentary-body-okays-presidential-decree-jobs-2023-02-15/>. [Accessed 15 March 2023].

<sup>333</sup> GDP shrank by an estimated 20% in Curaçao and 24% in Sint Maarten in 2020 alone; IMF. (2021). 'IMF Executive Board Concludes 2021 Article IV Consultation with the Kingdom of the Netherlands – Curaçao and Sint Maarten' (press release). In: *Kingdom of the Netherlands – Curaçao and Sint Maarten: 2021 Article IV Consultation Discussions – Press Release; and Staff Report*. IMF Country Report No. 21/186. August.

<sup>334</sup> As a matter of constitutional law, the three islands and the (European) Netherlands constitute the four autonomous and equal parts of the Kingdom of the Netherlands, linked together by the *Statuut* (Charter) of 1954 (as modified in a series of changes since then). However, in practice there is very little difference between the Kingdom and the European Netherlands, and the latter has significant influence over the Caribbean islands. Although note that the smaller Dutch Caribbean islands of Bonaire, St. Eustatius and Saba do not share this status; rather, they are 'overseas municipalities' and as such considered part of the (European) Netherlands; Oostindie, G. & Veenendaal, W. (n.d.). *Head versus Heart: The Ambiguities of Non-Sovereignty in the Dutch Caribbean*. At pp5-6. Also see: Mary Allen, R. (2010). 'The Complexity of National Identity Construction in Curaçao, Dutch Caribbean'. In: *European Review of Latin American and Caribbean Studies*, 89 (October): 117-125.

<sup>335</sup> The Daily Herald. (2021). 'No liquidity support, no deficit without political commitment'. In: *The Daily Herald*, Vol. 31, No. 152. 20 December. At pp1, 8. To provide a snapshot of the issue at hand, Curaçao's primary fiscal deficit increased from 0.4% of GDP in 2019 to 14.9% in 2020; IMF. (2021). 'Kingdom of the Netherlands – Curaçao and Sint Maarten: Staff Report for the 2021 Article IV Consultation Discussions'. In: *Kingdom of*

native but to accept, the islands' leaders were not happy about it. Sint Maarten's Prime Minister accused the Netherlands of 'unconstitutional handling' of the situation, being 'unethical',<sup>336</sup> 'strong-arm tactics', and 'heavy-handedness'.<sup>337</sup> Among the conditionalities was a requirement that the island governments dramatically reduce the total compensation (through wages and/or terms and conditions) paid to public sector employees by more than 12%,<sup>338</sup> and then freeze the pay rate.<sup>339</sup> The Netherlands had been making noises about reforms like this even prior to the pandemic, Gregory Wilson – a senior official at ABVO, one of the largest trade unions on the islands – told me. But when the pandemic hit, 'it was the moment to act'.<sup>340</sup> This created a dire scenario for the unions, in which – akin to the situation of many outsourced workers – the true decision-maker was not the direct employer, but rather an entity against whom they had considerably less leverage. 'It's not that the Government of Aruba does not want to stop the 12.6% [pay] cut,' the country's Prime Minister wrote in a letter to the unions, 'but rather that the Government of Aruba can't stop the 12.6% [pay] cut with-

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*the Netherlands – Curaçao and Sint Maarten: 2021 Article IV Consultation Discussions – Press Release; and Staff Report.* IMF Country Report No. 21/186. August. At p5.

<sup>336</sup> The Daily Herald. (2021). 'Jacobs: 'Undue political pressure' being placed on smaller countries'. In: *The Daily Herald*, Vol. 31, No. 152. 20 December. At pp1, 8. Citation at p8.

<sup>337</sup> The Daily Herald. (2021). 'PM updates Parliament, reacts to Knops' letter'. In: *The Daily Herald*. 28 December. At p8.

<sup>338</sup> Subject to minimum salary thresholds; see: èxtra. (2022). 'SSK ku Yamada dramático na parlamentario I ministernan: Analisá lei ku ta kòrta den trahadónan kompanian di gobièrnu bon'. In: èxtra. 16 February. At pp3, 25.

<sup>339</sup> IMF. (2021). 'Kingdom of the Netherlands – Curaçao and Sint Maarten: Staff Report for the 2021 Article IV Consultation Discussions'. In: *Kingdom of the Netherlands – Curaçao and Sint Maarten: 2021 Article IV Consultation Discussions – Press Release; and Staff Report.* IMF Country Report No. 21/186. August. At p45. In Aruba this was implemented via *Ley di austeridad, Landsverordening tijdelijke versoering bezoldigingen en voorzieningen overheid (AB 2020 no. 108)*; as reported by: èxtra. (2022). 'Minister Xiomara Maduro: Tur trahador publico ta cobra 100% di bashipremie na januari conforme e acuerdo bilateral entre Gobierno y Sindicato di aña 2014'. In: èxtra. 10 January. At p22. Incredibly, the cuts also applied to healthcare workers and employees of public bodies which were financially autonomous (and as a result any savings on wage packets would not affect the government deficit); see: èxtra. (2022). 'Segun sr. Wendell Muelen vicepresidente SSK: Mas di 50% Kompanianan gobièrnu no ta den bon tempu'. In: èxtra. 16 February. At pp5, 24.

<sup>340</sup> Gregory Wilson. Author Interview. 29 March 2022. Author's translation from Spanish.

out putting at risk liquidity support necessary for 2022.<sup>341</sup> The Prime Minister even repeatedly publicly proposed coming up with a joint proposal with the unions to present to the Netherlands,<sup>342</sup> although it didn't stop her from successfully soliciting a court's intervention to bar public sector unions from striking over the matter.<sup>343</sup>

Indeed, as will be seen below, workers and their unions have had to fight for their livelihoods; to be covered under government support measures, to make employers obey the law, to stop employers from using the pandemic as an excuse to effectuate dismissals, and to obtain just compensation when dismissals did occur. And like everything else during the pandemic, it was the marginalised, migrants, and the low-paid who had to fight the hardest. For '[a]nyone who has ever struggled with poverty,' once wrote the author James Baldwin, 'knows how extremely expensive it is to be poor.'<sup>344</sup>

## The Quest for Inclusion

As with other workers' rights in pre-pandemic times, employment status proved an important dividing line when it came to income support measures. Whilst most EU countries provided some income support for the self-employed, for example, the support tended to be inferior to that offered to employees.<sup>345</sup> This was also the case in the

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<sup>341</sup> On behalf of the Netherlands, the relevant government secretary said Aruba's request for liquidity support without implementing the cut was 'hard to explain' and that to want to stop implementing the pay cuts was 'unjust'; The Daily Herald. (2021). 'No liquidity support, no deficit without political commitment'. In: *The Daily Herald*, Vol. 31, No. 152. 20 December. At pp1, 8. Citation at p8.

<sup>342</sup> èxtra. (2022). 'Promer Minister Evelyn Wever-Croes: Gobierno ta reacciona riba carta di sindicato y ta invita sindicatonan pa dialogo'. In: èxtra. 7 January. Author's translation from Papiamentu.

<sup>343</sup> Èxtra. (2022). 'Gobierno na sindicatonan: No ta permiti traha menos ora pa luna!' In: èxtra. 2 February. At p20; èxtra. (2022). 'Gobierno ta topa sindicatonan SEPPA y SIMAR den Corte otro siman'. In: èxtra.; èxtra. (2022). 'Gobierno di Aruba: Huez a para e accionnan di sindicatonan te dia di veredicto'. In: èxtra. Although note that the court later ordered the government to present evidence of the steps it had taken and was going to take to present an alternative proposal to Holland which would avoid the salary cuts; NoticiaCla. (2022). 'Hues kier gobierno presenta solucion structural na Hulanda pa reemplasa recorte di salario'. In: èxtra. 3 March.

<sup>344</sup> Baldwin, J. (1993 (1961)). *Nobody Knows My Name: More Notes of a Native Son*, New York: Vintage International, p. 6.

<sup>345</sup> Weber, T. (2021). 'Two worlds of income support during COVID-19'. In: *Eurofund*. 9 February. <https://www.eurofund.europa.eu/publications/blog/two-worlds-of-income-support-during-covid-19>. [Accessed 11

UK, where the Coronavirus Job Retention Scheme (CJRS) – the government's main wage subsidies measure – was limited to workers whose income tax was deducted at source by employers.<sup>346</sup> This largely meant employees, leaving most limb b workers to rely on the inferior subsidy programme for self-employed workers (if they were even eligible). The IWGB union therefore brought a legal case to challenge the government on this, as well as on the exclusion of limb b workers and some employees from the country's sick pay regime.<sup>347</sup> *R (Adiatu and another) v H M Treasury*.<sup>348</sup> This was a case worth fighting, even if the union ultimately lost it. As Professor Bogg writes (this collection):

The High Court emphasized the extraordinary political context to the decision-making, which required the rapid implementation of policy in circumstances of emergency. On that basis, the exclusion of some self-employed workers from the CJRS was subject to a wide margin of appreciation and it could not be said to be 'manifestly without reasonable foundation'. ...it is important to consider the effectiveness of the IWGB's intervention beyond the direct outcome in the case itself. This was a high profile intervention that promoted the political visibility of precarious workers, highlighting the absence of a safety net for workers affected by the pandemic. It exposed issues of insecurity among frontline workers exposed to significant health risks. These issues have been central to the public discourse about post-pandemic economic recovery. Public law litigation can trigger a wider political dialogue even where the case itself has failed on technical legal grounds.

South Korea provides another example of the employment status conundrum. There, like the UK, the principal income support measure – the Employment Retention

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February 2023].

<sup>346</sup> Specifically, through the Pay As You Earn (PAYE) system.

<sup>347</sup> Bogg, A. UK Case Study, this collection. At pp7-8. For a global perspective on the exclusion of marginalised workers from paid sick leave, see: Waisath, W. & Heymann, J. (2021). 'Inclusive Design of Paid Sick Leave during COVID-19 and Beyond: A Globally Comparative Study of Approaches in 193 Countries'. 19<sup>th</sup> ILERA World Congress.

<sup>348</sup> [2020] EWHC 1554 (Admin).

Subsidy (ERS) – was limited to 'employees' covered by the Employment Insurance Act (EIA). The government offered an alternative subsidy to the self-employed, but to qualify for it, workers had to evidence a particular level of income or job loss.<sup>349</sup> As Aelim Yun describes:

[The programme] soon encountered various practical problems such as how to identify eligible workers and how to evaluate their job loss or income loss. Also, applicants were required to submit a contract as proof of their status as dependent contractors, or evidence of income loss, but it was a difficult procedure unless the employing entities cooperated with the workers.<sup>350</sup>

In total, only around 40% of South Korea's dependent contractors – a type of self-employed worker who is organizationally dependent on the hiring entity – are believed to have accessed the subsidy.<sup>351</sup>

Unemployment benefits, too, were tied to enrolment in the country's Employment Insurance (EI). Trade unions pushed the government to extend EI enrolment to dependent contractors.<sup>352</sup> The government did not go that far; however, the pandemic – as Yun puts it – 'drastically changed the political scene.' In January 2021 the government amended the EIA to provide limited categories of dependent contractors with the right to access unemployment benefits,<sup>353</sup> but not – due to employer resistance – the other entitlements in the EIA.<sup>354</sup> As Yun warns:

[T]his kind of discrimination in social insurance schemes may encourage employers

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<sup>349</sup> Yun, A. (2022). 'When Precarity Encounters COVID-19: A Critical Analysis of Korean Policy Responses'. In: *International Journal of Comparative Labour Law and Industrial Relations*, 38 No. 4: 487-504. Citation at p491.

<sup>350</sup> At p500.

<sup>351</sup> At p311. These sorts of problems were not unusual for self-employed workers around the world. For instance, in Georgia, employees received four times the level of income support as self-employed workers; Tchanturidze, G. & Surmava, T. (2021). *Impact of the Pandemic on the Labour Market and Employees Positions*. July. Georgia Trade Union Confederation. At p23.

<sup>352</sup> At p499.

<sup>353</sup> At p500.

<sup>354</sup> At p501.

to increasingly use dependent contractors instead of employees. In other words, employers with precarious workers could take advantage of flexible and cheaper workforce in good times, and offload their liability onto individual workers and society as a whole in times of crisis.<sup>355</sup>

Cambodia provides a similar example of how pre-pandemic union campaigns resulted in victory post-pandemic. As Michelle Ford and Kristy Ward have written:

Prior to COVID-19, Cambodian unions had struggled to convince employers and the State to extend the National Social Security Fund – a social protection scheme which provides employment injury, health insurance and pension benefits – beyond garment manufacturing. Informal workers are not covered by the Labour Law, and the absence of an employer for own-account workers, who comprise a large percentage of informal workers, meant that fund coverage was not possible. In the context of the pandemic, unions in the construction sector (where many workers are classified as informal due to the nature of subcontracting arrangements) engaged the Government in dialogue about extending the National Social Security Fund and minimum wage protections to all construction workers[.] Following this process, the Government announced that all informal workers would be covered by the fund, with the Ministry of Labour and Vocational Training and registered worker associations assisting workers to register in lieu of employers[.]<sup>356</sup>

As alluded to above, governments often left migrant workers, too, to fend for themselves. In the India Case Study (this collection), Gunjan Sing tells how that country's Supreme Court rejected an initial petition seeking relief for said workers.<sup>357</sup> The Court went so far as to accept the government's contention that the thousands of workers

<sup>355</sup> At p501.

<sup>356</sup> Ford, M. & Ward, K. (2021). 'South-East Asian unions respond to the pressure of COVID-19'. In: *International Journal of Labour Research*, Vol. 10, No. 1-2: 82-90. Citation at pp84-85; references omitted.

<sup>357</sup> Order dated 03/31/2020 passed in Writ Petition (Civil) No. 468 of 2020.

walking home was fake news and even ordered the media not to run unverified stories. However, after a backlash, and when the matter was once again before it – in the case of *In Re: Problems and Miseries of Migrant Labourers*<sup>358</sup> – the Court took a different approach,<sup>359</sup> acknowledging the government's inadequate response to the migrants crisis.<sup>360</sup> As Sing – who was also one of the lawyers representing a union in the case – writes:<sup>361</sup>

Several trade unions intervened in the case and presented data on the sufferings of workers from different parts of the country. The Court inter alia passed orders for free transportation of workers, free supply of food and water, and withdrawal of cases registered against workers for violating lockdown.<sup>362</sup> Though interim orders brought some relief to workers, the response of the Supreme Court to the crisis was very late. The Court also did not pass any order regarding payment of cash assistance, free distribution of food, and an increase in the guaranteed number of days for employment under the Employment Guarantee Act,<sup>363</sup> as prayed by the counsels of workers. Suggestions of the experts to pay compensatory wages or income assistance were also not considered by the Supreme Court. Unions argued the worker crisis was the result of the longstanding failure of the state to ensure coverage of workers under labor statutes. Therefore, workers must be registered by issuing identity cards under different statutes. In June 2021, the court delivered the final judgment directing the state authorities to ensure the registration of workers under different labor statutes by the end of 2021.<sup>364</sup>

<sup>358</sup> *Suo Motu Writ Petition (Civil) 6 of 2020*.

<sup>359</sup> At p2.

<sup>360</sup> At p6.

<sup>361</sup> At p6; footnotes reproduced from original with slight modification.

<sup>362</sup> See orders dated [05/28/2020](#), [06/09/2020](#), and [07/31/2020](#) passed in *Suo Motu Writ Petition (Civil) 6 of 2020*.

<sup>363</sup> The Act guarantees at least 100 days of wage employment in a financial year to every rural household whose adult members volunteer to do unskilled manual work.

<sup>364</sup> See final order dated [06/29/2021](#) passed in *Suo Motu Writ Petition*

As the India Case Study illustrates, migrant status and employment status (e.g., as a self-employed or informal sector worker) often intersect. This was true, too, in South Africa, where the Scalabrini Centre of Cape Town – a migrants' welfare organisation – brought a legal challenge<sup>365</sup> over the exclusion of asylum seekers and social permit holders from the distress grants offered to people affected by the pandemic.<sup>366</sup> As Baqwa J – writing for the High Court – summarised an aspect of the Centre's submissions (at [18]):

The Centre had experienced a surge in asylum seekers and permit holders requesting assistance for basic needs such as food. These persons stated that they had been self-employed or running informal businesses until they were prevented from doing so by the lockdown. Some had been employed in industries such as restaurants or the hospital-ity sector which had also been impacted by the lockdown. Their children had been unable to access the school funding programmes and parents had no income.

The Centre argued that the exclusion of asylum seekers and special permit holders violated their constitutional rights of dignity, equality, and access to social security. The right to social security is enshrined in Section 27 of the South African Constitution, which provides (materially): '(1) Everyone has the right to have access to...(c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.' The government did not dispute that the Covid-19 distress grants engaged Section 27(1)(c). And Section 27(1)(c) applied to 'everyone'. As Baqwa J held (at [24]-[25]; footnote supplied):

24. ... [I]t is logical to accept that the asylum seekers and special permit holders have not escaped the negative consequences of not only the pandemic but also of the lockdown. This would inevitably come about not, only due to the inability to move and work but also

(Civil) No. 6 of 2020.

<sup>365</sup> *Scalabrini Centre of Cape Town & Anor v Minister of Social Development & Ors* [2020] Case No: 22808/2020.

<sup>366</sup> The grants were only available to unemployed people without a source of income and who did not qualify for unemployment insurance benefits, among other qualifying criteria; judgment at [16].

through the inability to secure resources to buy food and other basic necessities for their families. It is also common cause that the asylum seekers and permit holders are as it were "locked in" in South Africa due to closed borders during lockdown, economic and other circumstances in their countries of origin.

25. For these reasons, a person's immigration status, especially when bearing in mind the Court's pronouncement in *Khosa*,<sup>367</sup> become irrelevant. For that reason, it must be accepted that it is irrational and unreasonable to utilise such status as a criterion for eligibility for the grant.

The Court also found the exclusion to violate the rights to equality<sup>368</sup> and human dignity.<sup>369</sup> And all of these rights were connected. As Baqwa J concluded (at [40]):

In the context of social assistance for asylum seekers and special permit holders, the inter-relatedness of the rights of equality, human dignity and access to social assistance cannot be overemphasised. Conditions created by Covid-19 and the subsequent lockdown declaration served only to highlight the need for State authorities to bear this interrelationship in mind when implementing the relevant regulations. Failure to do so could only lead to the result that the regulations be declared unconstitutional such as in the present case.

Five months after the asylum seeker case judgment, South Africa's Constitutional Court handed down its decision in *Mahlangu & Anor v Minister of Labour & Ors*,<sup>370</sup> in which it upheld a High Court ruling that domestic workers' exclusion from coverage under the Compensation

<sup>367</sup> *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others* [2004] (6) SA 505 (CC). In that case the court held unlawful the exclusion of (non-citizen) permanent residents from certain social security programmes.

<sup>368</sup> Pursuant to Section 9 of the Constitution.

<sup>369</sup> Pursuant to Section 10 of the Constitution. As Baqwa J held (at [34]): this right was violated when the people in question 'were denied Covid-19 assistance despite the desperate circumstances in which they found themselves.'

<sup>370</sup> (CCT306/19) [2020] ZACC 24.

for Occupational Injuries and Diseases Act (COIDA)<sup>371</sup> was unconstitutional. It should be noted at the outset, that despite a unionisation rate<sup>372</sup> of only 5%,<sup>373</sup> South Africa's domestic workers had already won various workers' rights, including – by chaining themselves to the gates of Parliament in protest – enrolment in the Unemployment Insurance Fund (IUF).<sup>374</sup> Like the case just discussed, this one – which the South African Domestic Service and Allied Workers Union (SADSAWU) supported – was argued on the bases of the Constitution's Sections 9 (equality), 10 (dignity), and 27 (social security).<sup>375</sup> The facts of *Mahlangu* occurred pre-Covid;<sup>376</sup> however, it is worthy of our consideration for its impact on the ability of domestic workers and their families to maintain income during the pandemic, as well as for its precedential value (as will be seen further below). Interestingly for present purposes, the majority judgment cited international law on the right to social security<sup>377</sup> (at [336]):

Social security is recognised as a human right in the Universal Declaration of Human Rights (Declaration). Article 22 of the Declaration provides that “[e]veryone, as a member of society, has a right to social security”. Article 25(1) of the Declaration provides that “[e]veryone has the right . . . to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond [their] control”. In

<sup>371</sup> 130 of 1993. More specifically, Section 1(xix)(v) excludes domestic workers from the definition of ‘employee’ and as such from entitlement under the Act; see *Mahlangu* at [6].

<sup>372</sup> Using the term ‘unionisation’ broadly so as to also encompass membership in non-union workers’ rights organisations.

<sup>373</sup> Tekie, A. & Mthombeni, M. South Africa Case Study, this collection. At p12.

<sup>374</sup> Tekie, A. & Mthombeni, M. South Africa Case Study, this collection. At p3.

<sup>375</sup> The respondents indeed conceded the argument; *Mahlangu* at [26].

<sup>376</sup> In short, Ms *Mahlangu* – who could not swim and was partially blind – drowned in her employer's pool. When her daughter – who depended on her financially – tried to collect compensation and unemployment benefits (to which she would be entitled if COIDA applied), she was told she could not. In response, she launched the case; *Mahlangu* at [7]-[9].

<sup>377</sup> On the basis that the South African Constitution requires courts (at Section 233) to, when construing legislation, ‘prefer any reasonable interpretation...that is consistent with international law over any alternative interpretation’ that is not. Further, Section 39(1)(b) of the Constitution directs courts to consider international law; *Mahlangu* at [41]-[42].

addition, Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that “[t]he state parties recognise the right of everyone to social security, including social insurance”.<sup>378</sup>

The Court also held that COIDA benefits engaged the constitutional right to social security.<sup>379</sup> However, it had to assess whether the exclusion was nevertheless ‘reasonable’, noting that ‘a core aspect of the reasonableness enquiry is whether a law or policy takes cognisance of the most vulnerable members of society and those in most desperate need.’<sup>380</sup> And when considering who falls into these categories, the court should also take notice ‘of those who fall at the intersection of compounded vulnerabilities due to intersecting oppression based on race, sex, gender, class and other grounds.’<sup>381</sup> The majority explained that such an intersectional interpretative approach – which ‘requires that courts examine the nature and context of the individual or group at issue, their history, as well as the social and legal history of society's treatment of that group’<sup>382</sup> – will achieve ‘the progressive realisation of our transformative constitutionalism.’<sup>383</sup> I concur.

With this interpretive approach in mind, the Court noted that domestic workers – the majority of whom in South Africa are Black women<sup>384</sup> –

<sup>378</sup> Footnotes omitted. Note also that the judgment further referred (at [37]-[38]) to provisions of international African law, such as the Maputo Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa and the Southern African Development Community's Charter of Fundamental Social Rights.

<sup>379</sup> As the majority judgment put it (at [56]):

It is unassailable that the inability to work and sustain oneself, or the loss of support by dependents as a result of the death of a breadwinner subjects the worker or dependents to a life of untold indignity. The interpretative injunction in section 39(1)(a) of the Constitution demands that this indignity and destitution be averted. Surely then, social assistance that seeks to heed this injunction falls within the ambit of that right.

<sup>380</sup> At [61].

<sup>381</sup> At [65].

<sup>382</sup> At [95].

<sup>383</sup> At [79], citing to *Hassam v Jacobs N.O.* [2009] ZACC 19; 2009 (5) SA 572 (CC); 2009 (11) BCLR 1148 (CC).

<sup>384</sup> At [20]. Domestic work is also the third largest source of employment for women in the country; at [93].

...experience racism, sexism, gender inequality and class stratification. This is exacerbated when one considers the fact that domestic work is a precarious category of work that is often undervalued because of patronising and patriarchal attitudes.<sup>385</sup>

The Court went on to hold that the COIDA exclusion of domestic workers was in violation of the constitutional rights to social security, equality,<sup>386</sup> and dignity.<sup>387,388</sup> The Court's order was to apply retrospectively from 27 April 1994, the date South Africa's post-apartheid interim constitution took effect.<sup>389</sup> If ever there was a model of how a court should consider the lawfulness of marginalised workers' exclusion from social support, the judgment that SADSAWU won is it. In looking to international law for inspiration, adopting an intersectional approach to discrimination, and boldly asserting the intertwined nature of racial, gender and economic justice, it is a ruling for the ages.<sup>390</sup>

'This powerful judgment,' write Amy Tekie and Maggie Mthombeni in the South Africa Case Study (this collection), 'serves as an important precedent for subsequent advocacy efforts,' providing as an example how farm and domestic workers won minimum wage rates on par with other workers in 2021 and 2022, respectively.<sup>391</sup> And the issues considered in the case were also at the forefront of another battle for domestic workers during the early stages of the pandemic: their eligibility for income support from the Temporary Employer/Employee Relief Scheme

<sup>385</sup> At [36].

<sup>386</sup> This was both on the basis that the exclusion violated the right to equality before, and equal protection and benefit of, the law in Section 9(1) of the Constitution, as well as on the basis that it constituted unfair indirect discrimination pursuant to Section 9(3). *Mahlangu* at [107].

<sup>387</sup> The majority concluded its holding on dignity by noting that the COIDA provision 'extends the humiliating legacy of exclusion experienced during the apartheid era into the present day, which is untenable.'

<sup>388</sup> Although limits on constitutional rights may be justified by virtue of a proportionality exercise enshrined in Section 36(1) of the Constitution, the majority held that in this case the limitations were 'neither reasonable nor justifiable'; at [119].

<sup>389</sup> At [129].

<sup>390</sup> For a similar attempt by a trade union to use constitutional law to win entitlement to social security for excluded workers – in this case, 'gig economy' workers in India – see: *Indian Federation of App-Based Transport Workers (IFAT) & Ors v Union of India & Ors*. Writ Petition.

<sup>391</sup> At p4.

(TERS).<sup>392</sup>

The fundamental problems with TERS, explain Tekie and Mthombeni, were twofold: i) eligibility was premised on an employer having enrolled the worker with the Unemployment Insurance Fund (UIF); and ii) the employer had to make the application for the TERS payment. Yet, most employers had not registered domestic workers with UIF – leaving them ineligible for both TERS and unemployment insurance – and many of those who had registered the workers chose not to apply for TERS on their behalf.<sup>393</sup> This resulted in only 7% of domestic workers receiving TERS payments by 27 October 2020.<sup>394</sup> Of course, TERS's deficiencies also proved detrimental to other groups of marginalised workers with less-than-model employers. So, in April 2020 the Casual Workers Advice Office (CWAO) threatened the government with legal action unless they remedied said deficiencies. By the end of the month – and without needing to go to court – the government amended the programme, making it mandatory for employers to apply on behalf of workers and allowing workers to apply on their own behalf if need be. But the problem of ineligibility for workers unenrolled in UIF remained.<sup>395</sup>

The following month, two further workers' rights organisations – Women on Farms and Izwi Domestic Workers Alliance (to which the case study's authors belong) – joined CWAO and filed proceedings in the Labour Court. As in the cases above, they relied on the constitutional right to social security.<sup>396</sup> Three days before a court hearing, the

<sup>392</sup> TERS provided for payments between 38% and 60% of a worker's salary, or minimum wage, whichever was higher; at p5.

<sup>393</sup> These sorts of problems have arisen in other countries as well. For instance, in Georgia, some of the many problems that the Georgian Trade Union Confederation (GTUC) raised with the government concerning the income support scheme for employees included: i) eligibility was also premised on the employer submitting information; and ii) there was no sanction on employers who failed so to do; Tchanturidze, G. & Surmava, T. (2021). *Impact of the Pandemic on the Labour Market and Employees Positions*. July. Georgia Trade Union Confederation. At p25. However, contrast this with the *Canada Emergency Response Benefit Act*, S.C. 2020, c. 5, Section 5(1) of which made clear that a worker can apply directly – rather than having to rely on the employer – for the assistance.

<sup>394</sup> At p5.

<sup>395</sup> At p7.

<sup>396</sup> At p8. Although note that parallel to the proceedings discussed here, the Socio-Economic Rights Institute of South Africa (SERI-SA), on behalf of SADSAWU, sent a legal letter to the government making an argument based on the provisions of the Unemployment Insurance Act, rather than the Constitution; at p9.

government issued another amendment, providing for access to TERS by workers who should have been enrolled in UIF.<sup>397</sup> 'Within two months, therefore, all three demands on behalf of workers had now been met,' write Tekie and Mthombeni, 'and vulnerable workers not registered for UIF or employed by compliant bosses had been given an avenue to access the critical TERS wage support.'<sup>398</sup>

However, the authors warn of the practical constraints on the otherwise far-reaching implications of such transformative constitutionalism. Despite the Mahlangu judgment, by June 2022 only 0.2% of domestic workers had been registered for COIDA.<sup>399</sup> And in the case of TERS, although the government caved on the law, it did not implement it. 'In subsequent weeks there was no visible publicity on the amended regulation, or information made available on the application process for unregistered workers,' Tekie and Mthombeni write.<sup>400</sup> Even worse, the people administering the programme appeared unaware of the changes, continuing to insist on eligibility requirements that no longer existed.<sup>401</sup> It was not until October that the government opened an online process for unregistered applicants; however, this too was riddled with – often-prohibitive – requirements.<sup>402</sup> As the authors conclude:

South Africa's TERS case, as well as the cases of UIF and COIDA, should be a cautionary tale. Meaningful legal advocacy requires effort and resources that must continue well beyond court victories. Partners must include not only legal rights firms and the labour movement, but also other key players, such as civil society actors, the media, and employers. The state must engage, and be engaged, in raising awareness of its own laws, and ensuring active enforcement.<sup>403</sup>

<sup>397</sup> At pp9-10.

<sup>398</sup> At p10.

<sup>399</sup> At p4.

<sup>400</sup> At p10.

<sup>401</sup> At p10.

<sup>402</sup> Among other things, the process still required employers to sign something (and some were unwilling) and also required a South African ID number, an absolute barrier for many migrant workers; at p11.

<sup>403</sup> At p13.

## Making Employers Pay

In the preceding section we have focussed on the government income support schemes, which often came in the form of wage replacement for workers and/or subsidies for employers. However, irrespective of government subsidies, one must not forget that most often, the normal position is that the employer is legally bound to pay the worker's wage for work done. The legal obligation may be rooted in the law of contract, in statute, by virtue of a collective bargaining agreement, in international law,<sup>404</sup> even – as is the case in Mexico – in a country's constitution,<sup>405</sup> or in more than one of these sources.<sup>406</sup> One of the major issues that arose during the pandemic was what happened to that legal obligation when workers had less work through no fault of their own, or when employers simply sought to save money by reducing wages. In some cases, governments provided for the ability of employers to impose a reduction in working hours on employees. For instance, in Australia, the Fair Work Act 2009 was amended such that an employer who qualified for the jobkeeper scheme – the country's main wage subsidy programme – could change an employee's working days or reduce their working hours if necessary (and subject to various limitations).<sup>407</sup> Similarly, in South Africa – in conjunction with

<sup>404</sup> For instance, in very narrow circumstances, the European Court of Human Rights has held Article 1, Protocol 1 (A1P1) of the European Convention on Human Rights – which provides for the 'peaceful enjoyment of [one's] possessions' – to protect wages or other benefits; e.g., see: *Smokovitis & Ors v Greece* (46356/99) 11/04/2022; *Kechko v Ukraine* (63134/00) 08/11/2005; and for a broader discussion: Sychenko, E. (2017). 'Potential of the European Convention on Human Rights in the field of Wage Protection'. In: *E-Journal of International and Comparative LABOUR STUDIES*, Vol. 6, No. 3 (September-October).

<sup>405</sup> As Alejandra Martinez Gil explains in the Mexico Case Study (this collection) (at p5):

Salary protection in Mexico is provided for in Article 123 of the Political Constitution of the United Mexican States, which establishes the basis for the protection of salaries. The Constitution establishes that workers have the right to receive their full salary, equal pay must be paid for equal work, no withholding of wages or salary cuts may exist, wages must be paid in legal tender, and they may not be paid in the form of goods.

<sup>406</sup> Although note that the law's protection of wages is not necessarily uniform, either between or within jurisdictions. For example, workers on zero hours contracts, or who depend on overtime hours, or whose work is structured in a series of short contracts, may not benefit from the same legal protections.

<sup>407</sup> See Section 789GDC(1) Fair Work Act 2009. However, the terms of such an employer direction still had to be reasonable. For example, in the case of *Jones v Live Events Australia Pty Ltd* [2020] FWC 3469, the

the TERS income support programme discussed above – the law sanctioned employers’ use of a ‘no work no pay’ policy.

However, some workers still had to fight to prevent employers from implementing a ‘yes work no pay’ policy instead. This can be seen in the Labour Court case of *Macsteel Services Centres SA (Pty) Ltd v National Union of Metal Workers of South Africa*.<sup>408</sup> Here, during an early phase of the pandemic in which the employer was allowed to operate only at 50% capacity, the employer sought to reduce everyone’s salary by 20% (among other measures), including for the 50% of staff who were still working full time. But it was no bother, said the employer, because it would apply for TERS and the workers would probably end up with 100% of their salaries in the end. If TERS didn’t end up covering the missing 20% though, the employer would not make up the shortfall. Quite understandably, the union did not accept this and ultimately called its members out on strike. The employer responded by seeking a declaration from the Labour Court that the strike was unlawful,<sup>409</sup> on the basis that there was no unilateral change in terms and conditions; rather, at issue was nothing more than a change in the date full salaries would be paid. The Court quite rightly called a spade a spade and refused the declaration.

It should be emphasized that – as seen above in the case of the Dutch Caribbean – the reduction in, or non-payment of, wages was not a phenomenon limited to the private sector. For another example, we can stay with South Africa, where the government made an ultra vires argument against itself in order to stiff public sector workers on a pay rise it had promised them. And with scant regard for its ‘transformative constitutionalism’, a unanimous Constitutional Court let the government get away with it.<sup>410</sup>

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Fair Work Commission rejected an employer direction in a case where the employer reduced the (minimum) working hours of an individual employee more than necessary and by far more than the rest of its staff, and could not provide a justification for so doing.

<sup>408</sup> Case no: J483/20.

<sup>409</sup> Under Section 64(3)(e) of the Labour Relations Act, 66 of 1995.

<sup>410</sup> *National Education Health and Allied Workers Union v Minister of Public Service and Administration and Others; South African Democratic Teachers Union and Others v Department of Public Service and Administration and Others; Public Servants Association and Others v Minister of Public Service and Administration and Others; National Union of Public Service and Allied Workers Union v Minister of Public Service and Administration and Others* [2022] ZACC 6.

Let’s break this down a bit. In May 2018, the government entered into a collective bargaining agreement with the public sector unions,<sup>411</sup> that provided for three years of wage increases, ending with 2020/21.<sup>412</sup> The pay increases would cause an unauthorised budget deficit,<sup>413</sup> and in failing to secure financing for the outlays, the government minister in question did not follow the relevant regulations.<sup>414</sup> But Cabinet had approved it,<sup>415</sup> and in any case, the government was unable to strike a deal with the unions for a lesser amount. So, it proceeded to implement the agreement, delivering the pay rises for the first two years. And as a result – as several of the unions argued – workers were precluded from striking.<sup>416</sup> However, when the pandemic hit, the state decided it was no longer feasible to implement the agreement, and so did not institute the pay rise for year three, which should have started on 1 April 2020.<sup>417</sup> The matter ended up before the Labour Appeal Court and then the Constitutional Court. Both courts sided with the government.

To say the Constitutional Court was ‘unsympathetic’ would be to paint too charitable a picture of the Court’s attitude towards the public sector workers, who – one must not forget – were doing the heavy lifting for the government’s response to the pandemic. The Court suggested these workers had been ‘unjustifiably enriched’ and pointed out that they ‘had their jobs secured and received year-on-year salary increments in the public sector outstripping inflation and outperforming the private sector salary

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Contrast this with Aotearoa New Zealand, where the government tried to protect collective bargaining by issuing an order extending the time during which collective bargaining agreements would remain in force after their expiry date. Statute provided for a one-year extension when at least one party wanted to negotiate a replacement agreement, however the order sought to extend this time period whilst an ‘epidemic notice’ (pursuant to Section 15(1) of the Epidemic Preparedness Act) was in effect. However, the Court of Appeal struck this down, saying the order was made without power; *Idea Services Ltd v Attorney-General* [2022] NZCA 470.

<sup>411</sup> At [17].

<sup>412</sup> At [18].

<sup>413</sup> At [18].

<sup>414</sup> Regulations 78 and 79 of the Public Service Regulations, GN R877 GG 40167, 29 July 2016.

<sup>415</sup> At [88].

<sup>416</sup> At [42].

<sup>417</sup> At [21].

increases.<sup>418</sup> In the end, the Court accepted the government's arguments that the collective bargaining agreement was invalid and rejected the unions' arguments it should be enforced,<sup>419</sup> concluding (at [113]):

In sum, if clause 3.3 were to be enforced, the amount available for service delivery in all its manifestations would be significantly reduced. In this regard, the State has laid emphasis on the impact that the Covid-19 pandemic has had on its financial resources, including the need to protect the lives and livelihoods of vulnerable people exposed to the severe consequences of the pandemic. In the present economic and health circumstances facing the country, it would not be just and equitable to require the State to make good the illicit salary increases it promised at the expense of far more pressing needs affecting the country.

Whilst one cannot ignore the pressures on government finances during a pandemic-induced economic crisis, the Court's reading is, at best, a simplistic assessment of the options available to a government when facing a budget shortfall. For instance, the words 'tax the rich' make no appearance in the 49-page judgment. Given that South Africa is – quite literally – the most economically unequal country in the world,<sup>420</sup> consideration of the proposition was perhaps 'worthy of the King's trouble.'<sup>421</sup> This case also sets a dangerous precedent; a 'get-out-of-jail-free card' for future governments to negotiate collective bargaining agreements, benefit from the lack of industrial action, and then argue the illegality of their own actions when the financial delivery becomes tough.<sup>422</sup>

<sup>418</sup> At [110].

<sup>419</sup> Whilst the Court did concede (at [91]) that 'Persons contracting in good faith with a statutory body or its agents are not bound, in the absence of knowledge to the contrary, to enquire whether the relevant internal formalities have indeed been complied with,' it held that that the trade unions in question 'were as much aware of the non-compliance...as the State was.'

<sup>420</sup> World Population Review. (n.d.). *Gini Coefficient by Country 2023*. <https://worldpopulationreview.com/country-rankings/gini-coefficient-by-country>. [Accessed 11 March 2023].

<sup>421</sup> Esther 7:4.

<sup>422</sup> By way of comparison – and although this case did not turn on a collective bargaining agreement – when the Republic of North Macedonia issued an ordinance (No. 44-2865 of April 7, 2020 as amended) pur-

Turning to the private sector, some countries attempted to compel employers to pay wages during lockdowns when workers were not working. This was the case, for example, in India, where the government issued a notification to this effect on 29 March 2020. When trade unions sought to make good on the notification on behalf of their members, employers challenged the notification before the Supreme Court<sup>423</sup> in what became the case of *Ficus Pax Private Ltd. v Union of India*.<sup>424</sup> As Gunjan Sing writes in the India Case Study (this collection):

[T]he court noted lockdown also had financial implications on employers and, therefore, stayed the operation of the notification.<sup>425</sup> The Court further directed the parties – i.e., employers, employees, and trade unions – to explore an option of a mutual settlement regarding payment of wages for the lockdown period.<sup>426</sup> The experience during the lockdown showed that the employers were unwilling to pay wages to the workers. Considering the wide power gap between employers and workers and, trade unions' limited collective bargaining powers, this order in effect meant there would be no payment of wages to workers. Before the said notification was stayed by the Supreme Court, trade

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porting to reduce salaries for certain categories of public sector workers during the state of emergency, that country's Constitutional Court struck it down as a violation of the Constitution (Case No. 49/2020); see: Shaburova, T. (n.d.). 'Macedonia, Constitutional Court of the Republic of North Macedonia, 28 April 2020, No. 49/2020'. <https://www.covid19litigation.org/case-index/macedonia-constitutional-court-republic-north-macedonia-no-492020-2020-04-28>. [Accessed 20 July 2022].

Spain's Supreme Court, too, came to the defence of public sector workers – specifically those working for a state-owned tourism company – in case STS 2028/2022 – ECLI:ES:TS:2022:2028. There, three trade unions had brought an action seeking payment for workers during a period of pandemic-induced business closure. The company's failure to temporarily lay off the workers pursuant to a government scheme in which the workers would receive compensation during the pendency of the lay off – a failure committed due to 'reasons of political opportunism' – disentitled the company from later arguing it did not owe the workers their wages.

<sup>423</sup> Sing, G. India Case Study, this collection. At p6.

<sup>424</sup> Writ Petition (Civil) No. 899 of 2020.

<sup>425</sup> See order dated [06/04/2020](https://www.courts.mca.gov/cases/orders/06/04/2020) passed in Writ Petition (Civil) No. 899 of 2020[.]

<sup>426</sup> See order dated [06/12/2020](https://www.courts.mca.gov/cases/orders/06/12/2020) passed in Writ Petition (Civil) No. 899 of 2020[.]



Migrant workers travel home amidst a nationwide lockdown due to COVID. Photo © Manoj Paateel / Shutterstock

unions were successful in ensuring payment of wages in some areas. Referring the parties to explore the opportunity of settlement, the Supreme Court once again missed the opportunity to grant timely relief to workers.<sup>427</sup>

The Supreme Court of Namibia considered similar issues, and came to an equally bad decision, in the case of *President of the Republic of Namibia v Namibia Employers Federation*<sup>428</sup> (referred to above). Importantly, although the impugned regulations<sup>429</sup> did ban Covid-related dismissals and retrenchments, they did not prohibit salary reductions<sup>430</sup> full stop. Rather, they required the employer to 'negotiate in good faith' with 'a recognised union', 'a workplace representative,' or - failing that - the affected employee(s).<sup>431</sup> If agreement on wage reduction was not possible, the matter had to be referred to the Labour

<sup>427</sup> At pp 6-7; footnotes reproduced from original.

<sup>428</sup> (SA 53/2020) [2022] NASC.

<sup>429</sup> *State of Emergency – Covid-19: Suspension of Operation of Provisions of Certain Laws and Ancillary Matters Regulations: Namibian Constitution*, Proclamation 16 of 2020, published in Government Gazette 7194 of 28 April 2020. The regulations were issued by the President, by virtue of Article 26(1) and (5)(a) and (b) of the Namibian Constitution. The regulations (materially) suspended provisions of the Labour Act 11 of 2007.

<sup>430</sup> At regulation 19(1).

<sup>431</sup> Regulation 19(2).

Commissioner for resolution.<sup>432</sup> However, the Court dismissed these provisions as 'meaningless', arguing that it was 'more probable than not, that employees would not agree'<sup>433</sup> and that employees were effectively given veto power over employers' decisions. The Court struck down the provisions on grounds of unreasonableness and irrationality, even going so far as to say (at [141]): 'Given the disproportionate harm it caused to employers in order to assist employees it is one which no reasonable decision maker would have adopted!'

Whilst one can easily accept the proposition that ordering an employer to pay a worker with money which does not exist is hardly a victory for workers' rights, the Court here failed to appreciate that workers and unions understand this, too. Unions are not in the habit of negotiating things they know the employer cannot deliver. The impugned regulations did not impose constraints on the substance of any agreement that workers or unions might come to with employers. What they did do was provide an incentive to employers to make the fairest arrangement possible, with the threat of real sanctions to keep them focused on the task at hand. But here's the crux of the matter: the Court's reasoning is premised on the assumption that - at least in times of crisis - workers and unions are so unreasonable that they would never engage in good faith with employers. Upon that premise, the entirety of a country's

<sup>432</sup> Regulation 19(3).

<sup>433</sup> At [132].

legal infrastructure for industrial relations may crumble.

A trade union victory before the Employment Court in Aotearoa New Zealand – *E Tū Incorporated v Carter Holt Harvey LVL Limited*<sup>434</sup> – presents an alternative view on the importance of consultation during the pandemic. In this case workers – with the support of their union E Tū – challenged the employer’s decision to compel them to use some of their (paid) annual leave during the initial lockdown period. Importantly, the Holidays Act 2003 requires employers to agree upon holiday dates with employees<sup>435</sup> and prohibits them from unreasonably withholding consent to an employee request to take holidays.<sup>436</sup> It is only (materially) if agreement cannot be made – after good faith engagement<sup>437</sup> – that an employer can unilaterally impose the dates.<sup>438</sup> But the employer here did not even try to agree upon dates, even ignoring overtures by the recognised union.<sup>439</sup> And like the Namibian employers, Carter Holt argued that engagement with employees and the union would be futile. The Court rejected this (at [72]):

[A]lthough Carter Holt LVL asserts that even if it had engaged with the individual plaintiffs and E Tū, agreement would not have been able to be reached, that was not inevitable. Although the circumstances may have meant that a more truncated process for attempting to reach agreement was used than would usually be the case, we do not accept that it necessarily follows that, objectively in all of the circumstances at the time, Carter Holt LVL, in fact, would have been unable to reach agreement with the individual plaintiffs on the timing of annual holidays.

The employer could not ‘say it was unable to reach agreement,’ the Court added, ‘when it made no attempt to do so.’<sup>440</sup> Unfortunately, the Court missed an opportunity to go further, rejecting a submission by the New Zealand

<sup>434</sup> [2022] NZEmpC 141.

<sup>435</sup> At Section 18(3).

<sup>436</sup> At Section 18(4).

<sup>437</sup> As required by Section 73.

<sup>438</sup> At Section 19(1)(a).

<sup>439</sup> At [68].

<sup>440</sup> At [73].

Council of Trade Unions (NZCTU)<sup>441</sup> to the effect that confinement in one’s home during lockdown should not be considered holidays in any case as it negated the opportunity for rest and recreation.<sup>442</sup> However, this decision is an important precedent on an aspect of the right to holidays and beyond; even in a crisis, the workers’ voice shall not be silenced.<sup>443</sup>

We remain in Aotearoa New Zealand to look at another important victory for workers’ rights, the implications of which will also outlast the Covid-19 pandemic. In the case of *Sandhu v Gate Gourmet New Zealand Ltd*<sup>444</sup> the Court of Appeal considered whether an employer is still bound to pay workers the minimum wage even if the employer has no work for them to do. In short, it said yes.<sup>445</sup> The dispute in the case arose between a company providing in-flight catering services for passenger aircraft on the one hand, and the company’s employees, who in turn were supported by the Aviation Workers United Inc Union (AWU).<sup>446</sup> The company – although classed as an essential business – did not have enough work available<sup>447</sup> and so directed many employees to stay home,<sup>448</sup> paying them only 80% of minimum wage (unless topped up by their paid annual leave entitlements).<sup>449</sup> The Employment Court below sided with the employer, reading Section 6 of the Minimum Wage Act 1983 so as to require the payment of minimum wage only

<sup>441</sup> Given the importance of the matter, the Court notified both the NZCTU and Business New Zealand of the case so that they could apply for leave to intervene should they so wish. They both did apply for, and received, leave.

<sup>442</sup> At [90].

<sup>443</sup> In France, in a somewhat similar case brought by the union *Solidaires Finances publiques*, the Conseil d’Etat went the opposite way, holding that a government ordinance (n° 2020-430 du 15 avril 2020) which required public sector workers to use 10 days of their paid leave entitlement during the initial lockdown period was lawful; Decision n° 440286 (ECLI:FR:CECHS:2020:440286.20201230).

<sup>444</sup> [2021] NZCA 591.

<sup>445</sup> Interestingly, in Mexico – as Alejandra Martinez Gil points out in this collection – if work is suspended due to a health emergency, whilst the employer may be exempted from owing the worker their full salary, they must still pay no less than the minimum wage (at p4).

<sup>446</sup> At [13].

<sup>447</sup> At [15].

<sup>448</sup> At [18].

<sup>449</sup> At [19]-[20].

for time actually worked.<sup>450</sup> The Court of Appeal, however, rejected that reading, instead holding that minimum wage was payable for the worker's agreed working hours, regardless of whether they worked them. The only circumstances in which an employer could make deductions for time not worked were those set out in Section 7(2) of the Act, namely: illness, accident, or something arising by the worker's default.<sup>451</sup> To hold otherwise, the Court said (at [147]), would be inconsistent with the Act's purpose:

[The Act] sets a floor below which employers and employees cannot go: they cannot contract out of this basic protection. The Act is directed at preventing the exploitation of workers. It recognises the diminished bargaining power of those in low-paid employment. It would be inconsistent with the purpose of the Minimum Wage Act, and the protections it seeks to provide for low-paid employees, if s 6 could be unilaterally disapplied by an employer simply by directing that the employee not attend work.<sup>452</sup>

When the purpose of the law is to prevent exploitation, the law must be capable of doing the heavy lifting necessary in times of crisis.

We end this section with a brief visit to Mexico, where – like the requirements to pay minimum wage in the case just discussed – the law limits the reasons for which an employer can reduce wages. Whilst important, the necessary next question is: what are the employee's options if the employer reduces their wages nonetheless? Alejandra Martinez Gil (this collection) provides one answer:

Article 51 of the Federal Labor Law establishes as a cause for termination of the employment relationship, without liability for the employee, the unilateral reduction of the salary by the employer. In such event, the employee has the right to terminate the relationship within 30 days of the salary cut and is entitled to severance payment in accordance

<sup>450</sup> At [28]-[32]. For that decision, see: *Gate Gourmet New Zealand Ltd v Sandhu* [2020] NZEmpC 237.

<sup>451</sup> At [3].

<sup>452</sup> Footnotes omitted.

with the terms of the Federal Labor Law.<sup>453</sup>

An important issue arose during the pandemic, however, when employees exercised this option: who shoulders the burden of proving that reductions were made (un)lawfully – the worker or the employer? Two Collegiate Courts of Mexico's Fifteenth Circuit answered this differently. The matter therefore went before the Plenary of the Fifteenth Circuit to resolve the split. The Plenary sided with the workers.<sup>454</sup> As Martinez Gil summarises it:

Plenary of the Circuit ruled that the employer has the burden of proof to demonstrate that there was no salary reduction or that, if there was, the reduction was justified based on the way the work was carried out, because they were deductions for absences from work or tardiness. This implies that the employer must demonstrate the cause and justification of its actions, and therefore is obliged to provide all the means of proof to support its claim.<sup>455</sup>

Whilst state enforcement is necessary to make workers' rights real in practice, so too are the mechanisms through which workers can take legal action themselves. Placing the onus on the employer – who holds the cards in terms of data and documents – to justify its actions is an important improvement to such systems of worker enforcement.

## Lay Offs and Pay Offs

In addition to the shorter-term issue of ensuring wages were paid, many governments concerned themselves with the longer-term issue of job losses. For example, as Phillip Karugaba summarises the approach of the Ugandan government in the early stages of the pandemic:

On 20 March 2020, the Minister of Labour issued a statement advising that Covid-19 should not disrupt...employer-employee relations. The Minister advised consultation with the Ministry before any measures are taken

<sup>453</sup> At p4. The structure for determining the amount of compensation is set out at Article 50 of the Federal Labour Law; see: Martinez Gill at p4.

<sup>454</sup> Labour Case Law 2023617 of 1 October 2021; Martinez Gil at p10.

<sup>455</sup> At p12.

with respect to termination of employees. The Minister recommended that employees be encouraged to take leave with or without pay upon agreement. Where termination of staff is inevitable, the Minister recommended that this be done with a humane face, with payment of all dues, counselling and a commitment to re-engage once business returns to normal.<sup>456</sup>

Some governments went further; for instance, the government of Namibia tried to ban dismissals during lockdown, as seen above. So too in Argentina, where – as Diego Zang writes in this collection:

[T]he national government, in line with previous experiences and with the support of trade union organizations that demanded it, established through DNU (Decree of Necessity and Urgency) 329 of 31/03/20, the temporary ban (of 60 days) on dismissals without cause or due to lack or reduction of work or force majeure.

This ban...was extended on different occasions until December 31, 2021, through the enactment of other DNU[.]

Coupled with income support schemes, some governments also relaxed the financial implications for employers of retrenching workers. For example, the Chief Justice of British Columbia's Court of Appeal has described how:

[The Canada Emergency Response Benefits (CERB) programme] was introduced federally to support workers at a time when the [British Columbia] provincial legislature was taking measures to reduce the impact of severance payments on businesses caused by the COVID-19 pandemic, including by extending the temporary layoff period to 24 weeks. Employers had extra time to recall their employees to work without being liable for severance pay during a critical time of uncertainty. Programs like CERB were, in part, intended to help businesses keep their employees and

quickly resume operations when the time was right[.]<sup>457</sup>

However, let's first dispose of a preliminary matter: not all retrenchments – even during a pandemic – are genuine. Whilst many employers may not have had the financial means to pay workers during the acute initial phases, others saw an opportunity to get rid of workers they did not want. As Michelle Ford and Kristy Ward point out in the case of Vietnam:

A study by the ILO found that 36.2 percent of firms surveyed had used the pandemic as an opportunity to lay off poorly performing workers, with older workers and women more likely to be targeted for furlough and contract termination[.]

Similarly, the Georgian Trade Union Confederation has stated that employers in that country relied on force majeure to dismiss workers 'even in [sectors] where work has not stopped [despite] the pandemic.'<sup>458</sup> Indeed, the impact of the pandemic or public health measures on a particular workplace must be a matter of evidence and not assumption. The Court of Appeal for the province of Ontario, Canada said as much<sup>459</sup> in the context of 'judicial notice'; i.e., when a court can accept as true alleged facts which are 'so notorious or uncontroversial that evidence of their existence is unnecessary.'<sup>460</sup> As the Court held:

The fact of the COVID-19 pandemic is notorious and uncontroversial, as are the facts that the government declared a state of emergency and has undertaken various remedial emergency measures to combat the pandemic's severe health, economic and social effects. However, the legislative context and intention behind the government's emergency measures and their impact, especially as they pertain to the parties to these proceedings, are not. This is demonstrated by the

<sup>456</sup> Karugaba, P. (2020). 'Uganda: Legal Implications of Covid-19'. In: *Uganda Legal Information Institute*. 28 March. <https://old.ulii.org/blogs/philip-karugaba/28-march-2020/uganda-legal-implications-covid-19>. [Accessed 18 February 2022].

<sup>457</sup> *Yates v. Langley Motor Sport Centre Ltd.* [2022] BCCA 398 at [59].

<sup>458</sup> Tchanturidze, G. & Surmava, T. (2021). *Impact of the Pandemic on the Labour Market and Employees Positions*. July. Georgia Trade Union Confederation. At p5.

<sup>459</sup> *Taylor v. Hanley Hospitality Inc.* [2022] ONCA 376.

<sup>460</sup> *Taylor* at [30], quoting *Public School Boards' Assn. of Alberta v Alberta (Attorney General)* [2000] SCC 2.

parties' respective, divergent pleadings. For example, the motion judge purported to take judicial notice of the respondent's pleading that it "was required by the Ontario government to close all their storefronts and was limited to takeout and delivery", which "had an impact on the employment market". As I have already noted, the appellant did not admit those facts and disputed that her lay-off was the result of the Ontario government's mandatory pandemic measures.<sup>461</sup>

In a series of Malaysian Industrial Court cases, workers were indeed able to demonstrate that their employers used redundancy as a mere pretext in order to dismiss them.<sup>462</sup> In *Mohamad Sahrul Bin Kahulan v Lourdes Medical Services Sdn. Bhd.*,<sup>463</sup> for instance, the Court rejected the company's contention that it faced a genuine redundancy situation, referring to the decision to retrench the Claimants as 'hasty and abrupt' and 'so ill conceived that the Company was even prepared to misinform the Claimants that the Company had made a decision to cease operation[.]'<sup>464</sup> In contrast to the Namibian Supreme Court case discussed above, this Court took a considerably more balanced approach in assessing the impact of lockdown on employers and employees (at [27]):

The [lockdown] may have been a very diffi-

<sup>461</sup> At [31].

<sup>462</sup> Four of these cases were against the same employer and were heard together: *Mohamad Sahrul Bin Kahulan v Lourdes Medical Services Sdn. Bhd.* (Case No: 4/4-1938/2020), *Gawri A/P Muthadakan v Lourdes Medical Services Sdn. Bhd.* (Case No: 4/4-1939/20), *Lalitha A/P Subramaniam v Lourdes Medical Services Sdn. Bhd.* (Case No: 4/4-1940/20), and *Rasalechumi A/P Kanagaratnam v Lourdes Medical Services Sdn. Bhd.* (Case No: 4/4-1941/20). For a discussion of these cases, see: van Geyzel, M. (2021). 'Case Update: Another company's retrenchment of employees due to COVID-19/MCO deemed unfair by Industrial Court'. In: *The Malaysian Lawyer*. 21 September. <https://the-malaysianlawyer.com/2021/09/21/case-update-companys-retrenchment-covid-mco-unfair/>. [Accessed 3 February 2023]. Also, see the case of: *Joseph Lim Chien Shuih v Dancom TT&L Telecommunications (M) Sdn. Bhd.* (Case No: 4/4-2602/20).

<sup>463</sup> Case No: 4/4-1938/2020.

<sup>464</sup> At [28]. The case of *Joseph Lim Chien Shuih v Dancom TT&L Telecommunications (M) Sdn. Bhd.* (Case No: 4/4-2602/20) turned on a slightly different issue: namely, the Court found that the employer had wanted to dismiss the claimant over alleged misconduct, rather than for genuine redundancy reasons. The Court said (at [26]) the Company's decision 'to seize the [COVID-19] pandemic as an opportunity to terminate the Claimant from his employment smacks rash and ill thought exercise' and that if misconduct was the issue, then (at [28]) 'the Company should have preferred charges of misconducts[.]'

cult period for the company and this Court is mindful not to be indifferent to the plight of companies especially the Company here but the same [lockdown] is certainly a period of great anguish and pain for ordinary wage earners fearful of losing their jobs and livelihood.

And – in language which is applicable to circumstances beyond the pandemic – the Court stated (at [30]):

It is common knowledge that companies' business and its revenue will fluctuate from time to time. It does not mean that the moment there is some reduction in the revenue of any company/companies, the company must quickly and immediately retrench its employees. There are many significant and meaningful ways in which a company can initiate financial austerity measures whenever the company experiences some business downturn and revenue dip without resorting to retrenching its employees as an immediate and first step in costs cutting measures[.]

Among other examples of expenditure, the Court went on to note that the Director's remuneration had remained the same in April 2020 as in the previous three months.<sup>465</sup>

Even when economic circumstances did create genuine situations of redundancy, workers have had to fight for employers to run proceedings in a fair and lawful manner. An example of this can be seen in the UK Employment Appeal Tribunal (EAT) case of *Teixeira v Zaika Restaurant Limited & Anor.*<sup>466</sup> In this case – in which an Indian restaurant in London dismissed one of its chefs without following any procedure – the EAT noted (at [7]) that: 'There was no real dispute that the claimant was dismissed by reason of redundancy...because of a very significant reduction in work because of the Coronavirus pandemic[.]' Nor was there any dispute that the dismissal was (procedurally) unfair.<sup>467</sup> The dispute that did arise was whether or not – if the employer had run a fair procedure – it was still inevitable that the worker would have been dismissed on the same date, and/or at all. It was a reasonable question; the

<sup>465</sup> At [30].

<sup>466</sup> [2022] EAT 171.

<sup>467</sup> At [7].

Claimant was the sole chef considered for redundancy, after all. And it mattered because if the answer to that question was yes – as the Employment Tribunal below had concluded was 100% likely – then it dramatically reduced the compensation to which the worker was entitled.<sup>468</sup> However, the EAT overturned the Tribunal's decision,<sup>469</sup> holding – in part – that (at [27]):

It cannot be said that there is only one possible outcome. There might be some compelling reason why a pool of one would fairly have been selected absent any warning or consultation, though I struggle to see what it might have been, as the business did continue and the other chefs were retained in employment.

We now turn to a series of Canadian cases in which workers were able to overcome a multitude of employer arguments deployed to justify less or no compensation for their dismissals. In the first, *Fanzone v 516400 B.C. Ltd.*,<sup>470</sup> the Supreme Court of British Columbia considered the Shady Tree Neighbourhood Pub's argument that it owed no severance payment after dismissing an employee because the employment contract in question had been 'frustrated'. The frustration doctrine was succinctly summarised by Lord Radcliffe in the UK case of *Davis Contractors Ltd. v. Fareham Urban District Council*<sup>471</sup> (at 728-29):

[F]rustration occurs whenever the law recognizes that without the fault of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the con-

<sup>468</sup> More specifically, tribunals have some discretion, pursuant to Section 123(1) Employment Rights Act 1996 to order a 'just and equitable' compensatory award in unfair dismissal cases. Exercising this discretion to grant a compensatory award of zero – in the circumstances described above – is referred to as a 'Polkey reduction' as it follows the case of *Polkey v A.E. Dayton Services Ltd.* [1988] A.C. 344. Although note that the worker would ordinarily still be entitled to a separate statutory award. The discussion on this issue in the judgment at hand is at [10]-[24].

<sup>469</sup> And remitted the matter back to the Employment Tribunal.

<sup>470</sup> [2022] BCSC 2089.

<sup>471</sup> [1956] A.C. 696 H.L. (Eng.). The Court in the instant case cited to this case.

tract.<sup>472</sup>

In an indication of the pandemic's ability to generate precedents – whether positive or negative – in the field of workers' rights, the Court noted (at [22]):

Rather remarkably, there appears to be only one reported BC Supreme Court case addressing the doctrine of frustration in the context of a wrongful dismissal claim. In *Verigen v. Ensemble Travel Ltd.*, 2021 BCSC 1934 [Verigen], the Plaintiff's employment as a business development director for an international travel agency cooperative was terminated following a temporary lay-off when business collapsed as a result of the COVID-19 pandemic. There, as here, the Plaintiff sued for wrongful dismissal and was confronted with the doctrine of frustration of contract as a defence to her claim.

However, the doctrine of frustration sets a high threshold – at least in these cases. In *Verigen* the doctrine was held inapplicable as performance of the contract had not become 'impossible'.<sup>473</sup> And in *Fanzone*, the Court rejected the frustration argument,<sup>474</sup> holding (at [28]):

[E]ven when most if not all of the other pubs and restaurants in the Squamish area re-

<sup>472</sup> The doctrine of frustration however is not to be confused with *force majeure*. As Phillip Karugaba explains – in the context of Uganda but equally applicable in other common law countries –

In the absence of an express *force majeure* provision, parties may be able to rely upon the doctrine of frustration. ... The doctrine of frustration is not available if the contract contains an express *force majeure* provision, since the provision will be regarded as the agreed allocation of risk between the parties.

Karugaba, P. (2020). 'Uganda: Legal Implications of Covid-19'. In: *Uganda Legal Information Institute*. 28 March. <https://old.ulii.org/blogs/philip-karugaba/28-march-2020/uganda-legal-implications-covid-19>. [Accessed 18 February 2022].

<sup>473</sup> As summarised by *Fanzone* at [23].

<sup>474</sup> In both cases the courts noted that Section 65(1)(d) of the *Employment Standards Act*, R.S.B.C. 1996, C. 113 provided exemption from the requirement to pay severance in certain circumstances (akin to frustration). However, both cases turned on the frustration doctrine as derived from the common law. But, in *516400 B.C. Ltd. (Re)* [2022] BCEST 73, the Employment Standards Tribunal upheld a decision on a similar issue against the Shady Tree Neighbourhood Pub on the basis of the *Employment Standards Act*.

opened, [the employer] chose not to follow suit, whether with or without renovations necessary to accommodate any COVID-19 health and safety policies developed by [the provincial OSH regulator] (none of which he put into evidence or even appeared to be aware of). Indeed, in June, 2020 [the employer] had posted a large “for lease” sign on the outside of his closed Pub.

The worker was wrongfully dismissed, the Court held, and was owed damages.

The Superior Court of Justice of Ontario has also held – in a number of cases – that the economic situation the pandemic caused was reason for extending the length of the notice period that employers owed dismissed employees.<sup>475</sup> This was the case, for example, in *Williams v Air Canada*,<sup>476</sup> where the Court held (at [27]):

Ms. Williams’ employment with Air Canada was terminated as a result of the COVID-19 pandemic. The economic uncertainty caused by the pandemic is a factor that may lengthen an employee’s notice period[.] Given the pandemic was the reason for Ms. Williams’ termination and the impact the pandemic has had on the airline industry, in my view, she is entitled to reasonable notice at the higher end of the range.<sup>477</sup>

Another manner in which employers seek to reduce what they owe to dismissed employees – at least in many common law countries – is by arguing that the employees have not sufficiently mitigated their losses, for example because the employee did not apply to enough jobs after being dismissed. In *Williams* the Court also took the pandemic situation into account in two ways with regard to the duty to mitigate. First, in considering the plaintiff’s efforts at job hunting, the Court noted (at [73]) it was

<sup>475</sup> It should be noted that in the cases that follow, the length of notice was not extended by a large amount. However, in a situation in which economic opportunities are limited, even one month’s extra salary is welcomed. In any case, we are interested presently in the qualitative – rather than quantitative – aspect of the cases.

<sup>476</sup> [2022] ONSC 6616.

<sup>477</sup> For a similar case also against Air Canada, see: *Ruel v. Air Canada* [2022] ONSC 1779.

mindful that Ms. Williams’ re-entry into the job market, as well as her job search, took place during the COVID-19 pandemic, with unprecedented restrictions and lockdowns, and associated economic uncertainty.

Second, it rejected Air Canada’s argument that (at [79]):

Ms. Williams’ failure to inquire into income replacement benefits – the Canada Emergency Response Benefit – was unreasonable and her explanations inadequate to relieve her of her legal duty to mitigate her damages.

The potential financial advantage for an employer when an employee mitigates their losses is that any income an employee earns from a new job may be deductible from the compensation owed by the employer who dismissed them. Again, in common law countries, this is standard.<sup>478</sup> However, another pandemic issue that arose is whether deductions from compensation should be made for the money the employee receives from government income support schemes such as the Canada Emergency Response Benefit (CERB).<sup>479</sup> No, said British Columbia’s Court of Appeal in the case of *Yates v Langley Motor Sport Centre Ltd.*<sup>480</sup> In this case the employer conceded having dismissed the worker without cause.<sup>481</sup> The court below awarded damages but then deducted 40% of them to account for CERB payments the worker had received.<sup>482</sup> In overturning the decision, the Court of Appeal noted (at [48]) that:

[A]s a matter of overall impression, it seems wrong for a defendant employer who has breached the employment contract with the plaintiff to enjoy, effectively, a windfall from an income support program designed to benefit workers impacted by the COVID-19 pandemic. If a windfall is to result, it seems to better reflect the intention of Parliament that

<sup>478</sup> In the Canadian context, see the leading (Supreme Court of Canada) case of *IBM Canada Ltd. v. Waterman* [2013] SCC 70.

<sup>479</sup> Pursuant to the *Canada Emergency Response Benefit Act*, S.C. 2020, c. 5, s. 8.

<sup>480</sup> [2022] BCCA 398.

<sup>481</sup> At [5].

<sup>482</sup> At [6].

it go to the worker.

More specifically, the Court addressed whether the failure to deduct CERB payments would leave the worker better off after the employer had breached the contract than before, thereby creating a so-called 'compensating-advantage problem' (at [62]):

I cannot conclude that this is the result if CERB is not deducted. CERB was an emergency measure delivering financial aid during the early weeks and months of an unprecedented global pandemic. The program's goal was to mitigate harm to individuals in a moment of great uncertainty. CERB payments notwithstanding, many people lost their livelihoods as a result of the pandemic. It strikes me as out of step with that reality to conclude that the combination of CERB and damages awards leaves individuals "better off" after their employment was terminated than before.

Taken collectively, what the Canadian compensation cases do is supply a body of precedent limiting the various ways in which employers can short-change workers after they dismiss them in dire economic circumstance. When one looks beyond the technicalities of common law doctrines, what's at stake is nothing less than a source of income after losing a job.

# Conclusion

As the final edits were being made to this report, the Covid-19 pandemic had just celebrated its third birthday. Nearly everywhere, lockdowns and stringent public health measures had become a thing of the past. Even China, one of the last major hold-outs, had succumbed to public pressure and protest and effectively ended its 'zero Covid' policy.<sup>483</sup> And in the US, one of the first things the new Republican majority in the House of Representatives did in January 2023 was pass the 'Pandemic is Over Act', seeking to terminate the public health emergency declaration.<sup>484</sup> The Biden Administration in any case agreed to end the declaration.<sup>485</sup>

But the pandemic is not over. To stick with these two countries, experts have estimated that China's loosening of restrictions led to between 1 and 1.5 million deaths. And the head of the EU Chamber of Commerce in China said some companies saw as much as 90% of their workforces become infected in December 2022.<sup>486</sup> In the US, as of the end of January 2023, around 500 people were still dying of Covid every day.<sup>487</sup> Many people are still vulnera-

ble to the disease as they have either not been vaccinated or the vaccines do not work as well for them. For others, Long Covid has left them struggling with symptoms. And for so many, the trauma of what we have just lived through will have ramifications for years to come.

Regardless of the past impact of Covid-19, one must be prepared for future crises. SARS-CoV-2 continues to circulate and mutate. And there is no law that requires mutations to tend towards mildness, as just as such a law may be. Of perhaps greater moment, the eco-destroying conditions of global capitalism are conducive to future pandemics. As the planet heats, animals migrate and different species come into contact with each other, allowing for viruses to spread between them and potentially on to humans.<sup>488</sup>

So, when it comes to workers' rights and the law, it is important that we draw lessons from the multitude of legal battles, and build on the victories, discussed in this report. Given the amount of material covered thus far, perhaps a brief recap of some of these victories is in order.

First, we saw how workers were able to fend off governments and employers trying to use the pandemic as an excuse to repress workers' rights. Trade unions convinced the Indian Supreme Court to strike down state laws which suspended rights, and persuaded the Israeli Supreme Court to provide a special disposition for journalists to avoid tracking by the state's security apparatus, among other examples. Next, we saw how the AMCU union in South Africa won a ruling from the Labour Court that the pandemic was both a public and occupational health matter and needed to be regulated as such. This sent a clear message that just because something is a public health concern, regulators and employers cannot disregard the risks posed to workers in the workplace.

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<sup>483</sup> Dawn Wei, T. (2022). 'Significant easing nationwide spells end to China's zero-Covid policy'. In: *Straits Times*. 8 December. <https://www.straitstimes.com/asia/east-asia/china-announces-further-easing-of-covid-19-measures>. [Accessed 8 December 2022].

<sup>484</sup> H. R. 382.

<sup>485</sup> LaFraniere, S. & Weiland, N. (2023). 'U.S. Plans to End Public Health Emergency for Covid in May'. In: *The New York Times*. 30 January. <https://www.nytimes.com/2023/01/30/us/politics/biden-covid-public-health-emergency.html?smid=nytcare-ios-share&referringSource=articleShare>. [Accessed 31 January 2023].

<sup>486</sup> Glanz, J. et al. (2023). 'How Deadly Was China's Covid Wave?' In: *The New York Times*. 15 February. <https://www.nytimes.com/interactive/2023/02/15/world/asia/china-covid-estimates.html?smid=nytcare-ios-share&referringSource=articleShare>. [Accessed 17 February 2023].

<sup>487</sup> LaFraniere, S. & Weiland, N. (2023). 'U.S. Plans to End Public Health Emergency for Covid in May'. In: *The New York Times*. 30 January. <https://www.nytimes.com/2023/01/30/us/politics/biden-covid-public-health-emergency.html?smid=nytcare-ios-share&referringSource=articleShare>. [Accessed 31 January 2023].

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<sup>488</sup> Zimmer, C. (2022). 'Climate Change Will Quicken Viral Spillover, Study Finds'. 3 May. In: *The New York Times*. At pD3.

In the following subsection we saw how workers won rulings to the effect that Covid-19 and/or Long Covid met – or could arguably meet – the definition of ‘disability’, thereby providing these workers with protections at work. And we saw how countries around the world – often at the insistence of trade unions – had classified Covid-19 as an occupational disease. And in various cases where employers disputed the workplace nature of a worker’s illness, how the worker was nevertheless able to persuade the court that their disease was indeed occupational.

In the Fighting for Lives section, we saw how the Amazon workers in France were able to win a more restrictive definition of what activities were essential as well as a holding that workers need to be consulted as part of employer risk assessments. Both of these wins bode well for workers for future OSH challenges. We also saw how a Mexican worker in Ontario, Canada turned a retaliation case into an historic victory for migrant workers, winning a ruling that the vulnerability of migrant workers, and power imbalances between them and their employers, were justification for awarding greater compensation.

We also saw how a small union in the UK won an extension of OSH rights to categories of workers beyond ‘employees’ – a change in law which covers (and will continue to cover) OSH rights beyond the pandemic. And we saw how in Spain and Ukraine unions pushed for and won new legal rights on remote work, through legislation and/or collective bargaining agreements. Whilst the pandemic may have induced a surge in remote work, many workers will continue to work remotely into the future and these protections will assist them when they do. And on the international law front, we saw how the International Transport Workers’ Federation (ITF) won improvements to the Maritime Labour Convention and how the global trade union movement was able to elevate the status of the key ILO conventions on OSH, rendering them obligatory for all ILO member states, regardless of ratification.

In the Fighting for Livelihoods section, we saw how trade unions and other organisations representing the most precarious and marginalised workers were able to win stunning legal victories, entitling these workers to economic support measures and setting important precedents for how government responses to emergencies need to be inclusive. Unions in India won support for migrant workers, and in South Africa unions and other organisations won the extension of pandemic economic support to asylum seekers, domestic workers, farmworkers, and others.

They also won the inclusion of domestic workers in the country’s occupational injury and disease compensation scheme.

Next, we saw how trade unions in New Zealand won a ruling that the minimum wage was still applicable, even if the employer had no work for the workers, and how workers in Mexico won a ruling that when a worker resigned because their employer reduced their wages, that it was on the employer to prove they had acted properly. And in a world in which many opportunistic employers took advantage of the pandemic to dismiss workers they no longer wanted – regardless of the employer’s economic situation – we saw how workers in Malaysia pushed back against this opportunism and won. And in Canada, workers won a series of cases which – taken together – entitled them to greater compensation after being dismissed due to the pandemic. This body of precedent demonstrated judicial sympathy with the workers, rather than their employers, in times of acute economic crisis.

The recap above does not cover all of the worker victories, just some of the important ones whose protective effects extend far beyond the Covid-19 pandemic. Having refreshed our memories on some of the impressive worker victories, here are some of the ‘lessons learned’ that I would emphasize.

Public health issues pose occupational hazards and need to be addressed as such. The pandemic’s very origin lay in a failure of OSH. Further inadequacies in OSH regimes contributed to the virus’s spread. At the same time, public health measures contributed to keeping workers safer at work. Seeking to treat these issues as completely separate serves neither workers nor the public at large. And in any case, as the trade union leader Luisa Moreno put it: ‘the interests of labour and the people are one.’<sup>489</sup>

Measures needed to protect lives and livelihoods intertwine. As seen in the Namibian Supreme Court case, for a lockdown to be effective workers must have the means to support themselves without going to work. Conversely, in order to keep earning an income, one cannot become debilitated by Covid. But the intertwining holds true beyond pandemic conditions. Without paid sick leave, low-paid workers cannot be expected to stay home when ill,

<sup>489</sup> Steinberg, J. (2023). ‘11 Quotes from Women Labor Leaders’. In: *U.S. Department of Labor Blog*. 2 March. <https://blog.dol.gov/2023/03/02/11-quotes-from-women-labor-leaders>. [Accessed 11 March 2023].

no matter the cause of the illness. Similarly, when pay levels and structures are designed so as to incentivise the cutting of safety corners in order to make a living, low pay itself becomes an occupational hazard. Decent pay and working conditions are not just about protecting livelihoods; they are also about saving lives.

We must fix the roof of our industrial relations infrastructure while the sun is shining. Workers on the margins of a nation's employment laws – e.g., the low-paid self-employed, the outsourced, migrants – have in too many cases not benefited from the protective scope of OSH laws and income support schemes. At least, not without fighting for inclusion. Trade unions – whether they represent these workers or not – should continue to push for broader coverage of protective regimes.

Laws must enshrine a seat at the table for trade unions. This is particularly important when it comes to OSH. Workers – and through them, unions – are experts on their working conditions. The France Amazon case provides one of the best examples of how the law must incorporate the duty to consult within an employer's duty to protect worker safety and health. When unions are involved in designing policy, lives and livelihoods will be better protected and disputes will be less likely to occur. When unions are not present, the law should provide for consultation with the alternative of elected workers' representatives. Like trade union officials, these representatives must be protected from coercion and retaliation.

When disputes are necessary, organising and litigation go hand-in-hand. Trade unions need not choose between campaigns and legal cases; they tend to work better when they are run in conjunction. The US Case Study on the Amazon workers in New York provides a great example of this. And the sheer number of legal victories discussed in this essay refutes any contention that the law cannot be used to protect workers.

Strategic litigation is about strategy. This means more than just winning a legal argument. For, as Professor Bogg's discussion of the IWGB case challenging sick pay and income support provisions for limb b workers demonstrates, sometimes when you lose, you still win. A high-profile legal case can win the moral argument and score a victory in the court of public opinion even if it fails to do so in a court of law. This can lead to a change in behaviour and ultimately a change in law. Conversely, as the South Africa case study shows, sometimes when you win,

you still lose. Winning the legal argument, without more, does not always lead to a change in the practical result for workers.

The law must be enforced. Workers need legal protections in practice, not in theory. Governments must provide correct guidance on employers' legal obligations, ensure workers have the means to access the rights to which they are entitled, and above all, crack down on employers who disobey the law. The penalties must be harsh enough to change employers' analyses of the costs and benefits of law breaking, and to dissuade other employers from following the path of unlawfulness. The onus for enforcing laws should be on the state, not on workers and trade unions. However, workers must also be given the legal means for enforcement and the courts and tribunals must be accessible forums which do not price the low-paid out of justice.

Whilst this essay has focussed on how workers and unions have used the law in their fight for lives and livelihoods during the pandemic, one must remember that the law is but one weapon in the arsenal necessary for the war against injustice. Strikes, protests, and publicity campaigns are others. But to effectively use these tactics, workers must be organised. And whether in times of crisis or otherwise, the words of the former Farmworkers Union of America leader Dolores Huerta ring true: Every moment is an organizing opportunity, every person a potential activist, every minute a chance to change the world.

# Essays

# U.S. Covid-19 Case Study: Amazon Warehouse Workers

Frank Kearl<sup>1</sup>

## Introduction

In March 2020, New York City became the epicenter of the Covid-19 pandemic. As cases, hospitalizations, and deaths spiked in the city, then-Governor Andrew Cuomo declared a state of emergency, closed all schools and signed an executive order, New York State on PAUSE, shuttering non-essential businesses statewide. Under New York State on PAUSE, essential businesses like Amazon could remain in operation if they followed state guidelines to provide a safe work environment.<sup>2</sup> However, workers at Amazon's JFK8 Robotics Sortable Fulfillment Center ("JFK8") in Staten Island remained deeply concerned by Amazon's lack of health and safety protections in their workplace. The massive JFK8 facility continued to operate through the crisis, business as usual, with workers expected to maintain breakneck productivity standards,<sup>3</sup> while packed into enclosed spaces alongside thousands of other workers from all over the New York City metro region.

The situation at JFK8 came to a head during the week of March 23, 2020, when several Amazon workers learned from an associate manager that at least two of their co-workers had tested positive for Covid-19. Meanwhile, JFK8 managers had not notified the workforce about those positive cases nor made any visible efforts to increase

sanitization practices, enforce social distancing rules, or provide personal protective equipment ("PPE"), such as face masks, gloves, or cleaning supplies, to employees. When management failed to address the worker-organizers' concerns, those workers staged a walk-out and delivered a series of demands related to the Covid-19 crisis to several upper-level managers at JFK8 and other Amazon executives, including then-CEO Jeff Bezos.<sup>4</sup> The protest received extensive press coverage, and Amazon immediately responded by terminating the leader of the organizing efforts, Christian Smalls.<sup>5</sup> Smalls' termination sparked even further press coverage and put the Amazon workers' fight for Covid-19 protections at the center of a national conversation about workplace health and safety.

Within the week, an internal memo addressing Smalls' termination and subsequent media attention leaked from one of Amazon's top-level management meetings. The correspondence featured racially-charged language that worked to belittle Smalls, outlined the need for a public relations strategy to make Smalls "the face" of the entire organizing movement, and discussed targeting Smalls to try to suppress further labor organizing at Amazon.<sup>6</sup> One

<sup>1</sup> Director, Justice Partnership, Center for Popular Democracy.

<sup>2</sup> Press release, New York Governor's Office, Governor Cuomo Issues Guidance on Essential Services Under The 'New York State on PAUSE' Executive Order (March 20, 2020), <https://www.governor.ny.gov/news/governor-cuomo-issues-guidance-essential-services-under-new-york-state-pause-executive-order>.

<sup>3</sup> Amazon primarily uses two temporal surveillance systems to enforce its productivity and efficiency standards: "Rate" and "Time Off Task." Rate tracks the speed at which a worker is performing their assigned task, be it picking, packing, counting, etc., and Time Off Task aggregates all the time a worker spends on their shift not actively scanning items in the course of their workflow, including bathroom breaks, mechanical failures, conversations with managers, etc. Workers can be disciplined and/or terminated for working too slowly or for having too much "off task" time during a shift.

<sup>4</sup> Author interviews with clients; Amanda Farinacci, *Staten Island Amazon Workers Protest Company's Coronavirus Response*, SPECTRUM NEWS NY1 (March 31, 2020), <https://www.ny1.com/nyc/all-boroughs/coronavirus/2020/03/31/staten-island-amazon-workers-protest-company-s-coronavirus-response>; Athena & Hedge Clippers, *AMAZON: ENDANGERS WORKERS, DELIVERS CONTAGION, REAPS THE PROFIT*, HEDGE (2020), [https://hedgeclippers.org/wp-content/uploads/2020/04/AmazonWorkersCoronavirus\\_FD2.pdf](https://hedgeclippers.org/wp-content/uploads/2020/04/AmazonWorkersCoronavirus_FD2.pdf).

<sup>5</sup> Tyler Sonnemaker, *An Amazon Warehouse Worker in New York was Fired on the Same Day he Helped Lead a Protest of the Company's Coronavirus Response to Safety Concerns*, BUSINESS INSIDER (March 30, 2020), <https://www.businessinsider.com/amazon-fires-warehouse-worker-led-strike-protest-covid19-cornavirus-response-2020-3>.

<sup>6</sup> Paul Blest, *Leaked Amazon Memo Details Plan to Smear Fired Warehouse Organizer: 'He's Not Smart or Articulate'*, VICE NEWS (April 2, 2020), <https://www.vice.com/en/article/5dm8bx/leaked-amazon-memo-details-plan-to-smear-fired-warehouse-organizer-hes-not-smart-or-articulate>.

week after Amazon fired Smalls, JFK8 employees staged another Covid-19-related protest outside the JFK8 facility, and Amazon again retaliated against the principal organizers, firing Gerald Bryson and issuing a final disciplinary write-up to Derrick Palmer.<sup>7</sup>

Following the termination of Amazon's worker-organizers, the company made some concessions on its workers' health and safety demands, providing masks and gloves to workers and installing a temperature check station at the entrance to the facility. But workers still complained about crowding in the facility, primarily caused by Amazon's refusal to stop using its temporal surveillance systems that require employees to work constantly and rapidly throughout their shifts. These policies forced workers to forego washing their hands, sanitizing their workstations, and spacing out on breaks and in the bathrooms—as all those activities required time spent not picking, counting, sorting, and packing items, so Amazon was loath to allow them.

Also, Amazon's attendance policies prevented workers who had symptoms of Covid-19, or who lived with people who had tested positive, from taking quarantine leave without being disciplined or terminated. In some instances, workers who had tested positive for Covid-19, and had notified Amazon that they had tested positive, still received threatening emails from the company's Human Resources department claiming they would be terminated for job abandonment, if they didn't return to work immediately.<sup>8</sup> Other workers on quarantine leave did not receive their state-mandated Covid-19 sick leave pay or only received a fraction of the money that they should have been paid during their leave.<sup>9</sup>

By this point, Make the Road New York (“MRNY”), a non-profit, membership-based community organization, was working with the principal worker-organizers. MRNY attorneys from the Workplace Justice team—including myself—began to develop legal strategies to counter Ama-

<sup>7</sup> Ben Fox Rubin, “Fired Amazon worker says termination was retaliation for speaking out,” CNET, April 23, 2020, <https://www.cnet.com/tech/services-and-software/fired-amazon-worker-says-termination-was-retaliation-for-speaking-out/>.

<sup>8</sup> Jodi Kantor, Karen Weise & Grace Ashford, *The Amazon That Customers Don't See*, N.Y. TIMES (June 15, 2021), <https://www.nytimes.com/interactive/2021/06/15/us/amazon-workers.html>.

<sup>9</sup> See discussion of *Palmer v. Amazon* below – infra Sec. III. A. – in which two worker-plaintiffs alleged they did not receive full or timely COVID-19 leave pay.

zon's retaliation, force the company to comply with health and safety laws and help support ongoing organizing efforts at JFK8.

## Legal Context

In the United States, the Occupational Safety and Health Act (the “OSH Act”) is the primary source of workplace health and safety protections for private sector employees. The agency tasked with developing standards and enforcing the OSH Act, the Occupational Safety and Health Administration (“OSHA”), is housed within the US Department of Labor. OSHA is an incredibly lean agency, with only about 1,850 inspectors responsible for the health and safety of 130 million workers nationwide.<sup>10</sup> The agency relies heavily on worker complaints to trigger investigations. For companies found in violation of the law, the OSH Act only provides for nominal penalties for violations.

In addition to promulgating general health and safety standards and industry-specific standards for covered employers, OSHA also has the power to issue emergency temporary standards (“ETS”) to protect workers from urgent, grave dangers. By the time the pandemic began, then-President Trump had spent his years in power actively trying to defund OSHA and had even refused to nominate an OSHA director, leaving his notoriously anti-worker Secretary of Labor Eugene Scalia in charge by default. Despite public outcry and various litigation efforts, Trump's OSHA resisted issuing a Covid-19 ETS in the early months of the pandemic, leaving U.S. workers with only the OSH Act's weak “general duty” clause to protect them.<sup>11</sup>

Making matters worse, Trump's OSHA actively coordinated with industry lobbyists and large employers to protect industry profits during the crisis by forcing workers to continue reporting to work without any additional protections. In one extreme instance, executives from Tyson Foods, Inc. and Smithfield Foods, two of the largest meatpacking companies in the country, pressured OSHA not to act on Covid-19 and then pressured OSHA to issue extremely watered-down, industry-drafted Covid-19

<sup>10</sup> *Commonly Used Statistics*, U.S. Occupational Safety and Health Administration, <https://www.osha.gov/data/commonstats> (last visited June 27, 2023).

<sup>11</sup> “Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.” OSH Act, § 5(a)(1), 29 U.S.C. § 654(a)(1).

“interim guidance” for the meatpacking industry to avoid liability. Corporate lobbyists even drafted the Executive Order, which invoked the Defense Production Act, to ensure that meatpacking companies could continue their operations free from the lifesaving standards associated with Covid-19 health and safety regulations.<sup>12</sup>

Beyond federal protections, New York Labor Law (“NYLL § 200” or “§ 200”) requires employers to maintain safe and healthy workplaces. A vestigial protection, this law predates the passage of the OSH Act, and it effectively mirrors the OSH Act’s general duty clause. NYLL § 200 is not frequently litigated, but it is occasionally invoked in dangerous situations like asbestos-filled construction sites. While the passage of the OSH Act did not expressly preempt § 200, with the arrival of federal guidelines and federal enforcement, the State of New York largely deferred to OSHA for almost all workplace health and safety enforcement.<sup>13</sup>

At the outset of the pandemic, though, when there was no serious federal effort to establish Covid-19 health and safety standards by OSHA, New York tried to fill the void by instituting requirements and issuing guidance for employers to protect the health and safety of workers and the general public. The state frequently updated the guidance as scientific understanding of Covid-19 changed. In early forms, the New York guidance called for employers to provide employees masks, increase workplace ventilation, allow for social distancing, and stagger shifts and breaks to help limit crowding. They also issued guidance for conducting contact tracing in the workplace and sharing information with local health agencies about any positive Covid-19 cases.

The State of New York published and promoted its

<sup>12</sup> This interim guidance was jointly issued by OSHA and the Centers for Disease Control and Prevention and only included “recommended actions” that meatpacking and meat processing employers could take to reduce exposure. U.S. Department of Labor’s OSHA and CDC Issue Interim Guidance

To Protect Workers in Meatpacking and Processing Industries, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (April 26, 2020), <https://www.osha.gov/news/newsreleases/national/04262020>. See also, Michael Grabell, *The Plot to Keep Meatpacking Plants Open During COVID-19*, PROPUBLICA (May 13, 2022), <https://www.propublica.org/article/documents-covid-meatpacking-tyson-smithfield-trump>.

<sup>13</sup> The OSH Act allows for states to create their own state OSHA agencies for enforcement of the federal law, but New York has never opted to do this.

Covid-19 requirements and guidance beginning in March 2020, ordering essential businesses to comply if they were going to remain in operation. While most employers complied, for those that did not, like Amazon, the enforcement mechanisms were slower to come together, with a patchwork of vastly under-resourced state and local agencies left to figure things out on the fly. Governor Cuomo also established a New York State PAUSE Enforcement Assistance Task Force, which could receive complaints of Covid-19-related violations and refer them to the New York State Department of Labor (“NYS DOL”) or local enforcement agencies for further investigation.

New York also moved quickly to pass a two-week paid Covid-19 sick leave law, recognizing the importance of quarantine and isolation in curbing the spread of the virus.<sup>14</sup> Any New York worker who tested positive, was in close contact with someone who tested positive, lived in the same household as someone who tested positive, or was ordered to quarantine or isolate by a local health department, was eligible to receive at least two weeks of full-paid leave. This Covid-19 sick leave was to be paid to workers at the same time those workers would have customarily received pay had they not been in quarantine or isolation. When passing this law, New York lawmakers stated that economic need should not prematurely force workers back to a workplace where they could spread Covid-19 to their colleagues.

The American workplace health and safety model relies almost entirely on complaints from workers to initiate investigations. Unlike other countries which have invested enough resources in full-time inspectors to allow their enforcement agencies to monitor and correct workplace abuses unilaterally, the United States has not provided OSHA with enough inspectors for routine inspections, surprise inspections, or even comprehensive incident inspections. At JFK8, the workers who were terminated or disciplined for raising health and safety concerns had only a handful of legal options available. At the federal level, OSHA has an anti-retaliation provision, Section 11(c) of the OSH Act. However, the only penalties available are back wages and reinstatement, and the process requires a worker to go through a morass of administrative proceedings where a deep-pocketed employer, such as Amazon, has ample opportunity to delay the process indefinitely. In

<sup>14</sup> Senate Bill S8091, New York State Senate, introduced and passed on March 18, 2020, <https://www.nysenate.gov/legislation/bills/2019/S8091>.

the first several months of the pandemic, OSHA only investigated twenty percent of the Covid-19-related retaliation complaints it received and only resolved two percent of those claims.<sup>15</sup>

The National Labor Relations Act (“NLRA”) generally provides protections for non-managerial, non-supervisory employees who engage in protected concerted activity—including organizing and protesting. The National Labor Relations Board (“NLRB”) enforces the NLRA, which includes investigating complaints, negotiating settlement agreements, and prosecuting unlawful activities through an administrative court process. The NLRB is influenced heavily by national politics, with Presidential appointees to the five-member Board shifting between pro-labor and pro-management enforcement priorities and legal standards as the country shifts between Democratic and Republican presidents. In exceptional circumstances, the NLRB also can seek injunctive relief in a federal court through a process called 10(j) relief, and the current leadership of the NLRB under the Biden administration has expressed interest in utilizing 10(j) relief as a tool for more aggressive enforcement of the NLRA.

New York Labor Law also has a provision, § 215, which protects workers against retaliation when they assert their state-based rights at work. Theoretically, this expansive provision protects workers and only requires them to believe “reasonably and in good faith” they have a right in order to avail themselves of the protections under § 215.<sup>16</sup> Another anti-retaliation provision of New York Labor Law is § 740, which protects whistleblowers from retaliation. The law is rather poorly drafted and requires a person to identify an actually unlawful situation at work, give notice of the illegal circumstance to their employer, and allow time for the employer to address the issue. Then, if the case is still not resolved, that person can report it to an enforcement agency or share it with the public and be protected from retaliation.

JFK8 workers and legal advocates looked to all available legal protections to address the health and safety concerns

<sup>15</sup> Deborah Berkowitz & Shayla Thompson, *OSHA Must Protect Covid Whistleblowers Who File Retaliation Complaints*, NATIONAL EMPLOYMENT LAW PROJECT (Oct. 8, 2020), <https://www.nelp.org/publication/osha-failed-protect-whistleblowers-filed-covid-retaliation-complaints/>.

<sup>16</sup> For example, a worker demanding overtime payments could be protected under § 215 even if they were not in fact entitled to overtime pay.

and retaliation issues during the early months of the pandemic.

## Interventions

### Palmer v. Amazon, the Public Nuisance Case Against Amazon

While the federal government failed to respond, and the New York State government initiated investigations, but was slow to enforce the law, workers at JFK8 encountered real-time threats from Covid-19 in their workplace and needed immediate protection. In early June 2020, attorneys from Make the Road New York and colleagues at Towards Justice, Public Justice, and the Terrell Marshall Law Group, filed litigation in the United States District Court for the Eastern District of New York on behalf of three Amazon employees and three members of their households.<sup>17</sup> The lawsuit alleged that Amazon violated NYLL § 200 by failing to properly implement New York’s Covid-19 guidance to protect its workers and violated New York’s Covid-19 Sick Leave law by failing to fully and timely pay workers on Covid-19 sick leave.

Additionally, the suit claimed that the company’s failure to protect its workers was causing a public nuisance by unlawfully creating conditions that fostered the spread of Covid-19 among employees who were then bringing the virus home to members of their families and households, further accelerating the spread of Covid-19 throughout the region. One of the employee-plaintiffs in *Palmer* had almost certainly contracted Covid-19 at Amazon’s JFK8 facility during the lockdown in New York City. She subsequently gave Covid-19 to her young children and another family member living with her, who tragically died from complications related to Covid-19 in her home.

A public nuisance tort is a special kind of litigation in American jurisprudence. Unlike a private nuisance lawsuit, such as a grievance you might file against a noisy neighbor, *public* nuisance litigation requires there to be harm done to the community as a whole. U.S. case law textbooks highlight stories of factories that dump chemicals into drinking water or send noxious fumes into the air as prototypical public nuisance cases.<sup>18</sup>

<sup>17</sup> *Palmer et al. v. Amazon.com Inc. et al.*, No. 1:2020cv02468 (E.D.N.Y. 2020). A fourth worker was later added as a plaintiff in the amended complaint.

<sup>18</sup> For a private, non-governmental plaintiff to have standing to file a

The Covid-19 public nuisance litigation strategy had been tried a couple of months earlier in a meatpacking facility by some of the same attorneys representing Amazon workers in *Palmer*. A federal judge dismissed that case citing the existence of the aforementioned OSHA interim guidance as a factor in their decision.<sup>19</sup> The judge relied on the primary jurisdiction doctrine in granting Smithfield's motion to dismiss, recognizing OSHA's expertise and experience in regulating workplace safety and highlighting the need to promote uniformity and consistency in enforcement. But for the Amazon litigation, no federal Covid-19 warehouse-industry guidance existed, and by June 2020, OSHA had made it clear they were focusing all their enforcement resources on the healthcare industry.

Shortly after filing their complaint, the plaintiffs in *Palmer* moved for a preliminary injunction citing the urgent safety crisis in the JFK8 facility. The plaintiffs requested, among other things, an immediate end to the use of Amazon's temporal surveillance systems and an overhaul of the company's system for Covid-19 leave to bring it into compliance with New York law. Two days before the oral argument on the preliminary injunction motion, Amazon filed a brief with the court along with internal Amazon communications and affidavits from high-level managers claiming the company had suspended the use of its temporal surveillance systems in March 2020. Amazon had initially marked the documents "confidential" and said they "should not be posted" in the workplace, but the documents acknowledged that the company's Rate and Time Off Task policies made it difficult for workers to take necessary steps to protect themselves from the spread of Covid-19 in the workplace.

Importantly, JFK8 employees had not seen any of these documents, nor had they heard about the suspension of temporal surveillance policies at Amazon. The same day that Amazon filed its brief and internal documents, JFK8 workers found a message posted in the facility's bathrooms announcing the suspension of Rate and Time Off

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public nuisance lawsuit, they must have experienced harm of a different *kind* than the general public, not just to a different *degree*. Workers at JFK8, the plaintiffs in *Palmer* argued, were not just at risk of contracting the virus, they were being prohibited from taking steps to protect themselves at work by Amazon. Their harm was not just heightened by a concentration of Covid-19 cases in the JFK8 warehouse, it was a different kind of harm altogether because they could not take steps that the general public could to avoid contracting the virus.

<sup>19</sup>Rural Community Workers Alliance and Jane Doe v. Smithfield Foods, Inc. et al., No. 5:20-CV-06063-DGK (W.D. Mo. 2020).

Task policies due to Covid-19. Amazon had not earlier notified its employees of the change nor mentioned these policy suspensions to the Court in its answer or any prior briefing in the *Palmer* case.

Following the plaintiffs' momentous victory, forcing Amazon to publicly admit that its Rate and Time Off Task policies were dangerous for workers during the pandemic, the plaintiffs withdrew their motion for a preliminary injunction, and Amazon filed a motion to dismiss the case. Amazon's motion to dismiss primarily centered on the doctrine of primary jurisdiction: to prevent inconsistencies, the Court should defer the enforcement of workplace health and safety laws to OSHA, an agency specially charged with that task. In early November 2020, without a hearing or any discovery, the Judge granted Amazon's motion and dismissed the *Palmer* case holding that the public nuisance and section 200 claims were moot, that the state's Workers' Compensation law precluded injunctive relief under section 200, and that despite OSHA's inaction, refusing to intervene was a discretionary choice and the agency was still the only venue for the plaintiffs to seek relief for their health and safety concerns.

The Judge's decision also dismissed the plaintiffs' New York Covid-19 sick leave claims, holding that the state-mandated wage replacement is just a "benefit . . . like vacation and holiday pay" and therefore cannot be protected in court by the enforcement mechanisms for unpaid wages. The Judge gave no deference to the New York State Legislature or the NYSDOL, both of whom made it clear that employers had to treat Covid-19 leave payments as if they were wages and said payments were subject to the same enforcement rules as wages.<sup>20</sup> The Judge instead decided that the New York State Legislature "can fix this if it wants to" by passing another law further clarifying their intent that the New York Labor Laws protect a worker's right to New York Covid-19 sick leave.

The plaintiffs appealed the decision to the United States Court of Appeals for the Second Circuit (the "Second Circuit") in December 2020. Nearly two years later, on October 18, 2022, the appellate court issued its decision vacating the lower court's dismissal of the section 200 claims and remanding the case for further proceedings on that

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<sup>20</sup> While refusing to defer to the NYSDOL's guidance on enforcing the Covid-19 sick leave law, the Judge simultaneously held that the NYSDOL is solely responsible for the enforcement of Covid-19 leave payments.



Protestors gather in New York City in support of Amazon Warehouse workers unionizing in Alabama. Photo © Ben Von Klemperer / Shutterstock

issue alone.<sup>21</sup> The Second Circuit held that the plaintiffs' section 200 and public nuisance claims raise issues and seek relief that is squarely within the traditional realm of judicial competence and that OSHA's expertise would not materially aid the resolution of the matter, affirming that New York workers facing unsafe workplaces *do* have the right to seek relief in court. The Second Circuit also held that the plaintiffs' claims are not moot, but it agreed with the lower court that the plaintiffs did not sufficiently allege a special injury to secure standing for their public nuisance claims and that the Covid-19 leave payments are not wages. Amazon has notified the district court it will again move for summary judgment.

## The New York Attorney General's Amazon Litigation

In February 2021, Amazon filed a preemptive federal lawsuit against New York Attorney General Letitia James (the "NYAG"), claiming her office was unfairly targeting the company.<sup>22</sup> This dramatic step signaled the end of Amazon's willingness to continue participating in the NYAG's ongoing investigation into the company's Covid-19 health and safety practices, which had been catalyzed by worker

complaints dating back to March 2020.<sup>23</sup> Within a week, the NYAG's office sued Amazon in New York State Court, alleging that Amazon had violated § 200, similar to the claims in *Palmer*, and further claiming that Amazon's retaliatory terminations and disciplinary punishments against workers violated sections 215 and 740 of the New York Labor Law.<sup>24</sup> The Office of the NYAG also included disgorgement allegations, claiming that Amazon had wrongfully profited from these unlawful activities during the pandemic.<sup>25</sup>

Throughout the summer and fall of 2021, Amazon fought to move the NYAG's case into federal court, while also moving to dismiss the case as moot under the guise that the pandemic's risk to its workers had passed. Eventually, the NYAG successfully advocated for the dismissal of Amazon's preemptive lawsuit in federal court<sup>26</sup> and prevented Amazon from moving the NYAG-initiated case from New York state court to federal court. The state court judge also dismissed Amazon's motion to dismiss

<sup>23</sup> Some, but not all, of the complaints received by the NYAG about Covid-19 health and safety concerns at Amazon warehouses, came from workers involved in the *Palmer* litigation.

<sup>24</sup> People of the State of New York by Letitia James, Attorney General of the State of New York v. Amazon.com, Inc. et al., No.: 450362/2021 (N.Y. Sup. Ct. N.Y. Cnty. 2021).

<sup>25</sup> N.Y. EXEC. LAW § 63(12) (McKinney 2021).

<sup>26</sup> Amazon appealed this dismissal to the United States Court of Appeals for the Second Circuit, and there was an oral argument on June 1, 2022. As of this writing, there has been no decision issued.

<sup>21</sup> *Palmer et al. v. Amazon.com Inc. et al.*, No. 20-3989-cv (2d Cir. Oct. 18, 2022).

<sup>22</sup> *Amazon.com, Inc. v. Attorney General Letitia James*, in her official capacity as the Attorney General of the State of New York, 21-cv-00767 (E.D.N.Y. 2021).

the case, a decision the company appealed to the state's appellate court.

In early December 2021, the NYAG filed a motion for a preliminary injunction in state court that asked the judge to reinstate Smalls and requested an independent monitor to evaluate and oversee Amazon's Covid-19 health and safety practices. The holiday shopping season—which always prompts the hiring of hundreds of temporary workers in JFK8, the addition of mandatory extra work shifts each week, and longer shifts overall—was coinciding with a wintertime rise in Covid-19 cases and the surge of the Omicron variant in the New York City region, promising a difficult and dangerous time for workers in the Staten Island facility. In support of their motion for injunctive relief, the NYAG filed several affidavits from workers and experts about the conditions and risks in Amazon's warehouses.

The NYAG also filed some evidence they had gathered during their investigation, clearly showing Smalls' termination had been premeditated, intentional, and retaliatory. These documents included internal text messages from Amazon's bespoke "Chime" messaging system between Amazon's Human Resources managers at JFK8—who discussed Amazon's plan to put Smalls into an ill-defined quarantine, allow him to come to the parking lot of the facility to protest unsafe conditions, and then terminate him for violating the company's quarantine order. All these conversations took place *before* the date that the company claimed its contact tracing team identified Smalls as someone who was in close contact with a Covid-19-positive worker in the JFK8 facility necessitating his quarantine. There was smoking gun evidence proving Amazon had wrongfully fired Smalls for organizing around, and speaking out about, employees' health and safety concerns, and now it was public information for all to see.

In May 2022, before the state court decision on the NYAG's preliminary injunction motion, the New York appellate court reversed the lower court's earlier decision denying Amazon's motion to dismiss the case. The very-short decision from the appellate court focused on the NYAG's § 215 and § 740 retaliation claims, holding that the NLRB is the only forum that can protect a worker from retaliatory terminations "based, in part, on their participation in protests against unsafe working conditions." This ruling runs counter to all common sense and creates an incredibly perverse incentive: any employer that wants to get away with retaliating against workers in violation of New York Labor Law need only also to violate the NLRA.

The appellate court's decision<sup>27</sup> went on to explain that the existence of Bryson's related but entirely separate retaliatory termination, which the NLRB was attempting to resolve (more discussion on this topic below), created the possibility of inconsistent rulings between the state court's enforcement of § 215 and § 740 in the case of Smalls and Palmer, and NLRB's enforcement of the NLRA in the case of Bryson. The decision did not consider that Smalls was arguably ineligible for protection under the NLRA at the time of his termination due to his supervisory position in JFK8, and neither party had fully briefed the issue of NLRB preemption to the court.

The decision also dismissed the NYAG's § 200 claims against Amazon as moot because the State of New York withdrew its public health guidance. Amazon had long operated as if the pandemic was over and finally got a court to agree.

Following the decision from the appellate court, the lower court judge dismissed the NYAG's case, eliminating the need for a decision on the preliminary injunction motion. The judge did not specifically address the NYAG's disgorgement claims in her dismissal, but in a status conference, she explained through a clerk that those claims were also moot because they relied on the § 200 claims as the underlying illegal activity back in 2020.<sup>28</sup> On June 9, 2022, the Office of the Attorney General filed a Motion for Reargument and Leave to Appeal with the New York appellate court, but eventually, a settlement was reached with the NYAG withdrawing their appeal in return for Amazon dropping their aggressive counterclaims.

### Gerald Bryson, the Amazon Labor Union, and the National Labor Relations Board

In April 2020, one week after Amazon terminated Smalls, the company targeted and fired another JFK8 worker-organizer: Gerald Bryson. One of the JFK8 organizers who helped catalyze worker actions and raise complaints to management, Bryson subsequently filed an unfair labor practice charge with the NLRB claiming Amazon fired him for engaging in collective activity that the NLRA protected. Following an investigation, the agency determined in November 2020 that Bryson's termination was likely unlaw-

<sup>27</sup> *People v. Amazon.com*, No. 2021-03934 (App. Div. 1st Dep't May 10, 2022).

<sup>28</sup> You are not alone if you are confused about how a past violation of the law could be dismissed as moot due to changed regulatory circumstances some two years later.

ful.<sup>29</sup> When Amazon refused to accept the determination and settle the case, the agency issued a formal complaint in December 2020. A hearing occurred before an Administrative Law Judge (“ALJ”) in April and May 2021. But Amazon frustrated the process with frequent delays and refusals to produce subpoenaed documents. Amazon even filed a Special Appeal to the 5-member Board challenging an ALJ ruling on an evidentiary matter, effectively delaying the proceeding by five months, only to willfully disobey the orders of the Board and the ALJ by refusing to produce subpoenaed documents once it lost its appeal.<sup>30</sup>

By the time the Board issued its decision denying Amazon’s Special Appeal, Bryson had been out of work for 20 months. During that time, JFK8 workers and organizers, including Bryson, had coalesced their organizing efforts into the Amazon Labor Union (“ALU”) and had begun the process of winning the right to formally represent JFK8 employees and bargain for a new employment contract. The process, outlined in the NLRA and enforced by the NLRB, begins with demonstrating a sufficient showing of interest. A common way to achieve this is by collecting signed union authorization cards from at least 30% of the workforce. Once there is a showing of interest, the NLRB is triggered to conduct a representation election. If a majority of voters select the union and the election is certified, then the union becomes the bargaining representative, and the employer must engage in good-faith negotiations for a collective bargaining agreement.

But throughout the time that the ALU was organizing JFK8 workers and collecting authorization signatures, the unresolved and unlawful terminations of Bryson and Smalls still hampered organizing efforts. Workers feared that if they showed support for the ALU, Amazon would target them for discipline and termination. Amazon put on a high-powered and expensive anti-ALU campaign, and some workers did not believe the NLRB could protect worker-organizers and ALU supporters against retaliation. The NLRB needed to resolve Bryson’s nearly two-year-old

<sup>29</sup> Lauren Kaori Gurley, *Federal Labor Agency Investigation Finds Amazon Illegally Fired Protesting Warehouse Worker*, MOTHERBOARD TECH BY VICE (Dec. 17, 2020), <https://www.vice.com/en/article/y3gngk/federal-labor-agency-investigation-finds-amazon-illegally-fired-protesting-warehouse-worker>.

<sup>30</sup> Once the Office of the NYAG filed the smoking-gun “Chime” messages alongside their Motion for Preliminary Injunction in their state court case, it became obvious that Amazon had lied to the ALJ and the Board about the nature of the documents it was refusing to produce, blatantly hiding evidence of unlawful retaliation.

unlawful firing, but without Amazon’s willingness to obey the orders of the ALJ and the Board, the NLRB could not force the company to turn over the subpoenaed documents without filing a motion to compel in federal court. The agency had to choose between strengthening its case by demanding the subpoenaed documents through the time- and resource-intensive process of a federal court proceeding or closing the hearing and allowing the ALJ to decide the case with the evidence already on the record.<sup>31</sup> Amazon was effectively playing chicken with a federal enforcement agency. In the interest of time, and due to limited enforcement resources, the agency opted not to seek an order to compel, and the ALJ closed the hearing record in early January 2022.<sup>32</sup>

Around this time, the NLRB also explored using 10(j) injunctive relief in Bryson’s case. Amazon’s continual contumacious behavior made it increasingly clear that the company and its lawyers would continue to bend and break legal and ethical rules to evade liability throughout the administrative process, so the agency decided it would need to use the full force of the NLRA to enforce the law. On March 17, 2022, nearly two years after the start of the organizing efforts at JFK8, and a little more than a week before the ALU’s scheduled JFK8 representation election, the NLRB filed 10(j) litigation in federal court demanding Bryson’s immediate reinstatement.<sup>33</sup>

Because of the imminent election, the NLRB asked the judge for a quick decision based solely on the record from the administrative hearing along with several recent affidavits from Amazon workers highlighting the ongoing harm from Bryson’s unresolved termination. Unfortunately, the judge did not defer to the NLRB’s enforcement authority and granted Amazon limited discovery. The discovery process allowed Amazon’s lawyers to depose each

<sup>31</sup> In one final dump of documents in December 2021, just before the hearing was closed, Amazon belatedly turned over a “Run of Show” document that guided the company’s real-time response to the March 30, 2020 protest. This document called on the company’s internal intelligence agency to track Amazon workers’ social media accounts, acknowledged the existence of additional internal communications that had never been produced, and referred to the use of Amazon’s “Protest Playbook” and “Labor Activity Playbook,” neither of which were produced despite being clearly responsive to subpoenas.

<sup>32</sup> This decision triggered a 30-day deadline for a post-hearing brief, but Amazon was able to extend the deadline by another month, further delaying a decision in the case.

<sup>33</sup> NLRB v. Amazon.com Services LLC, No. 1:22-cv-01479-DG-SJB (E.D.N.Y. March 17, 2022).

worker who provided an affidavit to the NLRB for the litigation.<sup>34</sup> In addition to delaying the process, Amazon used these depositions to bully worker-organizers and to try to obtain sensitive information about their organizing efforts.

On April 18, 2022, the ALJ from the administrative case released his decision: Amazon had unlawfully fired Bryson. The ALJ ordered Bryson's immediate reinstatement, payment of his back wages, and the company to post notices in the JFK8 facility about its illegal retaliation. Amazon filed an appeal to the same five-member Board of the NLRB, delaying the administrative process for months, if not years.<sup>35</sup>

On November 18, 2022, the federal judge hearing the NLRB's 10(j) injunctive relief case finally issued her decision.<sup>36</sup> The judge agreed that Amazon's termination of Bryson likely violated the NLRA, and ordered Amazon to cease and desist from all forms of retaliation against workers engaged in protected organizing activities, but refused to demand the reinstatement of Bryson. In the court's eyes, the cease-and-desist order along with notice postings and a public reading of the court's decision are sufficient to protect the rights of Amazon employees pending the final disposition of Bryson's administrative proceeding. The decision should allow the NLRB to more aggressively bring Amazon's ongoing unlawful activities into court, but it is unclear how the judge will respond to those efforts.

## Analysis

### The Courts Alone Will Not Deliver Justice

Ultimately, the *Palmer* and NYAG litigation did push Amazon to make changes to improve the pandemic working

<sup>34</sup> The magistrate judge assigned to the case authorized four 7-hour depositions, one for each of the four affiants. The magistrate judge did not heed the NLRB's requests to expressly prevent the use of the depositions to get back-door discovery for other matters including the NYAG litigation. The ALU won their JFK8 representation election in the weeks between the filing of the 10(j) litigation and the four depositions. Amazon attorneys appealed the results of the election and then tried unsuccessfully to enter the four deposition transcripts into the record during the formal appeals hearing.

<sup>35</sup> As of this writing, the Board has been fully briefed on the appeal but has not issued a decision.

<sup>36</sup> *NLRB v. Amazon.com Services LLC*, No. 1:22-cv-01479-DG-SJB (E.D.N.Y. Nov. 18, 2022).

conditions for its workers at JFK8 and beyond.<sup>37</sup> And the cases allowed Amazon's workers to voice their concerns to their employer, the courts, and the general public. While the Second Circuit's decision overturning critical parts of the district court's decision is a huge win for workers throughout New York, the delay worked in Amazon's favor and allowed the company to continue to benefit from its unlawful behavior to suppress worker organizing and to profit from unsafe workplaces.

The workers' rights community in New York is particularly aghast at the New York appellate court's decision dismissing the NYAG's case. Workers joining together in their struggle against unlawful conditions at work has long been considered the safest and most effective way to improve working conditions while avoiding an employer's retaliation. New York workers now have *less protection* from retaliation if they engage in collective action, a preposterous and unacceptable situation. Many New York-based unions, advocacy groups, legal services organizations, and community organizations filed amicus briefs supporting the NYAG's position in the appeal, explaining the devastating consequences of eliminating essential and long-standing legal protections for workers against retaliation.<sup>38</sup> Going forward, New York workers with section 215 and 740 claims will likely point to the very narrow language about "participation in protests against unsafe working conditions" in the First Department decision to try to distinguish their cases, but there is no question this is a dangerous decision for workers' rights.

Beyond the litigation fights, attorneys and organizers are trying to springboard off the successes gained by pressuring Amazon in court. The documents Amazon filed admitting the company's suspension of Rate and Time Off Task policies showed that the policy should have changed nationwide, but the company had failed to notify almost anyone, including most of its managers, about the change. Workers had not been taking steps to help prevent the spread of Covid-19 just because they didn't want to get fired for running afoul of Amazon's temporal surveillance policies. Using Amazon's court filings, MRNY in concert with other organizations and advocates disseminated

<sup>37</sup> The NYAG litigation also demanded Amazon make changes at DBK1, an Amazon delivery station in Queens, NY, where workers organized under the banner of Amazonians United to stand up to Amazon's botched response to the Covid-19 crisis in *their* workplace.

<sup>38</sup> Additional amici include labor and employment law professors and Attorneys General from more than a dozen U.S. states.

information about Amazon's internal policy changes to workers across the country to help workers protect their health and safety and spur and facilitate further worker organizing efforts.

From the outset, the guiding principles of the *Palmer* litigation strategy were to galvanize organizing efforts, call attention to the safety crisis in Amazon warehouses, and help build coalitions that could push for more systemic change. At JFK8, worker-organizers gave copies of Amazon's "confidential" documents to their colleagues as part of their nascent organizing campaign. The JFK8 organizers showed considerable strength by resisting Amazon's unlawful, dangerous practices and forcing the company to change its long-derided Rate and Time Off Task policies. Before the pandemic, these temporal surveillance systems had been a driving factor behind Amazon's significantly higher injury rates at work and increased stress and pressure among its workforce,<sup>39</sup> but amid a pandemic, ending these policies became a matter of life and death.

As JFK8 worker-organizers and leaders coalesced into what later became the ALU, the *Palmer* appeal and NYAG litigation validated worker-organizers' voices and helped maintain a focus on Amazon's dangerous Covid-19 policies among its workforce. The ALU used significant dates in the litigation process, like the oral arguments before the Second Circuit or the NYAG's motion for a preliminary injunction, to draw media attention to the JFK8 workers and their organizing efforts. The litigation and the organizing work ran on separate tracks, but the constant communication between lawyers and organizers helped ensure that both sides could aid and amplify the efforts of the other. The National Labor Relations Act Is Not Protecting Workers from Retaliation.

As of this writing, Gerald Bryson has still not gotten his job back. The NLRB's administrative enforcement process will reach its conclusion with a Board decision and order, but Bryson's wait for that decision could last months or years. Amazon can then appeal the Board's decision to the federal courts, a process sure to last many more years. The NLRB's 10(j) injunctive relief litigation seeking Bryson's immediate reinstatement has yet to be decided, but even an order of reinstatement from the judge might not secure Bryson's reinstatement if Amazon can convince the

<sup>39</sup> Strategic Organizing Center, *THE INJURY MACHINE: HOW AMAZON'S PRODUCTION SYSTEM HURTS WORKERS 1* (2022), <https://thesoc.org/wp-content/uploads/2022/04/The-Injury-Machine-How-Amazons-Production-System-Hurts-Workers.pdf>.

Second Circuit to stay the order pending appeal.<sup>40</sup>

The resources Amazon has already poured into defending its retaliation in the Bryson case dwarfs the financial penalty it will face if it loses and must compensate Bryson for unpaid wages dollar-for-dollar. But this is not merely a matter of money; it is a matter of principle. As Amazon's ruthless tactics lay bare, Amazon's entire business model in the United States relies on its ability to exhibit complete control over its employees. Gerald Bryson's organizing (as well as that of Chris Smalls and Derrick Palmer) signifies an existential threat to that model. Amazon will spare no expense in attempting to evade liability to maintain its dominance over workers.<sup>41</sup>

Amazon was accused of violating the law by a federal enforcement agency, and then it lied to a judge to hide evidence of unlawful behavior.<sup>42</sup> The company was caught red-handed, thanks to evidence produced in the NYAG's litigation, but the success of Amazon's brazen strategy, to simply disregard the authority of a federal enforcement agency, should be an eye-opener. For Bryson, who merely dared—courageously—to demand that his employer Amazon follow the law to protect him and his family from Covid-19, there still is no justice. It remains to be seen how the federal court's cease-and-desist order will impact the NLRB's ability to enforce the law, but Amazon can be expected to appeal and delay those efforts.

Amazon Is So Big, Traditional Regulation Is Insufficient.

Amazon is a behemoth, directly employing over 1.1 million employees in the United States and controlling at least another quarter-million delivery drivers (many of whom technically are employed by "delivery service providers"—companies that only exist to deliver Amazon packages).<sup>43</sup>

<sup>40</sup> The NLRB successfully used 10(j) litigation to win an order of reinstatement for seven illegally fired Starbucks worker-organizers in Memphis, Tennessee, but the United States Court of Appeals for the Sixth Circuit stayed that order pending appeal at Starbucks' request. *McKinney v. Starbucks Corp.*, No. 2:22-cv-2292-SHL-cgc (W.D. Tenn. Aug. 18, 2022).

<sup>41</sup> Dave Jamieson, *Amazon Spent \$4.3 Million On Anti-Union Consultants Last Year*, HUFFPOST (March 31, 2022), [https://www.huffpost.com/entry/amazon-anti-union-consultants\\_n\\_62449258e4b0742dfa5a74fb](https://www.huffpost.com/entry/amazon-anti-union-consultants_n_62449258e4b0742dfa5a74fb).

<sup>42</sup> See Brief for Make the Road New York as Amicus Curiae, *NLRB v. Amazon.com Services LLC*, No. 1:22-cv-01479-DG-SJB (E.D.N.Y. March 17, 2022).

<sup>43</sup> "Investing in the U.S.," Amazon, <https://www.aboutamazon.com/investing-in-the-u-s>; Matt McFarland, *Amazon Generally Delivers Later*

Amazon had over \$21 billion in net income in 2020 and \$33 billion in 2021.<sup>44</sup> The company is rapidly expanding its warehouse logistics network throughout the United States. In recent years, Amazon has purchased an organic grocery chain, Whole Foods, an online pharmacy, PillPack, a health care provider, One Medical, and has become a major film and television producer and distributor.<sup>45</sup> Amazon founder Jeff Bezos even purchased the Washington Post. But the company's golden goose is its cloud computing business, Amazon Web Services, which is its biggest profit driver, controlling nearly half of the U.S. market in cloud computing.<sup>46</sup>

Litigation efforts to reign in the company's various tentacles have met armies of high-paid attorneys who are experts at frustrating the process. Governmental efforts to regulate the company often face legions of well-compensated lobbyists, many of whom previously worked in government and are adept at stifling and prolonging policy change and enforcement proceedings.<sup>47</sup> Even where governmental agencies have been able to issue fines or win decisions against Amazon, the company appeals its losses no matter the cost. When California's division of OSHA issued a \$1,870 fine for Covid-19-related health and safety violations in 2020, the company appealed.<sup>48</sup>

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*Than Competitors. That Can Be Terrifying for Some of its Drivers*, CNN (Dec. 21, 2021), <https://www.cnn.com/2021/12/21/tech/amazon-delivery-night/index.html>.

<sup>44</sup> *Amazon.com Announces Fourth Quarter Results*, AMAZON (Feb 3, 2022), <https://ir.aboutamazon.com/news-release/news-release-details/2022/Amazon.com-Announces-Fourth-Quarter-Results/>.

<sup>45</sup> Karen Weise, *Amazon to Acquire One Medical Clinics in Latest Push into Health Care*, N.Y. TIMES (July 21, 2022), <https://www.nytimes.com/2022/07/21/business/amazon-one-medical-deal.html>; Jennifer Maas, *Amazon Closes \$8.5 Billion Acquisition of MGM*, VARIETY (March 17, 2022), <https://variety.com/2022/tv/news/amazon-mgm-merger-close-1235207852/>.

<sup>46</sup> Aran Ali, "AWS: Powering the Internet and Amazon's Profits," Visual Capitalist, July 10, 2022, <https://www.visualcapitalist.com/aws-powering-the-internet-and-amazons-profits/>.

<sup>47</sup> Naomi Nix, *Amazon Is Flooding D.C. With Money and Muscle: The Influence Game*, BLOOMBERG (Mar. 7, 2019), <https://www.bloomberg.com/graphics/2019-amazon-lobbying/>; Jeffrey Dastin, Chris Kirkham & Aditya Kalra, *Amazon Wages Secret War on Americans' Privacy, Documents Show*, REUTERS (Nov. 19, 2021), <https://www.reuters.com/investigates/special-report/amazon-privacy-lobbying/>.

<sup>48</sup> Annie Palmer, *Amazon Fined by OSHA for Coronavirus Safety Violations at Two California Warehouses*, CNBC (Oct. 9, 2020), <https://www.cnbc.com/2020/10/09/california-osh-fines-amazon-for-coronavirus-safety-violations.html>.

This zero-sum, scorched earth strategy not only prevents the regulation of Amazon's warehouses; it also forces enforcement agencies to continue pouring resources into trying to enforce the law against Amazon, taking resources and attention away from other potential complaints or violations. Amazon's litigation tactics in *Palmer* and the NYAG case prevented Amazon employees from enjoying a safe workplace free from retaliation and also stripped rights away from millions of New York workers.

Amazon is not just getting too big to be regulated by underfunded agencies. It is actively using its power to break the institutions and enforcement systems that all workers have relied on for decades. The company is a dangerous example of deregulated capitalism run amok, and reigning it back in will require concerted coordination between the government, workers, unions, organizers, and lawyers across the country. As workers continue to organize to demand safe working conditions, they will need to develop holistic strategies that do not just rely on existing mechanisms to guarantee their rights.

## Conclusion

Amazon's fight against the enforcement of Covid-19 health and safety laws and anti-retaliation laws has been fierce. The company is not merely defending its actions; it is aggressively attempting to undermine the agencies and institutions in place to protect workers at every level. Amazon has alleged, without evidence, that the Regional Director of Region 29 of the NLRB has violated her oath to uphold the law neutrally.<sup>49</sup> Amazon has claimed, without evidence, that the New York Attorney General<sup>50</sup> has a personal vendetta against the company. Amazon has battled for decisions that have effectively stripped away protections from workers across New York.

The JFK8 cases have revealed a great need for redundancy in enforcement between federal, state, and local levels. When one agency fails to act or lacks resources, it should not mean a worker has no access to their legal protec-

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<sup>49</sup> Annie Palmer, *Amazon Loses Effort to Overturn Historic Union Election at Staten Island Warehouse*, CNBC (Sept. 1, 2022), <https://www.cnbc.com/2022/09/01/amazon-loses-effort-to-overturn-union-win-at-staten-island-facility.html>.

<sup>50</sup> It is worth noting that both the Regional Director and the New York Attorney General are Black women. I hope more is written exploring the role of racism, both systemic and deliberate, in Amazon's response to the Covid-19 crisis and its workers' organizing efforts.

tions. Other levels of government should be allowed to step in to enforce the law. These cases have also made it clear that we need much more vigorous enforcement of anti-retaliation laws and much more severe penalties for violating them. Perhaps more than anything else, these cases have laid bare the dangers of monopolistic power in the deregulated U.S. workplace. Amazon has been able to overwhelm enforcement agencies and threatens to break entire systems workers need to stay safe at work.

In March 2020, Amazon employees at JFK8 were worried about their safety at work. They began to organize because they did not believe Amazon was taking the necessary steps to prevent the spread of Covid-19 in their workplace. They identified ways that the company was failing to meet health and safety rules, and together they made demands for masks, gloves, sanitized workstations, time to wash their hands and socially distance, and paid sick leave. Litigation and enforcement efforts amplified worker voices and tried to force Amazon to adopt the Covid-19 safety measures workers demanded. And while Amazon resisted in court, JFK8 workers built an incredible campaign and secured a massive victory.

The ALU's resounding win in their JFK8 representation election has been a beacon of hope and appears to be the first spark in a much-needed surge of worker organizing at Amazon facilities. The power of organized labor can potentially force Amazon to make substantial concessions and dramatically improve working conditions at its warehouses. Litigation can play a role in the path toward more just Amazon workplaces, but worker organizing must lead the way.

# Changes to Working Conditions in the Wake of the Pandemic in Mexico:

## The Illegality of Unilateral Salary Reductions

Alejandra Martinez Gil<sup>1</sup>

### Introduction

On March 31, 2020, an agreement was published in the Official Journal of the Federation establishing extraordinary actions to address the COVID-19 health emergency.<sup>2</sup> The reaction of many Mexican companies to the pandemic was to reduce the salaries of their workers to try to cope with the impact of the health emergency. According to the Secretariat of Labor and Social Welfare (STPS, its acronym in Spanish), 95% of Mexican companies halted their activities. However, many companies operated under inadequate conditions that violated the safety and labor rights of their employees. The following are examples of measures adopted by Mexican companies, some of which are legal, but in most cases, illegal: compulsory on-site work; the continuation of activities even when they were not essential; non-compliance with health protocols needed to safeguard the health of workers and their families; and unilateral salary reductions.

Specifically, unilateral salary reductions were one of the measures with an immediate devastating impact on workers. The only legal way to reduce a worker's salary in Mexico is through a bilateral agreement between the employer and the worker.<sup>3</sup> However, if the employer unilaterally

<sup>1</sup> Alumni, Georgetown University.

<sup>2</sup> Through a decree published on March 27, 2020, in the Official Gazette of the Federation, the Head of the Federal Executive Power declared several extraordinary actions in the affected regions of the entire national territory in matters of general health, to combat the serious disease of priority attention generated by the SARS-CoV-2 virus (which causes the COVID-19 disease); within the extraordinary actions mentioned above, it was contemplated that, in addition to those expressly mentioned in the aforementioned decree, the Secretary of Health should implement any other actions deemed necessary. Decreto, Diario Oficial de la Federación [DOF] 27-03-2020 (Mex.), [https://www.dof.gob.mx/nota\\_detalle.php?codigo=5590673&fecha=27/03/2020#gsc.tab=0](https://www.dof.gob.mx/nota_detalle.php?codigo=5590673&fecha=27/03/2020#gsc.tab=0).

<sup>3</sup> Ley Federal del Trabajo (Federal Labor Law) [LFT], Diario Oficial de la Federación [DOF], art. 3, 01-04-1970, últimas reformas DOF 27-12-2022 (Mex.), <http://www.ordenjuridico.gob.mx/Documentos/Federal/pdf/wo9059.pdf>.

ally reduced their salary, the worker has the right to terminate the labor relationship and receive the corresponding compensation.

Everything related to labor relations is regulated by the Federal Labor Law,<sup>4</sup> which applies federally and governs all labor relations to create a balance between employer and employee, as well as to encourage and promote decent work.

### Legal Context

#### Hierarchy of Laws in Mexico:

There is a hierarchical normative order established in Article 133 of the Constitution:

1. The Federal Constitution
2. Federal Laws and International Treaties
3. Local Laws
4. Regulatory Standards
5. Municipal Standards

The judicial power of the Federation is vested in the Supreme Court of Justice of the Nation (SCJN, its acronym in Spanish), an Electoral Tribunal, Regional Plenaries, Collegiate Circuit Courts, Collegiate Appellate Courts, and District Courts. The SCJN is the supreme court in Mexico, and it is empowered to resolve contradictory decisions issued by lower courts.

#### Federal Labor Law

The Federal Labor Law governs the labor relations referred to in Article 123 "Labor and Social Security" of the Political Constitution of the United Mexican States. The rights or prerogatives contained in the labor laws cannot be waived

<sup>4</sup> Ley Federal del Trabajo (Federal Labor Law) [LFT], Diario Oficial de la Federación [DOF] 01-04-1970, últimas reformas DOF 27-12-2022 (Mex.), <http://www.ordenjuridico.gob.mx/Documentos/Federal/pdf/wo9059.pdf>.

by the employee. Article 33 establishes that any waiver made by the workers for accrued salaries, compensation, and other benefits derived from the services rendered will be null and void, regardless of their form.

For any agreement or settlement to be valid, it must:

- Be made in writing
- Contain a statement of the facts on which it is based, and the rights contained therein, and
- Be ratified before the Reconciliation Centers or the corresponding court.

The agreement will be approved if it does not contain a waiver of the workers' rights. If the agreement is entered into without the intervention of the corresponding authorities, it can be declared null and void before the Court. This rule only applies to clauses containing an implied or explicit waiver of the rights of the workers. The application of this rule does not affect the validity of the other clauses in the agreement.

Another possible way to reduce salaries is through an agreement with the union, although this only applies when the workers are part of a collective bargaining agreement.

## Collective Suspension of Labor Relations

The Executive Branch is empowered to order the suspension of work and activities in the private sector through agreements and decrees. Labor law establishes a series of grounds for the temporary suspension of labor relations in a company. Force majeure not attributable to the employer or the suspension of labor or work due to a government-declared public health emergency are some of the situations contemplated as grounds for temporary suspension of labor relations.<sup>5</sup>

<sup>5</sup>According to article 42:

Causes for temporary suspension of the obligations to render services and pay salaries that are without liability for the employee and the employer:

- I. The worker has a contagious disease;
- II. Temporary disability caused by an accident or illness that does not constitute an occupational hazard;
- III. Preventive imprisonment of the employee followed by a judgment of acquittal. If the employee acted in defense of the person or interests of the employer, the latter would have the obligation to pay the wages that the former would have not received;
- IV. Arrest of the worker;
- V. The fulfillment of the services and the performance of

In the event of suspension of work due to a health emergency, the employer will not be required to have the approval or authorization of the Court and will be obligated to pay its workers a compensation equivalent to one day of the current minimum wage for each day that the suspension lasts (not to exceed one month).

## Termination of Employment Relationships

Article 51 of the Federal Labor Law establishes as a cause for termination of the employment relationship, without liability for the employee, the unilateral reduction of the salary by the employer. In such an event, the employee has the right to terminate the relationship within 30 days of the date of the salary cut and is entitled to a severance payment under Federal Labor Law. This compensation is provided for in Article 50<sup>6</sup> of the law in question and will

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the duties mentioned in Article 5 of the Constitution, and of the obligations set forth in Article 31, Section III of the Constitution;

- VI. The designation of workers as representatives before state agencies, the National Minimum Wage Commission, the National Commission for the Participation of Workers in the Profits of Companies, and other similar entities;
- VII. Lack (sic DOF 04-06-2019) of the documents required by laws and regulations, necessary for the provision of the service, when it is attributable to the worker;
- VIII. The conclusion of the season in the case of workers contracted under this modality, and
- IX. The license referred to in Article 140 Bis of the Social Security Law.

Ley Federal del Trabajo (Federal Labor Law) [LFT], Diario Oficial de la Federación [DOF] 01-04-1970, últimas reformas DOF 27-12-2022 (Mex.), <http://www.ordenjuridico.gob.mx/Documentos/Federal/pdf/wo9059.pdf>.

Also article 42 bis states:

When the competent authorities issue a declaration of the existence of a health emergency, in accordance with the applicable provisions, which implies the suspension of work, the provisions of Article 429, section IV of this Law shall apply.

*Id.*

<sup>6</sup>According to Article 50:

The compensation referred to in the preceding article shall consist of:

- I. If the employment relationship is for a fixed term of less than one year, in an amount equal to the amount of the salaries of half of the time of services rendered; if it exceeds one year, in an amount equal to the amount of the salaries of six months for the first year and twenty days for each of the following years in which he has rendered his services;
- II. If the employment relationship is for an indefinite term,

depend on whether the employment relationship was for a fixed term of less than one year or for an indefinite term. In both cases, in addition to the corresponding compensation, the employer must pay three months' salary with interest.

## Case Law

Case law is established by mandatory precedents, reiteration, and contradiction. Case law which is established by contradiction goes through the Plenary or the Chambers of the Supreme Court of Justice of the Nation and by the regional plenaries. Case law established by the Supreme Court of Justice of the Nation is binding for all jurisdictional authorities of the Federation and of the federal entities, except for the Supreme Court itself.

Contradictory precedent is established by elucidating the discrepant criteria used in the chambers of the Supreme Court, in the regional plenaries, or among the collegiate circuit courts. A contradiction exists if any of the following elements are met:

- a) That two or more courts adopt, expressly or implicitly, differing legal criteria on the same legal point, regardless of the fact that the factual issues that give rise to it are not exactly the same; and,
- b) That they sustain contradictory theses, understanding "thesis" as the criterion adopted by the judge through logical-legal arguments to justify their decision in a controversy.

## Salary Protection in Mexico

Salary protection in Mexico is provided for in Article 123 of the Political Constitution of the United Mexican States, which establishes the basis for the protection of salaries.<sup>7</sup>

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the compensation shall consist of twenty days' salary for each of the years of service rendered; and

- III. In addition to the compensation referred to in the preceding sections, there will be a compensation of three months' salary and the payment of overdue salaries and interest, if any, under the terms provided in Article 48 of this Law.

Ley Federal del Trabajo (Federal Labor Law) [LFT], Diario Oficial de la Federación [DOF] 01-04-1970, últimas reformas DOF 27-12-2022 (Mex.), <http://www.ordenjuridico.gob.mx/Documentos/Federal/pdf/wo9059.pdf>.

<sup>7</sup> Constitución Política de los Estados Unidos Mexicanos, CP, art. 123,

The Constitution establishes that workers have the right to receive their full salary, equal pay must be paid for equal work, no withholding of wages or salary cuts may exist, wages must be paid in legal tender, and they may not be paid in the form of goods.

The Minimum Wage Commission is a tripartite institution, represented by workers, employers, and the government that determines the minimum wage for each year. The Commission may be assisted by advisory committees to determine the minimum wage for different sectors, occupations, and zones. The general minimum wage must be sufficient to satisfy the material, social and cultural needs of the head of household and to provide for the minimum education of their children.

In accordance with the provisions of the Constitution, Article 5 of the Federal Labor Law<sup>8</sup> also contemplates the protection of salaries, where it is established in the same sense as in the Constitution that a worker may not receive a salary lower than the minimum wage, the salary must provide remuneration, and the withholding of the salary as a fine by the worker is expressly prohibited.

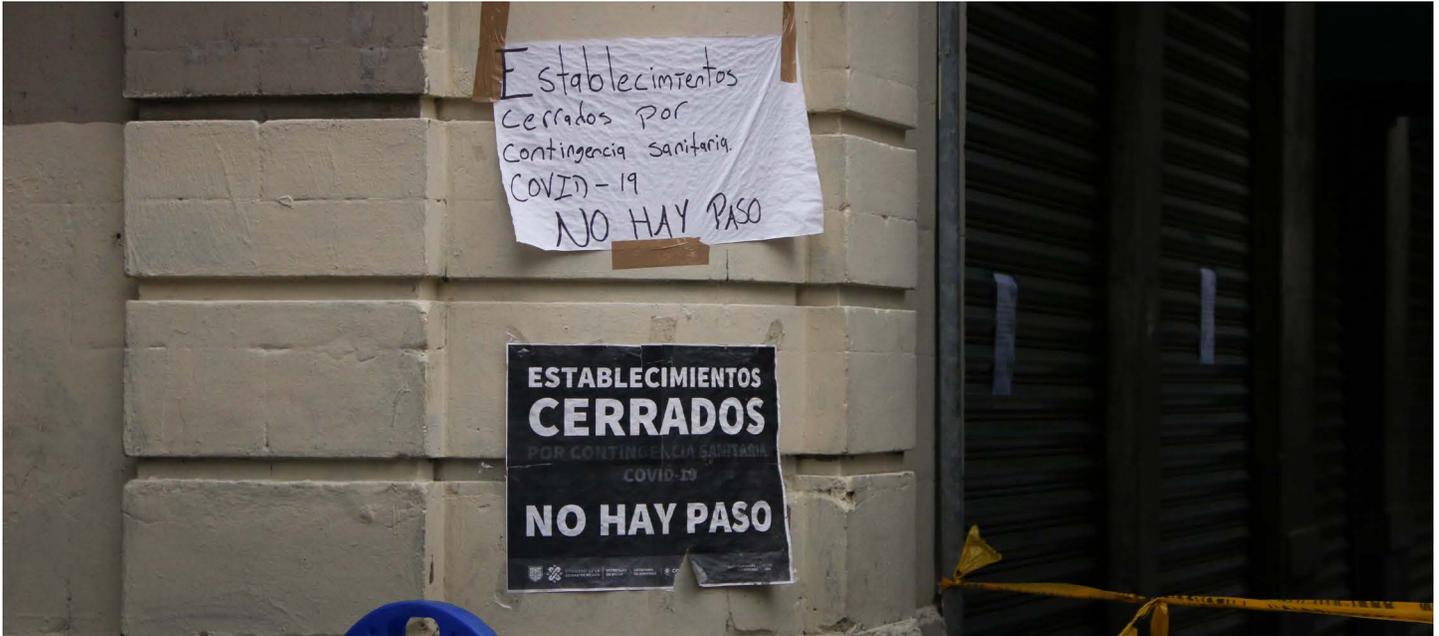
Therefore, the protection of workers' salaries in Mexico is established directly by the Mexican Constitution and the Federal Labor Law and applies to the entire country. Therefore, any provision contained in labor contracts or agreements that contravenes these provisions will be considered null and void. Any clause or provision that foresees a wage waiver or contravenes the provisions of the Constitution and the law will not produce any legal effect since they are public policy provisions. So, their inclusion will not prevent the enjoyment and exercise of rights, regardless of whether the stipulation is made in writing or verbally. The right to receive a salary cannot be waived.

Any lawsuit derived from the violation of the fundamental right to be paid a salary will be based on the right provided in the Federal Constitution, as well as in the Federal Labor Law, and will be heard before the conciliation and arbitration boards. The employer is obligated to allow inspection and surveillance by the labor authorities to ensure compli-

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Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 29-05-2023, <http://www.ordenjuridico.gob.mx/Constitucion/articulos/123.pdf>.

<sup>8</sup> Ley Federal del Trabajo (Federal Labor Law) [LFT], art. 5, Diario Oficial de la Federación [DOF] 01-04-1970, últimas reformas DOF 27-12-2022 (Mex.), <http://www.ordenjuridico.gob.mx/Documentos/Federal/pdf/wo9059.pdf>.



Empty streets and closed businesses due to outbreak of COVID in Mexico City. Photo © Andrea Quintero Olivas / Shutterstock

ance with labor regulations.

## Case

The contradiction of thesis 8/2020 between those sustained by the First and Third Collegiate Courts, both of the Fifteenth Circuit, arose when both Collegiate Circuit Courts issued their respective criteria in direct appeals challenging an award rendered in a labor lawsuit in which an employee demanded the termination of the labor relationship. The contradictory legal issue to be elucidated is who bears the burden of proof when determining whether there was a salary reduction when it is used as a cause for termination of the labor relationship without liability for the employee.

When ruling on protection lawsuit 507/2018, the First Collegiate Court of the Fifteenth Circuit concluded that Federal Labor Law establishes the general rule that the employer has the burden of proving the fundamental elements of the employment relationship, because it has the legal obligation to maintain and, if necessary, exhibit in court, the documents related to the fundamental aspects of the employment contract. However, the Court emphasized that from this obligation it does not follow that the employer has the burden of proof to demonstrate that it made the payment in full, i.e., that it did not reduce the employee's salary.

The Court stated that, according to provisions in Article

51, section IV, of the Federal Labor Law, for an action for termination of the labor relationship without liability for the employee to proceed, it must be demonstrated that there was the absence of the full payment of wages.

And secondly, it cited case law number 2a./J. 88/2005 with the heading "RESCISSION OF THE LABOR RELATIONSHIP BECAUSE OF SALARY REDUCTION, IT IS NOT NECESSARY TO PROVE THAT ACTIONS WERE MADE TO OBTAIN THE CORRECT PAYMENT. IT IS SUFFICIENT TO PROVE THE EXISTENCE OF ITS REDUCTION." This legal assertion coincides with the narrative of the case as it deals with a worker who demands the termination of the employment relationship without liability for them because the employer reduced their salary, a requirement of Article 51, section IV, of the Federal Labor Law. However, the precedent used as support by the First Collegiate Court concludes with a different legal point. The Second Chamber of the Supreme Court of Justice of the Nation in the mentioned case determined that for the termination of the labor relationship without liability for the worker to apply, all that is necessary is for the employee to prove the existence of a salary cut. It is not necessary to prove that they made attempts or did something to obtain the correct payment and that the employer refused to pay. The Supreme Court considered that adopting such a legal requirement introduces elements not foreseen in the law. Article 784 of the Federal Labor Law establishes that:

The Court shall exempt the employee from the burden of proof when by other means it is

in a position to obtain knowledge of the facts, and for such purpose, at the request of the employee or if deemed necessary, it shall require the employer to provide the documents which, under the law, it is legally obliged to keep, under the warning that, if they are not presented, the facts alleged by the employee shall be presumed to be true. In any case, it will be up to the employer to prove its statement when there is a dispute regarding:

- I. Worker's date of entry into the company;
  - II. Seniority of the employee;
  - III. Employee absences from work;
  - IV. Cause for termination of the employment relationship;
  - V. Termination of the employment relationship or contract which was established for a specific job or time period, according to the terms of Articles 37, Section I, and 53, Section III, of this Law;
  - VI. Proof of having given in writing to the worker or to the Tribunal the date and cause of the dismissal.
- The plain and simple denial of dismissal does not reverse the burden of proof.
- Likewise, the denial of the dismissal and the offer of employment made to the employee does not exempt the employer from proving its statement;
- VII. The employment contract;
  - VIII. Normal and overtime workday, when the latter does not exceed nine hours per week;
  - IX. Payment of days off and mandatory days off, as well as the end of year bonus;
  - X. Enforcement and payment of vacations;
  - XI. Payment of Sunday, vacation and seniority bonuses;

XII. Amount and payment of salaries;

XIII. Payment of employees' profit sharing; and

XIV. Incorporation and contributions to the Mexican Social Security Institute, the National Housing Fund, and the Retirement Savings System.

The loss or destruction of the documents mentioned in this article, due to unforeseeable circumstances or force majeure, does not exempt the employer from proving its statement by other means.<sup>9</sup>

Thus, it is evident that it was incorrect to use evidence of a salary cut as legal support since this thesis determines which are the reasons for the dismissal and not the burden of proof. Therefore, the Collegiate Court was wrong to use a precedent that elucidates a divergent legal point and therefore it is incorrect to use it as support.

On the other hand, the Third Collegiate Court of the Fifteenth Circuit, in resolving direct appeal 33/2020, ruled that it was illegal to impose on the employee the burden of proving the causes of termination of the employment relationship because of the nonpayment of wages and the modification of the work hours. When dealing with controversies regarding the amount, payment of wages, and working hours, the employer is the one who must prove these legal elements. The fact that it has been established that the termination has to be based on a lack of full payment of wages is incorrect since none of the articles of the Federal Labor Law mentions this requirement. On the contrary, sections IV and V of article 51 establish that it is sufficient to only prove that a lower amount is paid without any justification, as in this case, and therefore it was illegal that the burden of proof was placed on the worker, following the interpretation and decision of the Second Chamber of the Supreme Court of Justice of the Nation.

Thus, the burden of proof in the case of termination of the labor relationship, based on section IV of Article 51 of the Federal Labor Law, corresponds to the employer and not to the employee. Case law number 4a./J. 23/93, on which

<sup>9</sup> Ley Federal del Trabajo (Federal Labor Law) [LFT], art. 784, Diario Oficial de la Federación [DOF] 01-04-1970, últimas reformas DOF 27-12-2022 (Mex.), <http://www.ordenjuridico.gob.mx/Documentos/Federal/pdf/wo9059.pdf>.

the Third Collegiate Court of the Fifteenth Circuit relied, states:

TERMINATION OF THE LABOR RELATIONSHIP BECAUSE THE EMPLOYEE'S SALARY WAS NOT PAID ON THE AGREED OR CUSTOMARY DATE OR AT THE AGREED OR CUSTOMARY PLACE. IT IS NOT UP TO THE PLAINTIFF TO PROVE THAT THEY MADE EFFORTS TO OBTAIN THE PAYMENT AND THAT THE EMPLOYER REFUSED TO PAY, THE EMPLOYER HAS THE BURDEN OF PROVING THAT IT MADE THE PAYMENT ON SAID DATE AND PLACE.

The Court refers to the cause for termination of the employment relationship without liability for the employee when the employee does not receive the salary on the date or at the place agreed upon with the employer. Further, it concludes that the employer has the burden of proving that it made the salary available to the employee on the date or at the place agreed upon. Therefore, the thesis used as support is not strictly applicable since the hypothesis that gave rise to it is different from the case in question.

The Plenary of the Circuit after carrying out the corresponding study on the contradictory criteria previously presented, concluded that the criterion sustained by this Plenary of the Fifteenth Circuit should prevail, as precedent.

## Analysis

These above cases offer discrepant criteria for determining who has the burden of proof as to whether there was a salary cut when it is alleged as a cause for termination of the labor relationship without liability for the employee, based on section IV of article 51 of the Federal Labor Law.

The Plenary of the Fifteenth Circuit, through Labor Case Law **2023617** published on October 1, 2021, resolved the contradiction of criteria used among the collegiate courts, reiterating that it is the employer who has the burden of proof to demonstrate that there wasn't an unjustified salary reduction. The Plenary reiterated that salary reductions can only occur because of employee absences or tardiness.

### **BURDEN OF PROOF IN THE LABOR LAWSUIT. IT IS UP TO THE EMPLOYER TO DEMONSTRATE WHETHER OR NOT THERE WAS A SALARY REDUCTION WHEN IT IS CLAIMED AS A CAUSE FOR TERMINATION OF THE EMPLOYMENT RELATIONSHIP.**

Facts: The contending Collegiate Circuit Courts issued contradictory criteria when analyzing who has the burden of proof to demonstrate whether there was a salary reduction when it is alleged as a cause for termination of the employment relationship, in terms of section IV of article 51 of the Federal Labor Law, since one considered that it corresponds to the worker and the other to the employer.

Legal criteria: The Plenary of the Fifteenth Circuit establishes that in accordance with the provisions of articles 784, section XI, 804 and 805 of the Federal Labor Law, when the existence of a salary reduction is claimed, since it involves a controversy over the amount and payment of the salary, the burden of proof corresponds to the defendant employer.

Justification: If in the labor lawsuit, the worker demands the termination of the labor relationship without liability, because the employer has reduced their salary, in terms of section IV of article 51 of the Federal Labor Law, the controversy revolves around the amount and payment of the salary, therefore, under the provisions of article 784, section XII, of the law in question. **The burden of proof corresponds to the employer that must, in any case, demonstrate that there was no change or reduction in wages or that if there was, it was justified based on the way the work was carried out. This includes pay cuts because of absences from work, tardiness, or any other reason that serves as justification or makes it clear that there was no intention on the part of the employer part to unduly reduce the worker's salary.**

PLENARY SESSION IN THE FIFTEENTH CIRCUIT.

The contradiction of the judgments interpreting 8/2020, between those sustained by the First and Third Collegiate Courts, which are both part of the Fifteenth Circuit led to a plenary session of the Fifteenth Circuit. August 24, 2021. Through a unanimity of votes of Magistrates Jorge Alberto Garza Chávez, Blanca Evelia Parra Meza, Gustavo Gallegos Morales, Susana Magdalena González Rodríguez, Adán Gilberto Villarreal Castro, Alejandro Gracia Gómez, Rosa Eugenia Gómez Tello Fosado and María Elizabeth Acevedo Gaxiola. Speaker: Gustavo Gallegos Morales. Secretary: Óscar Jaime Carrillo Maciel.

Contending criteria:

The thesis sustained by the First Collegiate Court of the Fifteenth, when resolving direct protection lawsuit 507/2018, and the thesis sustained by the Third Collegiate Court of the Fifteenth Circuit, when resolving the direct protection lawsuit 33/2020.

Through the above-transcribed precedent, the Plenary of the Circuit ruled that the employer has the burden of proof to demonstrate that there was no salary reduction or that, if there was, the reduction was justified based on the way the work was carried out because they were deductions for absences from work or tardiness. This ruling implies that the employer must demonstrate the cause and justification of its actions, and therefore is obliged to provide all the means of proof to support its claim.

On April 6, 2020, the Ministry of Labor and Social Welfare published a document entitled "*Labor situation in the wake of COVID-19*" in which they resolve the question, "What does the new provision that establishes the suspension of work due to the declaration of a health emergency because of force majeure derived from COVID-19 imply for the payment of wages?" The Federal Labor Law establishes that if there is a temporary suspension of work due to force majeure, the authority will determine the amount of compensation based on the worker's salary for up to one month.<sup>10</sup> Currently, it is crucial that, depending on the branch of industry and the economic activity that

<sup>10</sup> Ley Federal del Trabajo (Federal Labor Law) [LFT], arts. 429-30, Diario Oficial de la Federación [DOF] 01-04-1970, últimas reformas DOF 27-12-2022 (Mex.), <http://www.ordenjuridico.gob.mx/Documentos/Federal/pdf/wo9059.pdf>.

each company or business is a part of, there is a mutual agreement to protect workers and sources of work. PRO-FEDET<sup>11</sup> can assist in reaching agreements that reconcile the interests of both parties.<sup>12</sup>

However, even though the company has made an agreement with the worker, the labor laws and the courts did not foresee that the Conciliation and Arbitration Board in charge of approving the mentioned agreements closing its doors for almost four months during the pandemic. When it finally reopened the backlog and accumulation of procedures was unmanageable, making the processing of something that should be automatic, become a long and bureaucratic process. Both workers and employers are now suffering the consequences of all the backlog and delays in the courts.

Similarly, another scenario that is not covered by this hypothesis is the situation where the company, for economic reasons, is forced to reduce the salaries of the workers and tries to follow proper legal procedure through an agreement with the worker. In response, the worker exercises his right and refuses to accept a salary cut. This refusal places the employer in a tricky situation since it is economically impossible for it to afford not to reduce salaries and continue operating. But, if it makes a salary cut without an agreement, it faces the possibility of the employee terminating the labor relationship and requesting a severance payment, which the employer will not be able to pay.

The pandemic has led to situations not foreseen by the laws and the courts. Over time, the criteria of the courts will have to adapt to the current economic and social reality. The precedent established by the circuit collegiate courts is mandatory for all the jurisdictional authorities of Mexico and of the federal entities of its circuit, except for the Supreme Court of Justice of the Nation, the regional plenary courts, and the circuit collegiate courts. This fact means that in a civil legal system such as the Mexican one, the criteria issued by courts applies once a case is filed with them, which means that the violation of their rights has already occurred. Unlike a country with a precedent system, the legal system in Mexico is based on

<sup>11</sup> Procuraduría Federal de la Defensa del Trabajo.

<sup>12</sup> Secretaría del Trabajo y Previsión Social, Situación laboral frente al COVID-19: preguntas frecuentes, Gobierno de México (April 6, 2020), <https://www.gob.mx/stps/documentos/situacion-laboral-frente-al-covid-19>.

written laws and not on precedents. Precedent in Mexico is not considered law, but rather a source of the law. The impact of the criteria issued may be seen in the long to medium term as cases are resolved in which the workers defend their cause with these precedents, and therefore the court in question must apply it.

## Conclusion

In the context of the pandemic, one of the key points of discussion is the interpretation of the cause for the temporary suspension of labor relations. The agreement issued by the General Board of Health (i.e., *Consejo de Saludubridad General*) declared that “[t]he epidemic generated by the SARS-CoV2 virus (COVID-19)” is “a health emergency due to force majeure.” It is not clear what this declaration could mean for the labor situation in Mexico.

If, on the one hand, the workers fall within the precepts of articles 42 bis, 427 section VII and 429 section IV of the Federal Labor Law, which stipulate the temporary suspension of labor relations based on the declaration of a health contingency by the competent authority, then, by implication, labor activities can be suspended without approval or authorization of the labor court. The only obligation would be to pay their workers a compensation equivalent to one day of the general minimum wage for each day of the suspension, without exceeding one month. The compensation of section IV of article 429 is extremely low and therefore leaves the workers unprotected and in an unbalanced relationship with the employers. It is in the best interest of workers in this vulnerable position to reach an agreement with the employer, either through their union or directly. There are various legal sources of support for workers where guidelines and directives have been established for the protection of workers.<sup>13</sup>

<sup>13</sup> According to the Legal Guide for the Effects Derived from COVID-19:

In the event of suspension of work due to a health contingency declaration, labor relations will be temporarily suspended, so workers will be exempted from reporting to the place of work center and providing the service, and must resume their activities as soon as the health contingency is over.”

In turn, employers will be obligated to pay their workers only the compensation equivalent to one daily minimum wage for each day that the

If, on the other hand, the cause of the temporary suspension of employment relations is attributable to a force majeure that produces the suspension of work, employers would be obliged to give the corresponding notice of suspension to the court for its approval or disapproval. The court would have the capacity to determine the compensation that should be paid to the workers.

Additionally, the precedent issued by the Plenary of the Circuit implies protection for the employee because the company assumes the burden of proof. The protection of the employee's salary is guaranteed. The employer cannot suspend totally or partially the payment of the salary, except in the cases established by law and through the procedure contained in the Federal Labor Law. Therefore, in the event of an illegal salary reduction, the employee may receive the corresponding compensation. The decision of the Circuit Plenary is a salary protection measure, but not a guarantee. Nonetheless, unilateral salary cuts could have a financial impact on the companies because they must provide the compensation contemplated in the law so that the decision to make this type of unilateral adjustments would be made with a different perspective and with greater prudence.

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suspension of work lasts, without exceeding one month. In this regard, the law establishes that the aforementioned compensation will also apply to pregnant women, nursing mothers and/or workers under 18 years of age. If the suspension of work exceeds one month, the employers will not be obligated to make any payment.

Notwithstanding the foregoing, and although there is no legal obligation to do so, some companies are analyzing the possibility of paying their employees, during the suspension of the employment relationships, an amount greater than the minimum wage. The foregoing, is a social duty, to counteract the negative economic impacts that could affect employees and their dependents.

¿Cuáles son las obligaciones y los derechos del patrón y del empleado en caso suspensión de labores por declaratoria contingencia sanitaria?, GUÍA JURÍDICA POR AFECTACIONES DERIVADAS DEL COVID-19, <https://asesoria.juridicas.unam.mx/preguntas/pregunta/34-Cuales-son-las-obligaciones-y-los-derechos-del-patron-y-del-empleado-en-caso-suspension-de-labores-por-declaratoria-contingencia-sanitaria> (last visited June 2, 2023).

The recommendation issued by the Ministry of Health and Social Security was very clear in stating that “[c]urrently, it is crucial that, depending on the branch of industry and the economic activity that each company or business is a part of, there is a mutual agreement to protect workers and sources of work. PROFEDET can assist in reaching agreements that reconcile the interests of both parties”

Thus, for any change to the working conditions where the working day and consequently the salaries are reduced to be legally valid, it must be approved by the employees through a written bilateral agreement. The agreements must be of a temporary nature, with the purpose that such changes preserve the health of the workers.

Given the situation in which many companies find themselves due to COVID-19, the best way to adapt working conditions to protect the health of employees, follow the recommendations of the World Health Organization (WHO), and preserve the economy of both employees and companies is to enter into agreements with employees.<sup>14</sup>

The pandemic in many cases brought the attention of companies back to the importance that they should give to caring for their human capital. Now more than ever, organizations will put their workers at the center of their actions and measures, always bearing in mind that the decision of the Plenary of the Circuit is a wage protection measure, but not a guarantee. The illegality of the salary cuts was never in doubt, the significance of this criterion is additional protection to the worker by placing the burden of proof on the employer when the worker demands the termination of the labor relationship resulting from salary cuts without liability for the worker.

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<sup>14</sup> *Id.*

# The IWGB Case and Employment Status in the Covid Pandemic:

## A Matter of Life and Death

Alan Bogg<sup>1</sup>

### Introduction

*R (on the application of The Independent Workers' Union of Great Britain) v The Secretary of State for Work and Pensions and the Secretary of State for Business, Energy and Industrial Strategy (IWGB)*,<sup>2</sup> was a public law judicial review challenge to the statutory restriction of certain EU-based health and safety rights (most notably, the provision of Personal Protective Equipment and the "right to refuse" unsafe work) to narrow the category of "employee" in English law. The action was brought by the Independent Workers' Union of Great Britain (IWGB) at the height of the Covid pandemic. The IWGB is a relatively small grassroots organization that is member-led in its industrial and political organizing. It is not affiliated with the umbrella organization, the Trades Union Congress (TUC). Along with some other unions, it has been active in using strategic litigation as a way of achieving wider industrial and political goals on behalf of its members. The IWGB was successful in this case. This led to a statutory extension of the personal scope of the legislation beyond the narrow 'employee' category to include the wider intermediate category of "worker."

### Legal Context

Recent strategic litigation in the UK has focused on using test cases to establish employment status for precarious workers as a way of enforcing statutory rights against an employer. These disputes obviously involve the pursuit of tangible material gains for the affected workers. Access to the statutory entitlement is of direct benefit to the claimants in the litigation. The litigation may also be described as strategic in that it pursues legal arguments that broaden the relevant legal criteria of employment status.

<sup>1</sup> Professor of Labour Law, University of Bristol.

<sup>2</sup> *The Independent Workers' Union of Great Britain, R (on the application of) v The Secretary of State for Work and Pensions & Ors* [2020] EWHC 3050 (Admin).

An example of this approach is the recent litigation in the *National Union of Professional Foster Carers (NUPFC)* case,<sup>3</sup> which established that foster carers enjoyed worker status under UK law for the purposes of certain trade union rights. The objective has been to make the legal criteria more inclusive so that workers in need of statutory protection (i.e., not just the directly affected foster carers or private hire drivers) can access statutory protections more easily.

*IWGB* was an unusual employment status case in seeking to use public law judicial review, rather than the direct enforcement of existing statutory rights in a "private" dispute with an employer, in order to extend the scope of statutory protections. A successful judicial review would require parliamentary reform of the existing statutory framework. In this respect, it was more radical than a "standard" employment status case. The "standard" cases involve attempts to broaden or relax the judicially formulated criteria for a legal category of employment status to render it more "inclusive." By contrast, the *IWGB* case required the legislator to extend the personal scope of the legislation beyond "employee," so that it encompassed the intermediate category of "worker" in UK law.

Some explanation of the legal context that enabled this type of challenge is necessary. It depended upon a particular conjunction of domestic law and European law. First, there is the basic legal framework of employment status in UK law. The relevant statutory health and safety protections, in this case, were restricted to "employees." "Employee" is a common law category based upon the "contract of employment." The courts have developed strict criteria for defining this category. It has tended to apply rather narrowly, and often excludes some precarious workers from its scope. The legal tests have not been static, and different features have been given judicial em-

<sup>3</sup> *National Union of Professional Foster Carers v Certification Officer (Independent Workers Union of Great Britain and others intervening)* [2021] EWCA Civ 548; [2021] ICR 1397 (Court of Appeal) (*NUPFC*).

phasis in different historical periods.

The current legal test for employees at common law encompasses a range of different factors: (i) a sufficient right of contractual control and a minimum degree of subordination;<sup>4</sup> (ii) the employee is subject to an obligation that the work be undertaken personally, which precludes a wide power for the individual to designate a “substitute” to undertake the work on her behalf;<sup>5</sup> (iii) a requirement of “mutuality of obligation,” such that the employer is under a minimum duty to provide future work and the employee is under a duty to accept those offers of work;<sup>6</sup> and (iv) the overall terms of the work contract are consistent with a contract of employment, such as income tax arrangements, sick pay, provision of uniforms and work materials, and the general distribution of economic risks.

In recent times, the courts have applied these criteria “purposively” and “realistically” to identify the “true agreement” between the parties.<sup>7</sup> This general interpretive approach allows the court to look beyond the written documentation to consider the contractual rights and obligations in the context of actual working practices.<sup>8</sup> Nevertheless, these strict definitional criteria can sometimes exclude many individuals who display similar features of subordination and dependence on employees but failed to meet the high legal threshold of employee status. This exclusion often occurred in relation to people in non-standard forms of work, for example in casual or temporary work arrangements, where “mutuality of obligation” was a particular legal obstacle. In other words, the more precarious the work arrangements, the more difficult it is for the worker to meet the threshold of employee.<sup>9</sup> In turn, the exclusion of the worker from the statutory protec-

<sup>4</sup> Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497 (Eng), <https://www.bailii.org/ew/cases/EWHC/QB/1967/3.html>.

<sup>5</sup> Pimlico Plumbers Ltd v Smith [2018] UKSC 29, <https://www.bailii.org/uk/cases/UKSC/2018/29.html>.

<sup>6</sup> On “mutuality of obligation” in the English law on employment status, see Nicola Countouris, *Uses and Misuses of “Mutuality of Obligations” and the Autonomy of Labour Law* in *THE AUTONOMY OF LABOUR LAW* 169 (Alan Bogg et al. eds., 2015).

<sup>7</sup> Uber v Aslam [2021] UKSC 5

<sup>8</sup> The modern origin of this “purposive” approach is *Autoclenz v Belcher* [2011] UKSC 41.

<sup>9</sup> Mark Freedland, *The Contract of Employment and the Paradoxes of Precarity* Oxford Legal Stud. Rsch. Paper, No. 37/2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2794877](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2794877).

tions linked to a “contract of employment” compounds the vulnerability of the worker. Mark Freedland has vividly described this dysfunctional legal trap as the “paradox of precarity.”

The UK legal system has relied increasingly upon an extended intermediate category of employment status for certain basic statutory entitlements, such as the national minimum wage, working time protections, anti-discrimination rights, and trade union rights. This is known as the “limb (b) worker” category. Its purpose is inclusionary, extending statutory protections to a wider range of personal work relations that would otherwise be excluded from the narrower “employee” category. It is defined in s. 230 (3)(b) of the Employment Rights Act 1996 as:

any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

While some legal systems continue with a basic “binary divide” between employees and the independent self-employed, UK law has opted for a third intermediate category of employment status for some basic statutory rights.

It is now settled law that some self-employed workers are included within the limb (b) intermediate category. As Lord Leggatt explained in the seminal case of *Uber*, the UK law on employment status now has a tripartite structure:

The effect of these definitions...is that employment law distinguishes between three types of people: those employed under a contract of employment; those self-employed people who are in business on their own account and undertake work for their clients or customers; and an intermediate class of workers who are self-employed but who provide their services as part of a profession or business undertaking carried on by someone else. Some statutory rights, such as the right not to be unfairly dismissed, are limited to those employed under a contract of employment; but other rights, including those claimed in these proceedings, apply to all “workers.”<sup>10</sup>

<sup>10</sup> Uber v Aslam [2021] UKSC 5 [38].

In *Uber*, the UKSC emphasized that the approach to employment status is “purposive,” with the relevant “purpose” that of the protective statutory rights being claimed. The words in the statutory definition of “worker” should likewise be applied inclusively and realistically, sensitive to any features of the work arrangement that indicate a vulnerability to exploitation by the employer. It should be noted that the statutory words require a “contract” and an undertaking to do “any work” personally and that the work is not performed as a “profession” or “business undertaking” to a “client” or “customer.” In applying these statutory concepts, a wide range of factors are relevant to the purposive approach. The statutory test involves consideration of many of the economic factors relevant to the employee test: subordination and control, the ability to influence the terms in the written contract through negotiation, the degree of “integration” into another’s business or whether the worker is in business on his own account, whether the worker can market his services widely or is tied to a single purchaser of his labor power. Crucially, however, limb (b) worker includes a broader range of personal work contracts than “employee,” and it must be understood as “lowering of the passmark” to count as a “limb (b) worker.”<sup>11</sup> There are certain important statutory rights, such as unfair dismissal protection, that continue to be restricted to employees under UK law. This restriction was also true of the health and safety rights in the *IWGB* case.

The statutory right not to be unfairly dismissed is a matter of domestic law. Any extension of this statutory right to include “limb (b) workers” must occur through legislative reform of the statutory framework. This is unlikely to occur through strategic litigation but will depend on political activism and democratic pressure. The health and safety rights in *IWGB* were derived from European law, however. This distinction was crucial to the legal challenge. In common with many employment rights in the UK, the relevant rights in *IWGB* were based on European “directives.” This source of rights is true of many fundamental rights in the UK, which are underpinned by European law: information and consultation in respect of collective redundancies and transfers; discrimination and equality law; and working time protections, such as the right to paid annual leave, to name just a few of them. “Directives” are a form of legal instrument that depend upon specific implementation in national law through ordinary legislation by the member state. The member state is under a duty to implement directives so that they are “effective” in the national legal or-

<sup>11</sup> *Byrne Bros v Baird* [2002] ICR 667 (UK).

der, and EU law enjoys juridical supremacy in national legal orders. There are also special interpretative duties that are engaged whenever courts are interpreting statutes that implement EU law. This is known as the *Marleasing* duty,<sup>12</sup> and it requires the national court to “read down” statutory definitions as far as possible to ensure that national law is compatible with EU law. In this respect, the supremacy of EU law means that it operates as a kind of “higher law” in the legal system to which it applies. Many of these rights are also articulated as “fundamental rights” in the Solidarity Chapter of the EU Charter of Fundamental Rights, which confers upon them a special constitutional status in the EU legal order.

The crux of the *IWGB* case was in harnessing this primacy of European law. It created an unusual constitutional opportunity for a legal judgment in a court to trigger a change to the statutory framework. This is unusual given the predominantly “political” character of the UK constitution, and its commitments to parliamentary sovereignty and the separation of powers. In restricting the entitlement to legal protection to “employees,” the *IWGB* argued that the relevant statutory rights failed to implement EU law; proper implementation required the extension of protections to the broader category of “workers.”

## Case Overview

In the High Court, Chamberlain J. explained the importance of the legal challenge for the *IWGB* and its members. The *IWGB* represented many precarious workers who were engaged in essential activities during the pandemic, including cleaners, foster care workers, couriers, and private hire drivers. These workers were often unable to work from home during lockdown periods, and their labour was critical to the smooth functioning of health and social care and supply chains. As a result of their occupational position in the frontline of the Covid response, many of them were exposed to higher risks of infection, serious illness, and death from Covid. Many of them worked under contracts that described them as self-employed contractors. These contracts would often be drafted as comprehensive standard-form documents and presented to workers on a take-it-or-leave-it basis and would include written clauses designed to negate employment status. For example, the

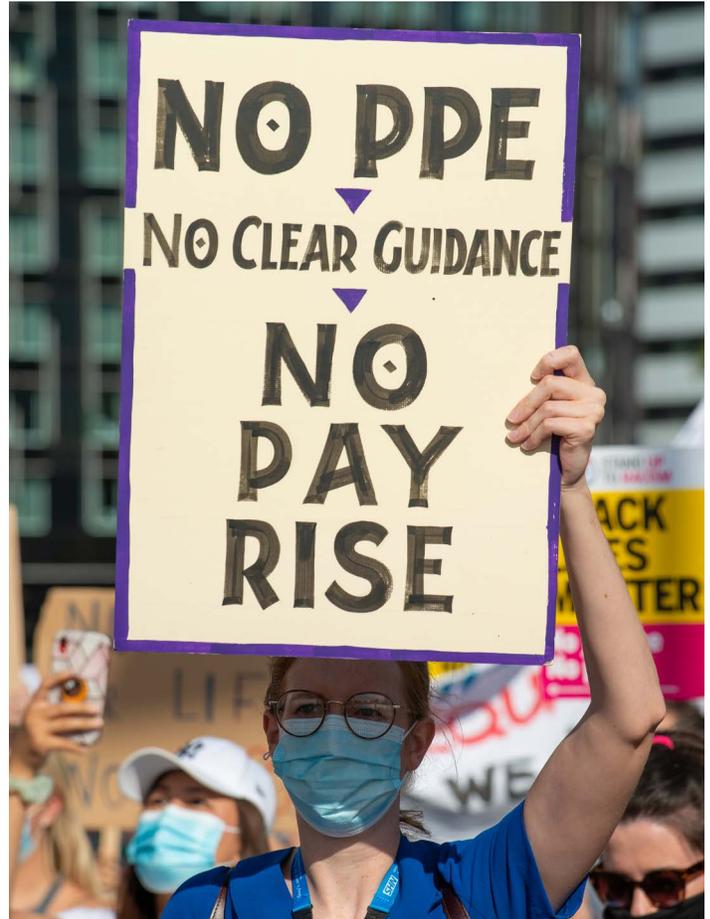
<sup>12</sup> See *Marleasing SA v La Comercial Internacional de Alimentación* [1990] ECR I-4135. The duty is preserved after “Brexit”: see s.5 of the European Union (Withdrawal) Act 2018 and the Explanatory Notes to that section at para. 104.

contracts might include “no mutuality” clauses (so that the employer was under no legal obligation to offer work and the worker was under no obligation to accept offers of work). The presence of such terms makes it more difficult for a court to find that the individual is an employee working under a contract of employment. This is because the legal test of employee in UK law is still based upon an underlying conception of standard and stable employment on an open-ended basis with a single employer. The effect of this was that many of those represented by the IWGB were unable to access legal rights to PPE and to refuse unsafe work. This effect exacerbated the urgency of the litigation. The workers did not have the luxury of years to wait for a final judicial resolution of an interesting point of law. This situation was a matter of life and death for many who had no economic choice but to put themselves in harm’s way without basic health and safety protections. The IWGB won the case, and this victory led to the extension of statutory protections to include a wider category of “worker” as a result of a statutory instrument.<sup>13</sup>

*IWGB* was a public law case. As explained, this was possible because it involved a challenge based on European law. The union sought a declaration that the relevant statutory rights in national law failed to implement the requirements of the EU health and safety directives. In essence, the IWGB argued that the directives envisaged a broad coverage that should extend to the wider category of “limb (b) workers”; whereas the relevant statutory rights in national law were restricted to employees. This restrictive approach in national law involved a failure to implement EU law. It necessitated legislative attention to extend the scope of statutory coverage.

Did the relevant EU directives require national law to use this wider category of “limb (b)” worker? Sometimes, the relevant directive will make a specific reference to the applicability of the national laws and/or practices on employment relationships. This deference to national definitions is relatively unusual, not least because of the imperative of ensuring a level playing field in the internal market. The general case law on European employment rights is generally aligned with an autonomous category of “worker” in EU law. This autonomous definition favours a broad and inclusive approach, for example in dispensing with any explicit reference to the “mutuality of obligation,” which has so haunted the UK law on employment status. Although

<sup>13</sup> The Employment Rights Act 1996 (Protection from Discrimination in Health and Safety Cases) (Amendment) Order 2021.



National Health Service workers protest in London. Photo © John Gomez / Shutterstock

the European Court of Justice has emphasized that the EU definition of worker may vary across different legal areas, it has settled upon a relatively stable (and broad) definition of worker in the contexts of free movement, working time, and equal pay law. The basic definition is of a person who performs services for and under the direction of another in return for remuneration.<sup>14</sup> The concept is treated as functioning autonomously from national definitions of employment status, perhaps reflecting its legal roots in the foundational European laws on free movement.<sup>15</sup>

In *IWGB*, the government argued that this general autonomous definition did not apply in the context of the health and safety directives. It argued that the relevant directives (unusually) posited an explicit statutory definition, which was a third approach distinct from either the (i) explicit deference to national definitions or (ii) the “autonomous”

<sup>14</sup> See, e.g., Case C-428/09, *Union Syndicale Isère v Premier Ministre* [2011] IRLR 84.

<sup>15</sup> See Nicola Kountouris, *The Concept of “Worker” in European Labour Law: Fragmentation, Autonomy and Scope*, 47 *INDUST. L.J.* 192 (2018).

EU definition of worker. Chamberlain J. agreed that there was a bespoke definition of worker in the Framework Health and Safety Directive. However, he rejected the argument that this definition should be construed *more narrowly* than the autonomous definition of worker used elsewhere in EU law. Indeed, the fundamental character of health and safety rights supported a broad and purposive approach to personal scope. In this regard, Chamberlain J. also observed that Article 31 of the EU Charter of Fundamental Rights recognised the right of “every worker” to working conditions “which respect his or her health, safety, and dignity” The dignitarian basis to this right, and the emphasis on “every” worker, could provide indirect support to a broad and inclusive approach to the statutory definition. Furthermore, there was nothing in the wording of the relevant directives to suggest that the personal scope should be defined narrowly. Since the directives were at least as broad as the autonomous EU definition of worker, and since this autonomous definition was broader than the narrow common law category of “employee,” there had been a failure to implement the directives properly.

Once it was established that the proper implementation of the directives required legal protections to extend to “limb (b) workers,” it was relatively easy to reject the argument that equivalent protections for “limb (b) workers” already existed in the form of whistleblowing protections. It was necessary to rectify the failure to implement EU law by extending specific statutory entitlements, namely the right to refuse unsafe work and the right to be provided with PPE, to limb (b) workers. The government did not appeal the judgment, not least because the political consequences of fighting the judgment would have been extremely damaging. It would have been sheer hypocrisy to celebrate the heroism of key workers during Covid while pursuing a legal case to block their entitlement to the most basic of health and safety protections. Such an appeal would have been particularly distasteful given the emerging data on correlations between poverty, precarity, and death or serious long-term health effects from Covid infection. This judgment led to the extension of statutory protections to include a wider category of employment status through secondary legislation, known in UK law as “limb (b) workers.”<sup>16</sup>

<sup>16</sup> The Employment Rights Act 1996 (Protection from Discrimination in Health and Safety Cases) (Amendment) Order 2021.

## Analysis

The *IWGB* case represents an emerging type of strategic labour litigation in public law. The working conditions of many self-employed workers are shaped by public regulatory regimes. This type of regulation may result from licensing and occupational accreditation regimes, which have been particularly important in the regulation of passenger transportation in private hire. The *IWGB* has been active in using judicial review and public law to achieve income security for the precarious self-employed in the gig economy. Where judicial review is successful, the impacts can be systemic, improving the welfare of large numbers of workers. These impacts avoid some of the weaknesses of a collective bargaining strategy focused on single employers and smaller bargaining units. Even where the judicial review is unsuccessful, the visibility of the litigation can generate political mobilization and expose the realities of precariousness and exploitation to public scrutiny. Aside from the *IWGB* case itself, which was a significant success, there are two further examples of this “public law” approach.

The first example concerned the regulation of taxis and private hire vehicles in London. In *R (Independent Workers’ Union of Great Britain) v London Mayor*,<sup>17</sup> the *IWGB* sought judicial review against the Mayor of London following the modification of the “congestion charge” that applied in the “central congestion zone” in London. This modification involved a change to the scheme of exemption, which had applied to taxis and private hire vehicles. Given the significant growth in private hire vehicles operating in the London area, the exemption was removed for private hire vehicles. This change was introduced to reduce traffic congestion in central London while maintaining service provision for disabled service users (taxis were required to have special adaptations to facilitate disabled access). The congestion charge would have a significant impact on the livelihoods of many private hire drivers, the vast majority of whom lived in the most deprived areas of London. There were also very significant racial disparities between taxi drivers and private hire drivers: 94% of private hire drivers were Black, Asian, or Minority Ethnic (BAME) compared with only 12% of taxi drivers. Given the disparate impact on different racial groups, the *IWGB* argued that the change constituted indirect race discrimination under the Equality Act 2010 and European law.

<sup>17</sup> *Independent Workers Union of Great Britain v. The Mayor of London* [2020] EWCA Civ 1046.

The Court of Appeal concluded that the scheme was a proportionate means of achieving a legitimate aim. Consequently, it did not constitute unlawful indirect race discrimination. The case reveals the complexities involved where there are conflicts between different groups of workers in the labour market, particularly against a backdrop of existing patterns of racial disadvantage in the local labour market.<sup>18</sup> These complexities were heightened in this case, as the IWGB's interests were aligned with private hire employers like Addison Lee. The union and the employer had a shared interest in protecting the economic viability of private hire services in the London area. The mechanism of judicial review provided the IWGB with a voice in respect of the congestion charge, in circumstances where it had less opportunity for political influence than the privileged incumbent group of (mostly white) taxi drivers. While the direct legal challenge failed, the Court of Appeal stressed that the racial disparities were so stark that it was necessary to subject the policy change to intensive review. This form of legal accountability, based on the intensive judicial scrutiny of public decision-making, could have indirect effects on future policy development.

The second example, *R (Adiatu and another) v H M Treasury*,<sup>19</sup> was concerned with the national implementation of job support measures in response to the economic impact of the Coronavirus pandemic. This implementation arose out of the Coronavirus Job Retention Scheme (CJRS), which provided financial payments to employers in respect of employees who were furloughed as a result of the situation brought about by Covid. The CJRS was restricted to those individuals who received their pay through PAYE ("pay as you earn," a mechanism of income tax collection deducted by the employer). While this might include some intermediate limb (b) workers, many individuals in the limb (b) worker category would be paid on a self-employed basis. This group of non-PAYE limb (b) workers was excluded from the CJRS. While there was also a parallel scheme for self-employed individuals, the qualification thresholds for the self-employed scheme meant that some limb (b) workers would be left without a safety net.

<sup>18</sup> On conflicts between different groups of workers as an object of concern in labour law, see ACL Davies, *Identifying 'Exploitative Compromises': The Role of Labour Law in Resolving Disputes between Workers*, 65 *Current Legal Probs.* 269 (2012).

<sup>19</sup> *Adiatu & Anor, R (On the Application Of) v Her Majesty's Treasury* [2020] EWHC 1554 (Admin).

The IWGB challenged the exclusion of limb (b) workers from the CJRS, and the Government's decision not to raise the level of Statutory Sick Pay (SSP) or remove the lower earnings limit to qualify for SSP. The legal challenge failed. The High Court emphasized the extraordinary political context of the decision-making, which required the rapid implementation of policy in circumstances of emergency. On that basis, the exclusion of some self-employed workers from the CJRS was subject to a wide margin of appreciation and it could not be said to be "manifestly without reasonable foundation." As with the congestion charge case, it is important to consider the effectiveness of the IWGB's intervention beyond the direct outcome in the case itself. This was a high-profile intervention that promoted the political visibility of precarious workers, highlighting the absence of a safety net for workers affected by the pandemic. It exposed issues of insecurity among frontline workers exposed to significant health risks. These issues have been central to the public discourse about post-pandemic economic recovery. Public law litigation can trigger a wider political dialogue even where the case itself has failed on technical legal grounds.

Conventional employment status cases like *Uber* are indeed litigated to achieve wider systemic effects beyond the parties themselves, for example, by developing more inclusive legal tests through legal precedents. However, the IWGB's health and safety judicial review was more radical in challenging the statutory restriction of fundamental health and safety rights to the narrower category of "employee." It prompted important systemic changes by effectively forcing the government to extend statutory coverage. Similar effects could never have been achieved by the IWGB through ordinary political lobbying or through private collective bargaining with individual employers, at least in the time scale necessary given the ongoing risks to the life and health of frontline workers. There were other areas where the extension of employment status to limb (b) workers was warranted under EU law, for example, in the current restriction of collective redundancies protections to employees. However, the government only introduced the legal changes that were strictly necessary to comply with the *IWGB* judgment. The political response was therefore narrowly tailored to the High Court's declaration, which is a timely reminder of the difficulties faced by precarious workers in using political lobbying to secure the most basic changes to the legal framework.

The *IWGB* litigation also provides an interesting perspective on the potential value of intermediate employment

status categories such as limb (b) worker. The introduction of intermediate categories is controversial from the perspective of worker protection, and there have been powerful arguments against intermediate categories as a regulatory response to the gig economy. The function of an intermediate category is to distribute a narrower range of statutory rights to certain workers so that they do not enjoy the full suite of protections enjoyed by employees. It represents a messy political compromise, allowing flexibility to employers and reducing costs while sacrificing some social protections for precarious workers. The existence of multiple categories for different employment rights can create legal uncertainty and so undermine the rule of law. Well-resourced employers may take advantage of this uncertainty by drafting contracts that attempt to reclassify workers so that they enjoy only reduced protections in the intermediate category. Yet if the underlying economic and social vulnerabilities are similar for employees and workers in the intermediate category, the value of equality appears to provide a strong justification for consistency in the distribution of legal rights. In this way, intermediate categories can be criticized as a form of unjustified employment deregulation that subvert the norm of equality in the legal system.

These arguments are powerful, and they certainly count against the introduction of intermediate categories where there is a well-functioning binary divide between employees and the self-employed operating in a suitably inclusive fashion. However, the UK situation reveals how an intermediate category can have positive worker-protective effects over time, even where the initial enactment of an intermediate category might be sub-optimal from a worker-protective perspective. *IWGB* provides a specific example where statutory rights previously reserved to employees were extended to limb (b) workers. A similar extension occurred in the Employment Relations Act 2004 when core freedom of association rights was extended to “workers,” whereas they had been previously restricted to employees. In this way, over time a growing number of statutory rights previously confined to employees have adopted the intermediate category as their allocative platform. In the UK, the intermediate category has evolved through incremental legal changes to become the most important legal dividing line in the labour market. There is no guarantee that intermediate categories will evolve in this worker-protective way. It has occurred in a gradualist and piecemeal way as different statutory rights have been extended to workers in response to specific political or legal circumstances. At the current time,

it is very unlikely that the right not to be unfairly dismissed will be extended to workers. However, the *IWGB* case also demonstrates how unions can use their agency and engage creatively with intermediate categories to promote worker-protective outcomes for their members. Aside from unfair dismissal protections, the most significant statutory rights have now been extended to workers. Furthermore, in political terms, it is more difficult to retract existing protections once they have been extended. So, over time, we would expect to see a kind of ratcheting effect where intermediate categories are introduced into a legal system.

## Conclusion

Ultimately, the success of *IWGB* depended upon the existence of EU law as a “higher” source of law, providing a legal basis for challenging deficient national laws on employment status. The case arose during the implementation period of the European Union (Withdrawal Agreement) Act 2020. This period ended on 31<sup>st</sup> December 2020. Until that time, the court had the power to grant declarations as if the United Kingdom was still a member state. If such a case were to arise today, it would not be possible to get the declaration. Furthermore, the EU Charter cannot be used by domestic courts as a source of interpretive guidance in interpreting “retained law” based on EU measures.

The importance of *IWGB* cannot be overstated. Yet it is both a milestone *and* a gravestone. It represented probably the last time in which EU social law operated as an impetus to worker-protective reform of national law. In the post-Brexit era, the legal footholds for this kind of innovative employment status litigation are regrettably more scarce. The nearest analogy now, though by no means exact, is the use of Article 11 of the European Convention on Human Rights to support a broader reading of the “worker” concept in domestic law for trade union rights. Of course, there is no supremacy of ECHR law as there was for EU law. However, under section 3 of the Human Rights Act 1998, courts have a *Marleasing*-style interpretive duty to “read down” provisions so that, “so far as it is possible to do so,” legislation will be interpreted so that it is compatible with Convention rights. In the *NUPFC* case, this enabled the Court of Appeal to “read down” the relevant statutory definition of “worker” in the Trade Union and Labour Relations (Consolidation) Act 1992. This reading down allowed the Court of Appeal to treat foster carers as included within the scope of certain fundamental trade union

rights despite the absence of a contract for foster carers. This was because a contract was not required for the legal concept of an employment relationship under Article 11.<sup>20</sup> Without the support of this interpretive obligation, the absence of a contract would have been fatal to their worker status under domestic law. In 2023, the Supreme Court will finally consider the worker status of Deliveroo riders by reference to the external legal yardstick of Article 11. While the legal issues are somewhat different to *NUPFC* in *Deliveroo*, being concerned with the legal requirement of “personal work” and the ability of riders to designate “substitutes” to undertake their deliveries, they can certainly be viewed as a further installment in the constitutionalisation of employment status litigation.

In this genre of strategic litigation, the *IWGB* case can be seen as a trailblazer for the public law approach. This view of the *IWGB* case also means that trade unions must be ever vigilant in challenging the dilution of mechanisms of legal accountability through modifications to the checks and balances of the Constitution. At the current time, the Human Rights Act 1998 is vulnerable to repeal and this may lead to extensive changes to the strong interpretive duty of the courts in section 3. An effect of this constitutional dilution may be the disempowerment of vulnerable groups of workers and their ability to use the courts to challenge unjust exclusions from basic statutory protections. The notion of labour law as public law, central to *IWGB*, is analytically useful in exposing this symbiosis between labour law and constitutional and administrative law.

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<sup>20</sup> See *Sindicatul Păstorul Cel Bun v Romania* (2014) 58 EHRR 10

# Covid 19 and Worker Health and Safety:

## The Case of Glove Factory Workers in Malaysia

Noraida Endut<sup>1</sup>

### Introduction

#### Malaysia and the COVID-19 Pandemic

Malaysia is a federation of thirteen states and three designated federal territories (including the capital city, Kuala Lumpur). Eleven states are located in the Peninsular or West Malaysia, and two states are in East Malaysia. Malaysia is a plural society of 32.6 million people, made up of different ethnic and religious groups.<sup>2</sup> The population also consists of about 9.8% non-citizens. In 2020, about 50,000 of Malaysia's population consists of international migrants.<sup>3</sup>

Malaysia is as affected as other countries by the COVID-19 global pandemic. The earliest confirmed COVID-19 cases in Malaysia were announced on the 25<sup>th</sup> of January 2020. The seriousness of the outbreak was later signified by the first imposition of a nationwide movement control order on the 18<sup>th</sup> of March 2020, which was made in pursuance of the Prevention and Control of Infectious Diseases Act 1988 and the Police Act 1967.

This full lockdown, which was first scheduled to end after two weeks, was extended to the 3<sup>rd</sup> of May 2020. Different degrees of movement control orders and border restrictions continued beyond this measure until March 2022. The two weeks initial lockdown required full shelter-in-place, where all social and most economic activities including travel, were suspended. Local and nationwide businesses and industries were closed except for infrastructure (e.g. construction) and provision of services (e.g. supermarkets, wet markets, grocery stores, and con-

venience stores). All public and private education institutions were also shut down. Violation of government lockdown orders was punishable by a fine of up to RM1000 (USD 223) and/ or imprisonment of not more than six months. The police made a total of 24,081 arrests of persons found to breach the orders during the first phase of the MCO (18<sup>th</sup> March – 3<sup>rd</sup> May 2020).<sup>4</sup> The government also conducted more than 5,000 public sanitisation operations (cleansing of public places, business centres, and residential areas by public service authorities) during the same period.

Throughout the two and a half years since the first cases of COVID-19 were confirmed, various case spikes have occurred, triggered by mass religious congregations and activities, by-election event gatherings, and crowded work-related living arrangements. At the end of January 2021, John Hopkins University's record of global cases showed that Malaysia ranked 29<sup>th</sup> among countries with the highest number of infections over a two-week period.

By the end of 2020, Malaysian residents had gone through three other versions of movement control order: Conditional Movement Control Order (CMCO), Recovery Movement Control Order (RMCO), and the Enhanced Movement Control Order (EMCO). By August 2020, Malaysia was under the RMCO (with increased lifts of movement control), but between 9<sup>th</sup> November and 15<sup>th</sup> January 2021, the CMCO (which only was a slight relaxation on the full lockdown) was reinstated due to spikes in COVID-19 cases. The EMCO was imposed on areas where large clusters of COVID-19 cases are detected.

A main contributor to the case spike in November was an outbreak in dormitories of the Top Glove Corporation (hereinafter Top Glove), a glove-manufacturing factory

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<sup>2</sup> Malaysia Department of Information, *Demography of Population*, MY-GOVERNMENT: MALAYSIA INFORMATION (2016), <https://www.malaysia.gov.my/portal/content/30114>.

<sup>3</sup> See Department of Statistics Malaysia (DOSM), *Migration Survey Report*, DEPARTMENT OF STATISTICS MALAYSIA OFFICIAL PORTAL (2020).

<sup>4</sup> Fauzi Suhaimi, *MCO: 401 individuals arrested for violation*, ASTRO AWANI (May 4, 2020), <https://www.astroawani.com/berita-malaysia/mco-401-individuals-arrested-violation-241424>.

in the state of Selangor. Top Glove is the world's largest manufacturer of medical gloves. On 23<sup>rd</sup> November 2020, 1,067 of a record-breaking 1,884 new cases were identified from Top Glove dormitories. By the end of November, more than 4,000 cases were linked to 28 out of 41 Top Glove's factories in the country. Due to the outbreak, the Ministry of Human Resources conducted a raid on the workers' living quarters and found that hundreds of migrant workers were living in metal shipping containers in squalid conditions.<sup>5</sup> News media featured workers' grave accounts of poorly maintained and overcrowded dormitories where the outbreaks occurred. The living and working conditions have been described as "modern slavery," were said to violate "Malaysian law on workers accommodation standards," and "could cause the spread of infectious diseases." The Malaysian authority ordered the factories to shut down for seven days.

### Top Glove Corporation Bhd.

Malaysia is the world's glove capital and it produces three out of every five pairs of rubber gloves worn globally. The highest producer in Malaysia, Top Glove, has an annual production of over 60.5 billion. Other big world players from Malaysia include Hartalega, Kossan, and Supermax.

Top Glove experienced a surge in glove orders as early as April 2020 due to the COVID-19 pandemic. The company commands 26% of the global gloves market. It has 41 factories throughout Peninsular Malaysia and six more in Thailand, Vietnam, and China. It also has marketing offices in USA, Germany, and Brazil. In December 2020, Top Glove won an award from The Edge Billion Ringgit Club (BRC) for the highest returns to shareholders over three years. In receiving the award, company executive chairman, Lim Wee Chai acknowledged the contribution of his dedicated workforce. In 2021, the company was also voted Malaysia's Most Preferred Employer for the manufacturing category in a poll of 23,000 undergraduates from more than 100 public and private universities. Top Glove employs an estimated 21,000 employees in its factories in Malaysia and more than half (13,000 in 2020) are migrant workers who came from Nepal, Bangladesh, Myanmar, and India.

Even before the global health crisis, there had been reports of poor working and living conditions in Top Glove's facto-

<sup>5</sup> *Workers at Malaysian Glove Maker Found Living in Shipping Containers*, REUTERS (Dec. 21, 2020), <https://www.reuters.com/article/health-coronavirus-malaysia-gloves-idUSL1N2J10TY>.

ries in Malaysia. In 2018, the UK newspaper *The Guardian* claimed that Top Glove, one of the National Health Service's (NHS) medical glove suppliers, was non-compliant with international labour law due to its alleged abuse of migrant workers through forced labour, forced overtime, debt bondage and withholding of workers' passports. According to Reuters, workers at the factory put in 90 to 120 hours of overtime per month compared to the legally permitted 104 hours.<sup>6</sup> Workers had also revealed that they took up long overtime hours to repay their excessive recruitment-related loans.

Top Glove faced another labour law violation controversy during the first year of the global COVID-19 pandemic. In May 2020, a Nepali worker, Yubaraj Khadka, took pictures of his co-workers in the factory where he worked to show that social distancing was not enforced in the workplace. He shared the pictures anonymously with several interested parties, but Top Glove discovered his identity through a CCTV recording of workers entering the factory. On 23<sup>rd</sup> September, Khadka was given a termination letter by Top Glove. The United Kingdom's Channel 4 News investigative coverage in June 2020 revealed that living conditions for foreign workers in Top Glove dormitories were appalling and provided a high risk for COVID-19 infections.<sup>7</sup> In an ABC News interview, workers said that the company's dorms housed up to 22 people each. Top Glove argued that each of its dormitories was 52.71 square metres in size and was shared by no more than 12 workers at a time. Furthermore, the workers work in different shifts and thus, it argued, only half of the workers were staying in the dormitories at a particular time.

In the November 2020 COVID-19 outbreak, the government had placed Top Glove dormitories under the Enhanced Movement Control Order (EMCO) for two weeks on 17-30 November after 215 workers tested positive for COVID-19. The EMCO included the government putting up barbed wires around the dormitories. On 12 December 2020, one of the workers from Nepal died due to COVID-19 complications.

<sup>6</sup> Nassim Khadem, *Top Glove, Malaysian Rubber gloves Supplier to Ansell, Accused of Abusing Workers' Rights*, ABC NEWS (Dec. 8, 2018), <https://www.abc.net.au/news/2018-12-08/rubber-gloves-supplier-to-ansell-accused-abusing-worker-rights/10595996>.

<sup>7</sup> Jonathan Miller, *Revealed: Shocking Conditions in PPE Factories Supplying UK*, CHANNEL 4 NEWS (June 16, 2020), <https://www.channel4.com/news/revealed-shocking-conditions-in-ppe-factories-supplying-uk>.

On 15<sup>th</sup> July 2020, the US Customs and Border Protection (CBP) put a Withhold Release Order (WRO) on imports of products manufactured by Top Gloves subsidiaries concerning the debt bondage of its foreign workers and poor housing provided for them. A WRO is a mechanism utilised by US customs authorities to address human rights injustices by imposing detention of goods arriving at US ports from countries or businesses known to commit such injustices, for example, through the use of forced labour.<sup>8</sup> Reports had emerged since the second quarter of 2020 of harmful working conditions, particularly for migrant workers, which were exacerbated by the company's need to meet the high production demand for personal protective equipment (PPE) to face the COVID-19 pandemic. As a response, in October 2020, Top Glove announced that it would compensate migrant workers up to RM20,000 per person to mitigate the impact of the ban. On 13<sup>th</sup> May 2021, the CBP seized and effectively banned Top Gloves' shipment of latex gloves entering a US port, because they had been made using forced labour. This finding was modified on 9 September 2021 after Top Glove took proactive steps to remediate the situation, including by engaging independent consultants and cooperating with labour rights activists<sup>9</sup>.

## Legal Context

### The Malaysian Legal System

The Federal Constitution of Malaysia is the supreme law of the country and any law that is inconsistent with the Constitution is considered void to the extent of the inconsistency.<sup>10</sup> The Constitution contains guarantees of fundamental rights and liberties in its articles 5 to 13. Article 5 provides that no person shall be deprived of his/her life or personal liberty except in accordance with law. Article 6 prohibits slavery and all forms of forced labour. Article 8(1) ensures that all persons are considered equal before the law and are, thus, entitled to the equal protection of the

<sup>8</sup> See, e.g., *What is CBP Withhold Release Order and Why Goods May Be Issued One?*, PCBUSA, <https://www.pcbusa.com/post/what-is-a-cbp-withhold-release-order-and-why-goods-may-be-issued-one>.

<sup>9</sup> A. Ananthalakshmi & Rozanna Latiff, *US Lifts Import Ban on Malaysia's Top Glove over Forced Labour*, REUTERS (Sept. 10, 2021), [https://www.reuters.com/business/malaysias-top-glove-says-cleared-resume-business-with-us-2021-09-10/#:~:text=KUALA%20LUM-PUR%2C%20Sept%2010%20\(Reuters,world's%20largest%20medical%20glove%20maker](https://www.reuters.com/business/malaysias-top-glove-says-cleared-resume-business-with-us-2021-09-10/#:~:text=KUALA%20LUM-PUR%2C%20Sept%2010%20(Reuters,world's%20largest%20medical%20glove%20maker).

<sup>10</sup> Federal Constitution, art. 4 (Malay), <https://www.wipo.int/edocs/lexdocs/laws/en/my/my063en.pdf>.

law. Article 9 prohibits banishment and guarantees freedom of movement for citizens. However, these rights may be overridden by any law relating to the nation's security, public order, public health, or punishment of offenders.

In the Malaysia court system, employee-employer disputes on specific matters are generally heard in the Labour Court, a quasi-judicial structure located in the Department of Labour, Ministry of Human Resources. This is provided in section 69 of the Employment Act 1955, whereby the Director-General of Labour is empowered to inquire into and decide disputes between employee and employer about wages or any cash payments due to the employee. The Industrial Court is another quasi-judicial structure within the Ministry of Human Resources, which hears and decides industrial disputes in accordance with the Industrial Relations Act 1967. Cases include employment dismissal (section 20), trade dispute (section 26), rights to form or join a trade union (section 4) and leave of absence for trade union business (section 6). The Industrial Court is presided over by a President and two other members. The President is appointed by the *Yang Dipertuan Agung* (the King) and the other members by the Minister of Human Resources (section 21).

### Laws Related to Infectious Diseases

In relation to the COVID-19 pandemic, two Acts of Parliament were invoked to establish the movement control order: Prevention and Control of Infectious Diseases Act 1988 (hereinafter Act 342 or the Act)<sup>11</sup> and the Police Act 1967.<sup>12</sup> Section 11 of Act 342 states that:

(1) If the Minister<sup>13</sup> is satisfied that there is an outbreak of an infectious disease in any area in Malaysia, or that any area is threatened with an epidemic of any infectious disease, he may, by order in the Gazette, declare such area to be an infected local area.

(2) The Minister may, by regulations made under this Act, prescribe the measures to be taken to control or prevent the spread of any

<sup>11</sup> Prevention and Control of Infectious Diseases Act 1988, act 342, Aug. 13, 1988 (hereinafter Act 342), [http://www.commonlii.org/my/legis/consol\\_act/pacoida1988458/](http://www.commonlii.org/my/legis/consol_act/pacoida1988458/).

<sup>12</sup> Police Act 1967, act 344 (as amended), [https://ccid.rmp.gov.my/Laws/Police\\_Act\\_1967.pdf](https://ccid.rmp.gov.my/Laws/Police_Act_1967.pdf).

<sup>13</sup> Impliedly, minister in charge of health matters.



Sanitation operations to combat Covid at the Top Glove Factory in Seremban, Malaysia. Photo © tok anas / Shutterstock

infectious disease within or from an infected local area.

Act 342 provides that the minister is vested with the power to appoint an “authorized officer” who is a “Medical Officer of Health” in the medical service of the government or any local authority, or any health officer or any other officer.<sup>14</sup> The Act also allows the authorized officer to be assisted by police, customs and immigration officers and officers from other government departments or agencies.<sup>15</sup>

The Act makes specific reference to “boarding-house” as a premise where infectious disease may significantly cause an outbreak. It provides in section 10 (3) that:

The person in charge of any boarding-house shall, with the least practicable delay, notify the officer in charge of the nearest district health office or government health facility or police station if he knows or has reason to believe that any person in the boarding-house is suffering from or has died of an infectious disease.

Boarding-house in this context includes a hotel, hostel or “any institution of refuge or rest for persons needing

<sup>14</sup> *Supra* note 10, § 2.

<sup>15</sup> *Supra* note 10, § 5.

care.”<sup>16</sup>

Section 12 of the Act prohibits any infected person from acting in a manner that is likely to spread the infectious disease. This prohibition includes refraining from being present in public places or any other place used in common by persons other than the members of his own family or household. A person who is in a space to obtain necessary medical treatment is exempt from this prohibition.

The Act further provides that during the enforcement of any preventative control measures, the authorities may compel affected or relevant persons to treatment or immunisation and to isolation, observation or surveillance. Section 18(1) of the Act also provides that if the authorities have reason to believe that a person with an infectious disease is residing or staying in any premise, or that there is a likelihood of the condition of a premise will lead to an outbreak or spread of an infectious disease, they may do the following:

- (a) examine or cause to be examined any person found on the premises with a view to ascertaining if the person is suffering or has been suffering from an infectious disease;
- (b) examine the premises and any article or animal on the premises with a view to ascertaining if they are contaminated or infected,

<sup>16</sup> *Supra* note 10, § 2.

as the case may be;

(c) order the premises or any part thereof to be disinfected, disinfected and deratted;<sup>17</sup>

(d) order the premises or any part thereof to be closed until the premises have been thoroughly disinfected, disinfected and deratted;

(e) order the disinfection of all contaminated articles and infected or contaminated animals on the premises or, if such article or animal is incapable of being thoroughly disinfected, order its destruction;

(f) do any other act to prevent the outbreak or the spread of any infectious disease.

In relation to section 18, the authorised officer may enter the relevant premise at any time to exercise the power under subsection (1).

Section 22 of Act 342 also lays out the offences related to the breach of the Act. These include obstructing or impeding or assisting in obstructing or impeding the execution of duty of the authorised officer in pursuance of the Act. Punishment for these offences is in the form of imprisonment not exceeding two years or a fine or both. The quantum of the fine is not mentioned in the Act, but a repeat offender may be liable to a fine not exceeding two hundred ringgit for every day during which the offence continues.

Act 342 is supported by several pieces of subsidiary legislation. In relation to the COVID-19 pandemic at least four new Regulations were enacted:

1. Prevention and Control of Infectious Diseases (Measure within Infected Local Areas) (Movement Control) Regulations 2021
2. Prevention and Control of Infectious Diseases (Measure within Infected Local Areas) (Conditional Movement Control) Regulations 2021
3. Prevention and Control of Infectious Diseases (Measure within Infected Local Areas) (Recovery Movement Control) Regulations 2021

4. Prevention and Control of Infectious Diseases (Compounding of Offences) (Amendment) Regulations 2021

In relation to the COVID-19 pandemic, the Police Act 1967 regulates police powers and duties in enforcing relevant laws for the prevention of infectious diseases. This includes their general duties to maintain public order and specific duties to enforce laws related to sanitation and quarantine.<sup>18</sup> Their powers in relation to enforcing the law includes to inspect licences and vehicles,<sup>19</sup> erect road barriers,<sup>20</sup> and to make orders to require persons to remain indoors.<sup>21</sup> In addition, police powers of arrest and seizure are derived from the Penal Code, Criminal Procedure Code, and legislation on specific offences.

### **Laws Related to Employment and Workers' Protection**

Workers in Malaysia are guided and protected by several statutes and bylaws regulating employment and work issues. While the public sector employees are regulated by a large body of public service regulations and circulars, the rights and protection of private sector employees are mainly contained in the Employment Act 1955 and issue-specific legislation relating to diverse employment situations, trades, and industries.

The Employment Act 1955 (Act 265) (EA)<sup>22</sup> is an overarching statute that addresses employment issues. The EA is applicable in West Malaysia only, whereas the States of Sabah and Sarawak in East Malaysia each have its own Labour Ordinance. The EA legislates a comprehensive range of labour issues, including the employment of foreign employees and complaints and enquiries. Several provisions in the EA have recently undergone important amendments that aim to increase the rights and protection for workers in key areas including forced labour and employment of foreign employees. The new amendments came into force on 1<sup>st</sup> September 2022.

Before the amendments, the EA was only applicable to

<sup>18</sup> *Supra* note 11, § 20.

<sup>19</sup> *Supra* note 11, § 25.

<sup>20</sup> *Supra* note 11, § 26.

<sup>21</sup> *Supra* note 11, § 31.

<sup>22</sup> Employment Act 1955, act 265 (as amended), <https://www.mp.gov.my/acts/EA1955.pdf>.

<sup>17</sup> Rendered free from rodents. See § 2 of Act 342.

employees earning below RM2000 (approx. US\$421) per month or employees who are manual workers, supervisors of manual workers, or those who operate mechanically propelled vehicles (section 2 and First Schedule). The new law provides that the Act shall apply to any person who has entered into a contract of service or an employment contract. However, certain protections in the Act are only provided for employees earning RM4000 (approx. US\$842) per month or below. This includes the issues of rest days, overtime payments, termination, and lay-off benefits. The amendment has also reduced the maximum weekly working hours from 48 hours to 45 hours. The EA improves the process for the employment of foreign employees by requiring employers to be free from outstanding matters related to an issue or a breach under the Act. The employers, in addition, must not have been convicted under any written law in relation to anti-trafficking in persons and forced labour.

Other than the EA, the employee-employer relationship is also broadly governed by the Industrial Relation Act 1967 (Act 177) (IRA).<sup>23</sup> The IRA lays down the protection of workers' rights in relation to their employers and trade unions. Section 4(1) provides that employees have a right to form and join a trade union and they must not be interfered with, restrained, or coerced concerning this right. The Act also establishes an Industrial Court to hear and decide on trade disputes and on disputes between employees and employers in relation to a breach of employees' rights to establish or join a trade union.

There are several other statutes addressing different contexts of work and employment in Malaysia. The Top Glove outbreak triggered the government to enforce the law contained in the Employees' Minimum Standard of Housing and Amenities Act 1990 (Act 446).<sup>24</sup> This Act was significantly amended by the Emergency (Employees' Minimum Standards of Housing, Accommodations and Amenities) (Amendment) Ordinance 2021.<sup>25</sup> Key changes made by

<sup>23</sup> Industrial Relation Act 1967, act 177, Aug. 7, 1967 (as amended), <https://www.ilo.org/dyn/natlex/docs/ELECTRON-IC/48066/99440/F-291511780/MYS48066%202015.pdf>.

<sup>24</sup> Employees' Minimum Standard of Housing and Amenities Act 1990, act 446, Aug. 22, 1990, <https://jtksm.mohr.gov.my/sites/default/files/2023-03/2.%20Employees%20Minimum%20Standards%20of%20Housing%2C%20Accommodations%20and%20Amenities%20Act%201990.pdf>.

<sup>25</sup> Emergency (Employees' Minimum Standards of Housing, Accommodations and Amenities) (Amendment) Ordinance 2021, Feb. 26, 2021.

this amendment include extending the application of the Act beyond Peninsular Malaysia to include East Malaysia and expanding the meaning of "accommodation" to include centralised accommodation. This amendment coincides with the enactment of the Employees' Minimum Standard of Housing and Amenities (Employees Required to be Provided with Accommodation) Regulations 2021, which was made in pursuance to section 25(2)(ab) of Act 446, to extend the application of Part IIIA of the Act to foreign employees.

Act 446 requires employers to abide by its provisions in utilising any building as housing or accommodation for their employees (section 5). Section 20 of the Act also establishes a duty on the person in charge of the building to instantly isolate any employee in the building who is suspected of being infected by an infectious disease as defined by the Prevention and Control of Infectious Diseases Act 1988. An employer is also responsible for segregating any employees who are suffering from an infectious disease (section 21).

## International Treaties and Instruments

Malaysia is a member of the International Labour Organisation (ILO) since 1957 and has acceded to 18 of its Conventions. This includes the Forced Labour Convention 1930 (No.29), Rights to Organise and Collective Bargaining Convention 1949 (No. 98), Promotional Framework for Occupational Safety and Health Convention (No. 187), Labour Inspection Convention (No. 81) and Protection of Wages Convention (No.95). In 1990, Malaysia denounced the Abolition of Forced Labour Convention (No. 105). Malaysia has not acceded to the Convention on the International Protection of the Rights of All Migrant Workers and Members of Their Families. This Convention has not been ratified by many migrant-receiving countries.

Malaysia has a dualist approach to international law. This means that accession to an international treaty does not automatically make the treaty enforceable domestically. The treaty must first be adopted, in whole or in part, through the ordinary Parliamentary legislative process. It should be noted that very few laws in Malaysia reflect the adoption of international treaty obligations.

Malaysia supports and has committed to the Global Agenda for Sustainable Development. Although this is not a legal document, many of the targets and indicators of the Sustainable Development Goals (SDGs) require the adop-

tion of legal measures by the United Nations State Parties and can be the standards for addressing human rights issues. The SDGs are the express basis for national development strategies and plans of the Twelfth Malaysia Plan (2021-2025).

## Intervention and Court Case

Top Glove was investigated for 19 cases of failure to comply with the Workers' Minimum Standard of Housing and Amenities Act 1990 (Act 446) in relation to the COVID-19 outbreak in November 2020. However, to date, it has only been charged in court with 10 counts of breach of section 24D(1) of the Act for failure to provide workers' accommodation that was certified with a Certificate of Accommodation by the Labour Department. This is an offence with a punishment of a fine not exceeding RM50,000 (approx. US\$10,535) if found guilty. The charge was made in the Sessions Court in Ipoh, in the state of Perak, in March 2021. No decisions have yet been made in this case.<sup>26</sup>

Much of the intervention taken to improve the situation of detrimental labour practice was made by Top Glove's own initiatives in response to international sanctions and allegations. The initiatives involve engaging with internal and external consultants. In responding to the 2020 UK media allegations of detrimental labour conditions for migrant workers, Top Glove engaged a UK-based independent consultant, Impactt. Impactt specialises in ethical trade practices, human rights, and the improvement of workers' livelihoods to benefit both businesses and workers. Since 28 September 2020, Impactt has set up a helpline to provide workers with a confidential channel so that they may seek clarification on any remediation action that has been taken. By April 2021, the helpline had received 991 calls from workers.

In April 2021, Impactt reported that Top Glove has "eliminated all [11 ILO] indicators of systematic forced labour in its **direct** operations."<sup>27</sup> In the case of abusive working and

<sup>26</sup> Top Glove Charged with Failure to Provide Satisfactory Accommodation for Workers, MALAY MAIL (May 16, 2021), <https://www.malay-mail.com/news/malaysia/2021/03/16/top-glove-charged-with-failure-to-provide-satisfactory-accommodation-for-wo/1958235>.

<sup>27</sup> See, *Top Glove Combined CAP Summary & Q3 Remediation payment verification findings*, IMPACTT LIMITED, Apr. 2021, [https://impacttlimited.com/wp-content/uploads/2021/09/Top-Glove-Verification-Report\\_Q3April2021\\_public\\_v2.1.pdf](https://impacttlimited.com/wp-content/uploads/2021/09/Top-Glove-Verification-Report_Q3April2021_public_v2.1.pdf) [[https://web.archive.org/web/20211203134807/https://impacttlimited.com/wp-content/uploads/2021/09/Top-Glove-Verification-Report\\_Q3April2021\\_public\\_v2.1.pdf](https://web.archive.org/web/20211203134807/https://impacttlimited.com/wp-content/uploads/2021/09/Top-Glove-Verification-Report_Q3April2021_public_v2.1.pdf)].

living conditions, it investigated 90 of Top Glove's accommodation sites and, concluded that the company had fully complied with the requirement of Act 446. Impactt also addressed the issue of workplace accidents in Top Glove's factories and found that the company had demonstrated serious effort to reduce and manage such accidents through medical coverage of workplace accidents, on-the-job training on workplace safety, and effective dialogue and communication between workers and supervisors on workplace safety. On 10<sup>th</sup> September 2021, based on Impactt's report, the US Customs and Border Protection lifted its import ban on Top Glove's disposable gloves.

Top Glove also reportedly cooperated with UK-based migrant worker rights specialist/activist, Andy Hall, who was willing to support the company's efforts to improve work conditions of migrant workers. Andy Hall was described as a "critical friend."<sup>28</sup>

## Analysis

Despite Impactt's positive report about Top Glove's improvement in the treatment of migrant workers, a study funded by the Modern Slavery and Human Rights Policy and Evidence Centre has concluded that there continues to be evidence of forced labour in the Malaysian medical gloves supply chain, in which Top Glove is a major player. This evidence includes, in connection with working and living conditions, workers' responses that accommodation tended to be congested, lacking privacy, lacking in toilets, and overheated.

While there is a solid legal basis for bringing charges and cases against large companies like Top Glove for violations of workers and labour rights during the pandemic, the Malaysian authorities have been less than rigorous in their enforcement. The number of charges brought against Top Glove in court to date does not reflect the actual extent of violations that occurred in the November 2020 COVID-19 case spike. A total of 28 Top Glove factories in different states in Malaysia experienced COVID-19

[lic\\_v2.1.pdf](#)].

<sup>28</sup> It should be noted that in the past, Andy Hall's relationship with Top Glove has not been amicable. In relation to pre-COVID-19 forced labour allegations, Top Glove Executive Chairman had alleged that Hall intended to "sabotage" the company. See Ahmad Naqib Idris, *Top Glove Chairman Alleges Activist 'Sabotage' Amid Forced Labour Claims*, THE EDGE MALAYSIA (Aug. 5, 2020), [www.theedgemarkets.com/article/top-glove-chairman-alleges-activist-sabotage-amid-forced-labour-claims](http://www.theedgemarkets.com/article/top-glove-chairman-alleges-activist-sabotage-amid-forced-labour-claims).

outbreaks, which involved a much higher number of accommodation buildings. 19 accommodation site investigations were conducted in relation to one COVID-19 Top Glove cluster in Kelang, Selangor. However, only 10 charges under section 24D of Act 446 have been brought to court so far. Other charges have not been made since March 2021.

The lack of charges may be attributable to Top Glove's positive and timely efforts to remediate the labour rights violations. However, actual violations should not go unmet, to ensure justice and fairness to workers who suffered the violations.

The 2021 amendments of Act 446 provide favourable opportunities for Malaysia to improve on and promote good labour practices in the country. This would be in line with Malaysia's engagement with the ILO in the promotion of decent work for sustainable development framework, which is also consistent with Malaysia's aspiration to achieve the SDGs and the Twelfth Malaysia Plan (12MP). The Malaysia Plan is the country's five-yearly development plan, introduced in 1965, that comprehensively outlines the government's development agenda, policies, and strategies. The 12MP, which spans the years 2021 to 2025, noted that one of the main challenges to labour market efficiency achievement in Malaysia is the low awareness among employers and employees of current legal rights and protections.<sup>29</sup> In addition, the absence of an effective mechanism to manage low-skilled foreign workers has led to an increased number of illegal immigrants. The COVID-19 pandemic is seen as having crucially altered Malaysia's labour market landscape.

A Priority Area in the 12MP identified as a way forward is to realign the labour market for inclusive and sustainable growth. This realignment includes "promoting equitable compensation of employees and labour participation" (Strategy A1) through ensuring that employers in all economic sectors protect the welfare of their workers, as well as ensuring that the labour market complies with relevant international obligations. Strategy A1 also highlights the importance of enhancing the enforcement of Act 446 to improve workers' rights and prevent forced labour and trafficking in persons<sup>30</sup>.

<sup>29</sup> See Economic Planning Unit, Malaysian Ministry of Economy, TWELFTH MALAYSIA PLAN 2021-2025: A PROSPEROUS, INCLUSIVE, SUSTAINABLE MALAYSIA 10 (2021), <https://rmke12.epu.gov.my/en>.

<sup>30</sup> *Id.* at 10-17.

## Conclusion

A situation of global health pandemic, such as COVID-19, brings about risks and threats to the health and safety of everyone, including people in the work setting. Towards the top of this risk pole are low-skilled migrant workers working in conditions where labour rights and protections are scant or unenforced.

In the case of Malaysia, while Top Glove has shown efforts to improve its poor labour situation through engagement with different stakeholders, improvement across the board of the glove manufacturing industry in Malaysia needs to be more carefully evaluated and monitored. Top Glove's efforts are mostly triggered by international sanctions and critiques and the need to remain a major global player. The government's interventions for workers suffering in the wake of COVID-19 have also been significantly influenced by the external or international conditions put on the country's trade relations and by media exposure. The series of regulations introduced in 2021 in relation to Act 342 is clear evidence of these influences.

The COVID-19 experience demonstrates the government's intolerance of whistleblowers and that it will not hesitate to mete out harsh consequences to them. This posture by the government threatens workers who wish to enforce their rights to decent working conditions. However, international media coverage may serve to temper these risks by demanding that employers and the government be more accountable. There is perhaps room for workers' champions, such as workers' unions and human rights organisations, to bridge the gap between workers, employers, and the government. Malaysia's recent political change—the election in November 2022 of the heretofore opposition party—may provide opportune space and time for workers' rights advocates to negotiate better conditions for migrant workers.

Malaysia is committed to achieving the UN Sustainable Development Goals and has clearly incorporated them into its national development plan. The commitment must include the provision of decent work to all regardless of their citizenship status. This commitment should be demonstrated, *inter alia*, through more rigorous enforcement of labour rights and standards and through upholding principles of human rights and social justice.

# Victory is Not Enough:

## Fighting for Meaningful Access to Wage Support for South Africa's Domestic Workers During the Covid-19 Pandemic

Amy Tekie and Maggie Mthombeni<sup>1</sup>

### Introduction

*"As domestic workers, we are present in [government] documents, but no one speaks for us. Now we will speak out for ourselves. We won't be invisible anymore."*

- Florence Sekolane, Domestic Worker,  
Johannesburg, South Africa

The Covid-19 pandemic and resultant lockdown in South Africa had a devastating effect on the lives of domestic workers and their families. Just before the pandemic, there were over one million domestic workers in South Africa. 95% of these were women, and the vast majority are previously disadvantaged under the colonial and Apartheid regimes.<sup>2</sup> With many being summarily dismissed or put on unpaid leave, hundreds of thousands of families faced hunger and evictions. Already working for wages below the poverty line, most did not have savings to fall back on. Mothers did not have money to feed their children, and families were being evicted from their homes.

This situation was not particular to South Africa. The ILO noted that domestic workers globally were among the hardest hit by the COVID crisis, losing more jobs and working hours than other sectors. According to the ILO's Director General during the time of the pandemic, "The crisis has highlighted the urgent need to formalize domestic work [...] starting with the extension and implementation of labour and social security laws to all domestic workers."<sup>3</sup>

<sup>1</sup> Co-founders, Izwi Domestic Workers Alliance.

<sup>2</sup> Statistics South Africa, *Quarterly Labour Force Survey: Quarter 1: 2020*, STATISTICAL RELEASE (June 23, 2020), <https://www.statssa.gov.za/publications/P0211/P02111stQuarter2020.pdf>.

<sup>3</sup> *10 Years on, Domestic Workers Still Fight for Equality and Decent Work*, INTERNATIONAL LABOUR ORGANISATION: NEWS (June 15, 2021), [https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS\\_802516/lang--en/index.htm](https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_802516/lang--en/index.htm).

Despite their official status as workers, and inclusion under basic labour regulations in South Africa, domestic workers continue to fall through the cracks of social protection. After years of struggle, domestic workers have won the rights to most basic workplace protections, but the Department of Employment and Labour (DoEL) has neglected to effectively tackle enforcement in this sector. As a result, most domestic workers were unable to benefit from interventions to support unpaid workers during the pandemic.

In April 2020, several associations of vulnerable workers in South Africa launched an urgent court case to challenge the DoEL on the de facto exclusion of mass numbers of vulnerable workers, including domestic workers, from Covid-19 wage support payments. Their ultimate success has become an important building block in creating a safety net of social protections for domestic workers. It has also shed light on why too often legal victories do not translate into meaningful change for workers.

### Legal Context

#### Understanding Labour Rights and Domestic Work in South Africa

South Africa's labour movement has a long and storied history, having played a critical role in the overthrow of the Apartheid regime. The post-Apartheid government put in place a strong policy and regulatory foundation of worker protections. Furthermore, the national Constitution is known for its progressive and inclusive stance on rights, which are frequently enforced in strategic litigation at the Constitutional Court. This framework of legal protections and recognition of rights is the foundation from which workers and allies can advocate for meaningful access to justice.

The legislation currently regulating domestic work in South Africa includes:

<b>The Constitution of South Africa</b>	Enshrines the rights of domestic workers to the protection of the law, including non-discrimination, freedom from slavery, freedom of association and right to unionise, fair labour practices, and the right to access justice institutions
<b>Basic Conditions of Employment Act (BCEA)</b>	Sets the basic standards for employment concerning working hours, leave, pay, dismissal and related terms.
<b>Sectoral Determination 7 (Domestic Work)</b>	Builds on the BCEA and sets out the minimum standards of employment for domestic workers to improve their working conditions, including regulation of conditions specific to domestic work.
<b>Labour Relations Act (LRA)</b>	Details the rights to join a trade union, sets out dispute resolution mechanisms and provides for the Commission for Conciliation, Mediation and Arbitration (CCMA) to mediate workplace disputes.
<b>Employment Equity Act (EEA)</b>	Promotes equal opportunities and fair treatment in the workplace and aims to eliminate unfair discrimination.
<b>Occupational Health and Safety Act (OHSA)</b>	Promotes health and safety at work and requires every employer to provide and keep a working environment that is safe and does not put the employee's health at risk
<b>Unemployment Insurance Act (UIA)</b>	Governs the Unemployment Insurance Fund (UIF) which gives short-term relief to employees when they become unemployed, or when they are unable to work due to illness, maternity leave, or adoption leave.
<b>Compensation for Occupational Injuries and Diseases Act (COIDA)</b>	Provides for compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment, or for death resulting from such injuries or diseases.
<b>National Minimum Wage Act (NMWA)</b>	Sets the national minimum wage to improve the wages of lowest paid workers, protect workers from unreasonably low wages, preserve the value of the national minimum wage, promote collective bargaining, and support economic policy.

After the fall of apartheid, when the new government took power in 1994, domestic work was recognised as a formal occupation and its workers were covered in the legislation governing workplace relations, such as the LRA, BCEA, and EEA. In comparison to much of the world, South Africa's legal protections for domestic workers are advanced. Domestic workers have the right to limited working hours, overtime pay, a minimum wage, decent working conditions, paid annual leave, sick leave, and other basic workplace rights. In 2013, South Africa was also a relatively early adopter of the 2011 ILO Convention 189, which sets a standard for working conditions of domestic workers.

Despite the provision of formal workplace rights, only after decades of extended advocacy were domestic workers granted the right to social protection. Domestic workers were initially excluded from the Unemployment Insurance Fund (UIF), until 2003 when members of the South

<sup>4</sup> Adapted from Izwi Domestic Workers Alliance & Socio-Economic Rights Institute of South Africa, EMPLOYING A DOMESTIC WORKER: A LEGAL AND PRACTICAL GUIDE (2021), <https://files.elfsightcdn.com/6477d0ba-6d4c-4f7c-85f9-91d6aa2e4932/b76b4503-bdab-4b6a-b3bb-4a7b0c36aa04.pdf>.

African Domestic Workers Union chained themselves to the gates of parliament to fight for inclusion, which was ultimately granted. Initially, the Department of Labour ran campaigns and set up local drives to conduct UIF registration for domestic workers throughout the country. Over time, however, employers of domestic workers were not held accountable for formalising the employment relationships, and most domestic workers in South Africa remain unregistered for UIF. Reports from academia, workers organisations, and the ILO estimate that only 20-30% of domestic workers in South Africa are currently UIF registered. For years, domestic workers' unions have called for the Department to strengthen its enforcement mechanisms in the sector by deploying more inspectors and giving them the right to carry out unannounced inspections in domestic settings but to no avail.

Over a decade later, in 2019, a landmark court victory took another step forward in recognising the right of domestic workers to workplace social protections. Domestic workers were one of the only class of workers explicitly excluded from the Compensation for Occupational Injuries and Diseases Act (COIDA, 1993), leaving workers who were

injured on the job or made sick from working conditions unable to claim any support or compensation. Sylvia Bonggi Mahlangu, the daughter of domestic worker Maria Mahlangu, sued the government's labour office when she was denied benefits under COIDA after her mother drowned at work. After years of hearings and appeals in the lower courts, the Constitutional Court ruled that the exclusion of domestic workers from COIDA was unconstitutional.

Sections 27(1)(c) and (2) of the Constitution protect everyone's right to access social security, and require that the State take reasonable measures to realise this right. The Court ruled that not only must domestic workers be registered for the Compensation Fund, but the Fund must provide compensation retroactively, for domestic workers with claims going back as far as 1994.

Domestic workers – despite the advent of our constitutional dispensation – remain severely exploited, undermined, and devalued as a result of their lived experiences at the intersecting axes of discrimination. Yet, these Black women are survivors of a system that contains remnants of our colonial and apartheid past. These Black women are brave, creative, strong, and smart. They are committed mothers and caretakers and have the ability to perform work in conditions that are challenging both psychologically and physically. These Black women are not “invisible” or “powerless”. On the contrary, they have a voice, and we are listening. These Black women are at the heart of our society. Ensuring that they are afforded basic rights, and an avenue to vindicate these rights, is central to our transformative constitutional project.

This powerful judgement serves as an important precedent for subsequent advocacy efforts. That same year, the National Minimum Wage Act (2019) assigned domestic workers and farm workers a lower minimum wage - only 75% and 90% respectively of the basic wage earned by all other workers in the country. The One Wage Campaign, a coalition of domestic and farm worker organisations, partnered with Lawyers for Human Rights and the Solidarity Centre, to issue submissions arguing the economic and human rights cases for wage parity. The full minimum wage was ultimately granted to farmworkers in 2021, and domestic workers in 2022.

Although these hard-won rights to labour protections and social security have created a more formal environment for domestic work than is seen in other countries in the region (and much of the world), too often these rights are not reflected in the actual experiences of workers. The lack of

compliance on UIF registration noted above is accompanied by lack of formal contracts, and failure on the part of employers to meet legal criteria for fair pay, working hours, termination processes, and non-discriminatory treatment. Unemployment in South Africa is currently at 33%. An oversupply of job seekers renders employed workers vulnerable to dismissal should they not meet their employers' demands, and both employers and workers are often unaware of the legal guidelines mandating the relationship. In the 2.5 years since the COIDA judgement, only seven COIDA claims have been made by domestic workers. Although the law now requires domestic employers to register their workers for COIDA, as of June 2022, only 1677 domestic workers have been registered since the judgement. This is a shocking 0.2% of workers in the industry.

Nevertheless, when the domestic work sector was devastated by the country's economic shutdown in response to Covid-19, these legal victories provided a foundation on which domestic workers and legal rights organisations could fight for fair inclusion of domestic workers in the government's Covid-19 support fund for workers.

## Protecting Workers During the Covid-19 Economic Collapse

Domestic workers in South Africa were hit hard in the 2020 economic fallout of the Covid-19 pandemic. On 28 March 2020, a lockdown was introduced which shut down much of the economy. Domestic work was not considered an essential service, and while many “live-in” workers (who resided at their employers' premises) continued to work, most domestic workers were temporarily forced to stay home. Some employers continued to pay wages over this period, but many did not. By the second quarter of 2020, 259,000 domestic workers (about 25% of the sector) were reported to have lost their jobs. Many workers were forced to choose between their jobs and their families, as employers refused to let them leave the workplace, take food to their kids, or see their spouses for months on end. Workers were dependent on support from family, friends, churches, and food distribution services, and were fighting eviction from their homes. Surviving at the best of times on wages that do not allow for a savings cushion, many domestic workers became destitute just weeks into the lockdown period.

A survey conducted in April 2020 found that only 38% of over 600 respondents were being paid their full wages during the lockdown pe-

riod. Comments from respondents included: For companies that were unable to do business during the lockdown, the government sanctioned a “no-work, no-pay” policy, with the understanding that workers could be compensated through the Temporary Employer/Employee Relief Scheme (TERS). TERS was created to provide partial or full salary payments to workers whose employers were not able to operate during lockdown conditions. The exact payout amount was calculated on a sliding scale of 38-60% of the salary; the minimum payout was equal to the minimum wage. This benefit was made possible by the healthy financial surplus of the Unemployment Insurance Fund, and it was only available to employers and workers who were registered with the UIF. The UIF platform was used to operationalise the TERS claim and payment system. R64 billion (equivalent to \$3.96 billion at the time) was paid in TERS payments to 5.7 million workers.<sup>5</sup>

These results deserve recognition for providing meaningful relief to those workers who received payments. Unfortunately, as noted above, most domestic employers have never registered their domestic worker(s) for UIF. As a result, most of the hundreds of thousands of domestic workers put on unpaid leave were not able to access any TERS relief, and retrenched workers were not able to claim unemployment insurance. According to the DoEL, as of October 27, 2020, TERS payments were made to 60,275 domestic workers, a mere 7% of those employed in the sector.<sup>6</sup>

Even for those workers who had been registered for UIF, many eligible employers simply did not bother to make TERS claims on their behalf or were stymied by administrative issues with the claims process. In some cases, employers claimed the TERS wage subsidies but kept the money for themselves. Claims for migrant workers were also more administratively difficult and took substantially longer to be paid out, with some never paid at all.

These issues of fraud, failure to register employees for UIF, and failure to claim TERS funds on behalf of employees were not limited to the domestic work sector. Also impacted were casual workers, those employed through la-

<sup>5</sup>Thulas Nxesi, *Two Year Anniversary of the UIF's Covid-19 TERS Fund*, SOUTH AFRICAN GOVERNMENT: BLOG (Apr. 13, 2022), <https://www.gov.za/blog/two-year-anniversary-uif%E2%80%99s-covid-19-TERS>.

<sup>6</sup>*Unemployment Insurance Fund Exceeds R51 billion in Covid-19 TERS Payments*, DEPARTMENT OF EMPLOYMENT AND LABOUR, SOUTH AFRICA (Oct. 27, 2020), <https://www.labour.gov.za/unemployment-insurance-fund-exceeds-r51-billion-in-covid-19-TERS-payments>.

bour brokers, farmworkers, and employees of other businesses, which were not compliant with labour regulations.

## Intervention & Court Case

### CWAO & Others vs. the Department of Employment and Labour

As unpaid workers struggled to meet their basic needs, labour rights organisations sprung into action. On April 1, 2020, Casual Workers Advice Office, a non-profit that provides advice and support to casual, contract, labour broker, and other workers in South Africa, sent a letter to the Department of Employment and Labour (DoEL) urging that the TERS Scheme apply to all employers, irrespective of whether they have complied with their obligation to register with the UIF and that TERS claims be mandatory for all employers whose workers had been put on temporary leave without pay. Their demand to the Department noted that:

[T]he C19 TERS Regulations, in their current form, defeat the purpose for which they were made: namely to ensure that employees, whose employers cannot themselves afford to pay wages during lockdown, obtain at least part of their wages for up to three months during the disaster caused by the COVID-19 pandemic. The [current] Regulations make the employees' ability to achieve this entirely dependent on the goodwill of their employers. Employees are left without relief or remedy if their employer does not take this action.

With a non-committal response from the Department, CWAO engaged Kropman Attorneys to escalate the issues in urgent correspondence with the legal representative of the DoEL over the month of April 2020, demanding that the Department meet the following demands:

1. TERS claims should be mandatory, not optional, for employers who have put workers on unpaid leave.
2. Employees must be able to claim directly, rather than having to rely on employers to claim on their behalf.
3. Workers whose employers failed to register them for UIF should be eligible for TERS



A bus stop during lockdown in South Africa. Photo © Chadolfski / Shutterstock

claims.

In response to the threats of court action, the Minister amended the original Directive on April 16 to provide that employers must apply on behalf of workers put on unpaid leave. However, it did not introduce an enforcement mechanism. Then, in another amendment signed on April 30, the government allowed workers to make claims on their own behalf if the employer had failed to do so. These were important victories.

However, the Department did not acquiesce on the issue of allowing workers who were not registered for UIF to access TERS support, stating in correspondence:

If all employers are able to apply for the benefit, there is a very real risk of fraud because the veracity of an employer's application for benefits on behalf of its employees depends on the UIF's ability to confirm in its records who is in the employers employ and what they are being paid. Furthermore, already non-compliant employers may also not disburse the benefits to their employees which would result in wasted funds that could have provided crucial relief to other vulnerable workers.

The civil society applicants were not appeased. Two workers' rights organisations, Women on Farms and Izwi Domestic Workers Alliance (authors of this article) were

brought on as additional applicants to court, and a Notice of Motion was lodged with the Labour Court on May 13, 2022, giving the Department until May 28 to respond.

The case made by the applicants turned on the same lines of the Constitution's Section 27 as the Mahlangu Judgment discussed above. Section 27 of the Constitution grants *everyone* the right to social protections<sup>7</sup>:

27 (1) Everyone has the right to have access to—

(a) health care services, including reproductive health care;

(b) sufficient food and water; and

(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

<sup>7</sup>S. AFR. CONST., § 27(1)-(2), 1996, <https://www.gov.za/documents/constitution/chapter-2-bill-rights#27>.

This echoes Articles 22 and 25 of the Universal Declaration of Human Rights, which read:

Everyone, as a member of society, has the right to social security...

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family [...] and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.<sup>8</sup>

In the 2004 Constitutional Court case *Khosa and Others vs Minister of Social Development and Others*,<sup>9</sup> the definition of "everyone" was put to the test in the context of access to social protections for non-citizens. The Court determined that

"[t]he constitutional reference to 'everyone' implies that all in need must have access to the social welfare scheme that the state has put in place. Where some who are in need are excluded, everyone does not have access to the scheme."

In the case of TERS, ringfencing this particular social protection to include only UIF-registered workers may be a practical solution, argued the applicants in the Notice of Motion, but it irrationally limits the reach of the Scheme and breaches the Constitution's provision of this right to "everyone," as far as is reasonably possible.

In the meantime, CWAO, Women on Farms, and Izwi were by no means the only worker organisations engaged in advocacy to improve access to TERS for excluded workers. The state was also receiving pressure from the labour federations and other civil society voices to address barriers to TERS access for workers in various sectors and to address widespread employer fraud. One result of this was the DoEL creation of an online, publicly accessible

<sup>8</sup> Universal Declaration of Human Rights, arts. 22, 25(1), (Dec. 10, 1948); G.A. Res. 2200A (XXI), <https://www.un.org/en/about-us/universal-declaration-of-human-rights>.

<sup>9</sup> *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* (CCT 13/03, CCT 12/03) [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) (4 March 2004), <http://www.saflii.org/za/cases/ZACC/2004/11.html>.

database listing in which employers had submitted TERS claims, complemented by the creation of a hotline for reporting information on employer fraud. According to DoEL, over R900 million in fraudulent claims was returned to the Fund as a result of these efforts.<sup>10</sup> However, many labour rights organisations found the hotline and database to be ineffective, out of date, and/or unavailable.

In the domestic work sector, the Socio-Economic Rights Institute of South Africa (SERI-SA) sent a letter to the DoEL, on behalf of the South African Domestic Services and Allied Workers Union (SADSAWU) and endorsed by the United Domestic Workers of South Africa (UDOWSA) and Izwi Domestic Workers Alliance, which argued for unregistered domestic workers to have access to TERS payments. Their legal argument took a different angle than that of the CWAO case, using the Unemployment Insurance Act itself, rather than Constitution Section 27, to resolve the issue:<sup>11</sup>

- In instances where an employer fails to register their worker, Section 45 of the UI Act provides, "The Commissioner may deem a person to be a contributor for purposes of this Act if it appears that the person should have received benefits in terms of this Act but, because of circumstances beyond the control of that person, is not entitled to benefits." If domestic workers are deemed to be contributors, they would be entitled to benefit under the C19 TERS.
- Section 69 of the UI Act provides, "The Minister may, after receipt of an application in a prescribed form and with the concurrence of the Unemployment Fund Board, by notice in the Gazette, declare that as from a date specified in the notice any specified class of persons, or any person employed in any specified business or section of a business or in any specified area, must be regarded as contributors for purposes of this Act."

<sup>10</sup> Thulas Nxesi, *supra* note 10.

<sup>11</sup> *Legal Remedies from the Unemployment Insurance Act Available to Unregistered Domestic Workers during Lockdown*, SERI SOCIO-ECONOMIC RIGHTS INSTITUTE OF SOUTH AFRICA: NEWS (May 18, 2020), <https://www.seri-sa.org/index.php/more-news/1020-advocacy-legal-remedies-from-the-unemployment-insurance-act-available-to-unregistered-domestic-workers-during-lockdown-18-may-2020>.

In the case of CWAO and partners, correspondence continued, with the DoEL asking for more time to resolve the issue before court proceedings were launched. CWAO and co-applicants refused the additional time, with an urgent Labour Court application set down for hearing on May 28, 2020.

Referencing the TERS case, a CWAO representative noted, "I would advise other organisations that are looking to challenge state regulations during this time, especially blatantly irrational and unconstitutional regulations, to be wary of being drawn into endless engagements with government departments and their lawyers – which is their tactic."<sup>12</sup>

Finally, on the 25th of May, the Department sent through a signed Amendment, which was gazetted the following day, meeting the applicants' final demand. Making use of section 45 of the Unemployment Insurance Act, the amendment reads:

*Clause 1 is amended by the addition of the following definition after sub-clause 1.1.9:*

*"Worker" means -  
(a) a contributor; or*

*(b) **an employee as defined in the UI Act who should have received benefits under this Directive but for circumstances beyond that employee's control, namely that the employer failed to-***

*(i) register as an employer in contravention of section 10(1) of the Unemployment Insurance Contributions Act, 2002 (Act No. 4 of 2002);*

*(ii) provide details relating to the employees in contravention of section 10(3) of that Act and accordingly not registered as contributors; or*

*(iii) pay the contributions con-*

<sup>12</sup> Nelly Nyagh, *UIF Covid-19 Relief Fund: Using the Law to Get Wins for Workers*, LRS LABOUR RESEARCH SERVICE: BLOG (2020), <https://www.lrs.org.za/2020/06/12/uif-covid-19-relief-fund-using-the-law-to-get-wins-for-workers/>.

templated in section 5(1) of that Act in respect of that employee.<sup>13</sup>

Within two months, therefore, all three demands on behalf of workers had now been met by the DoEL, and vulnerable workers not registered for UIF or employed by compliant bosses had been given an avenue to access the critical TERS wage support.

## Victory in Practice

The celebratory press release from the applicants noted that:

This victory will be vital in securing the livelihoods of workers who have been most severely impacted by the economic consequences of the lockdown. But the latest amendment to the C19 TERS Directive comes after an unnecessarily slow and protracted process. [...]

The government's piecemeal approach to dealing with these two straightforward issues has resulted in distress and hunger for millions of workers over the last two months. As of today, there is still no clear information on how workers can apply. [...] This needs to be addressed urgently to accommodate the large number of additional workers who now qualify as a result of the most recent amendment. CWAO, Women on Farms Project, and Izwi warn that should the Department fail to immediately open up a viable channel for individual applications, many vulnerable workers will continue to face extreme poverty.

As warned, the victory eventually rang hollow. In subsequent weeks there was no visible publicity on the amended regulation, or information made available on the application process for unregistered workers.

Several months after the amendment, a group of worker organisations attempted to test the system through multiple queries to the TERS call centre. In 95% of those

<sup>13</sup> Amended Covid -19 Temporary Employee / Employer Relief Scheme Benefit (C19 TERS), Direction 2020, Gov't Gazette No. R. 595 (May 26, 2020), [https://www.gov.za/sites/default/files/gcis\\_document/202005/43353rg11123gon595.pdf](https://www.gov.za/sites/default/files/gcis_document/202005/43353rg11123gon595.pdf).

interactions, they were told, incorrectly, that only UIF registered workers were eligible to claim TERS. The one or two call centre assistants that affirmed the eligibility of unregistered workers said that the claim must be submitted by the employer, which directly contradicted the DoEL regulations and commitments.

The challenges in submitting claims were particularly relevant for domestic workers and farmworkers, who often work in informal conditions on sub-minimum wages, without UIF registration or even written contracts. Izwi and Support Centre for Land Change (SCLC), represented by Kropman Attorneys, began a series of legal communications with the DoEL, threatening court action if their commitment to unregistered workers was not operationalised. Despite the DoEL's repeated assurances that the online TERS application process would be adjusted to accommodate unregistered workers, no change was forthcoming.

Finally, in October 2020 after 5 months of legal correspondence and unkept promises, the Department opened the process for unregistered workers to apply online. According to the instructions provided by the DoEL (see Annex 2), to apply for TERS, unregistered workers would need to:

1. Create a profile on the Ufiling website.
2. Fill out an online form to make a claim for each month they were eligible for TERS between April 2020 and August 2020 (the Department promised to eventually open the process for September and October 2020).
3. Submit a form signed by their employer for each claim.

The Department stated that they would not yet begin processing those claims, but would collect them for processing.

From the beginning certain challenges were obvious:

- There were still no efforts to advertise the eligibility of unregistered workers, so those not affiliated with a worker organisation or union would not even know to apply.
- Many domestic workers could not submit

online forms due to data access, device limitations, and unfamiliarity with online application systems.

- Even employers with UIF registered workers were struggling with technological and bureaucratic blockages in the online UIF processes
- Some employers were not willing to sign forms, as it would incriminate them as non-compliant with UIF regulations
- Many domestic workers are migrants, as well as some employers, and the online claim form required a South African ID number for both.

These barriers dominated the claims process. The domestic worker rights organisations and unions were predominantly unsuccessful in submitting claims on behalf of their eligible members. Furthermore, workers were hesitant to come forward. Because of the DoEL delays in operationalising the process, this recruitment was happening six months after the hard lockdown. The initial outcry and frustration of workers at being excluded from TERS had died down (though the economic impacts continued), and mentally many workers had moved on from that period. Workers were intimidated by the registration process, including the requirement for their employers to sign the claim forms. As a result, very few TERS claims were successfully submitted to the DoEL by unregistered workers.

## Analysis

Reflecting on this case, two key threads emerge: 1) the potential for successive legal victories to normalise the inclusion of domestic work in labour rights and social protection policies, and 2) the critical challenge of bridging hard-won legal rights with the actual realisation of those rights by workers.

Workers from all industries had a variety of problems accessing TERS payments, especially migrants. But the marginalisation of domestic workers in this process was extreme. The exclusion of most domestic workers from this Covid-19 wage relief was most likely not intentional; rather it was symptomatic of the broader systemic issues that marginalise the sector generally. These include the:

1. Unique conditions of domestic work, including the isolation of workers, residential workplace, history of informality, and a nearly 1:1 worker-employer ratio. As a result, many general labour regulations are not suitable for the sector, and if bespoke regulations are not advocated for, these workers are excluded by default.
2. Lack of regulatory compliance in the domestic sector (resulting in the widespread UIF exclusion). This is fuelled by the failure of DoEL to enforce the regulation, and by the societal treatment of domestic work as informal and unregulated, despite its inclusion in the labour law.
3. Lack of strong presence of domestic workers in the organised labour movement. The domestic work sector is notoriously difficult to organise. The network of organisations in South Africa mobilising domestic workers and advocating for their rights is small; less than 5% of domestic workers in South Africa are part of a union or worker rights organisation. In South Africa, as in most countries, there is no bargaining council for the sector. As such, domestic workers have limited representation on National Economic Development and Labour Council (Nedlac) forums. This lack of representation meant that their interests were not adequately advocated for in consultations with labour when TERS policies were made. The same can be said for the negotiations on the initial National Minimum Wage, as well as other labour policies.

Despite these challenges, tremendous progress has been made over decades to improve the potential access to social protections for domestic workers. Setting powerful legal precedents, South Africa's Constitution, case law, and labour law have upheld the status of domestic workers as equal to other workers and deserving of unemployment insurance, worker's compensation, national minimum wage parity, and finally, wage support during the economic fallout of the Covid-19 pandemic.

Unfortunately, winning rights under the law is often the easier part of accessing justice for workers. A recent ILO report found that while most countries in Southern Africa

and the Indian Ocean region do have basic labour regulations in place to protect domestic workers, "workers in the region do not have meaningful access to these rights due to high levels of informality and vulnerability, and low levels of awareness and enforcement."<sup>14</sup> Of the 11 countries in the region, which offer social protections to domestic workers, half of these have less than 5% registration of domestic workers in one or more social protection schemes, and all have less than 30%.<sup>15</sup>

In 2022, South Africa's domestic worker unions and associations jointly conducted workshops and discussions with the Department to discuss the lack of compliance with social protections in the sector, and what can be done to shift the status quo. When domestic employers are held accountable for basic requirements, such as written contracts, payslips, and UIF/COIDA registration, the tone of the employment relationship changes from servanthood to service provider, and the employer is implicitly aware that they are liable to the Department of Employment and Labour for their actions.

## Conclusion

South Africa's TERS case, as well as the cases of UIF and COIDA, should be a cautionary tale. Meaningful legal advocacy requires effort and resources that must continue well beyond court victories. Partners must include not only legal rights firms and the labour movement, but also other key players, such as civil society actors, the media, and employers. The state must engage, and be engaged, in raising awareness of its own laws and ensuring active enforcement.

Let us hope that the suffering and destitution experienced by so many workers in 2020 can still serve as a lesson learned, driving a substantial increase in the UIF registration of domestic workers. This lesson could be the basis for a long-term shift to formalise the sector in practice, ultimately improving working conditions to reflect the rights which were long ago written into law.

<sup>14</sup> International Labour Organisation & Southern African Migration Project, *MIGRANT DOMESTIC WORKERS IN THE SADC REGION: INTERSECTING DECENT WORK WITH SAFE, ORDERLY, AND REGULAR MIGRATION* 75 (2022), <https://www.sammproject.org/wp-content/uploads/download-manager-files/Migrant-Domestic-Workers-Final-Report-1.pdf>.

<sup>15</sup> *Id.* at 86.

# Logistics Workers' Union Resilience Amidst Covid-19 in Ukraine

Inna Kudinska<sup>1</sup> and George Sandul<sup>2</sup>

## Introduction

2020 was hard on the workers in Ukraine. Chaotic COVID-19 prevention policies failed to halt the spread of infection. The medical system was chronically underfunded and insufficiently prepared to tackle the pandemic with regard to the number of hospitals and Intensive Care Unit beds; the availability of personal protective equipment (PPE); medicine; medical equipment and supplies; and testing capacities.<sup>3</sup>

Moreover, quarantine restrictions became a new challenge to the logistics sphere and postal operators,<sup>4</sup> as demand for delivery services increased several times, particularly in parcel and contactless delivery. However, there were fewer shipments of large loads due to the decline in business activity in the country. The number of delivered parcels doubled or even tripled at the onset of the Covid-19 pandemic in Ukraine.<sup>5</sup> Launching new social projects, such as delivering medicine and food kits to vulnerable groups of people, also significantly affected the work of postal operators.

In this regard, postal operators showed reverse dynamics

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<sup>3</sup> UN Ukraine, ASSESSMENT OF THE SOCIO-ECONOMIC IMPACT OF COVID-19 IN UKRAINE: RESPONSE AND RECOVERY PLAN (2020), <https://ukraine.un.org/sites/default/files/2020-12/UN%20SEIA%20Report%2020%20%281%29.pdf>.

<sup>4</sup> In Ukraine, the two largest delivery and postal companies are Ukrainian Postal Service or Ukrposhta, a public company, and Nova Poshta, a private Ukrainian postal and courier company.

<sup>5</sup> Centre for Applied Research, CONSEQUENCES OF THE COVID-19 EPIDEMIC AND QUARANTINE MEASURES FOR LEADING SECTORS OF THE UKRAINIAN ECONOMY (2020), [https://www.kas.de/documents/270026/8703904/ENG+2020+covid-19\\_economics\\_ukraine.pdf/c67ae\\_c2c-07b3-23df-78f5-ae605e21cdb5?version=1.0&t=1609238321655](https://www.kas.de/documents/270026/8703904/ENG+2020+covid-19_economics_ukraine.pdf/c67ae_c2c-07b3-23df-78f5-ae605e21cdb5?version=1.0&t=1609238321655).

in employment: While layoffs and business closures became a common feature of the lockdown period, postal and delivery companies announced additional vacancies due to the need to increase employees (couriers, operators, loaders).<sup>6</sup>

In this paper, the authors highlight the working conditions at the largest privately owned national logistics company, Nova Poshta, and the trailblazing role a trade union played in establishing groundbreaking health and safety protections against Covid-19 through the collective bargaining process. The authors were privileged to be engaged in this process as they had been providing legal advice to the Nova Poshta union for almost six years to date.

## Nova Poshta Union as a Modern Workers' Organization

The trade union at the Ukrainian logistics and delivery company "Nova Poshta" (in English, New Postal Service; hereinafter Nova Poshta Union)<sup>7</sup> was created in 2015 as a response to the rapid development of the Nova Poshta company and the need to have an institution for the collective and organized protection of workers' rights. The creation and functioning of this union is an exceptional case, as not all private companies in Ukraine have unions, which were created at the instigation of the workers themselves.

Due to the vast representation of the company in every region and almost every settlement of Ukraine, the Union has obtained the All-Ukrainian status. Union membership increased from 2,512 workers in 2015 to 11,562 in 2021. At present, the Union has about 11,000 members and boasts a strong collective bargaining agreement (CBA) covering all 31,000+ Nova Poshta workers. The first CBA

<sup>6</sup> *Id.*

<sup>7</sup> *About the Trade Union*, PROFSPILKA, <https://profspilka.org/en/pro-nas> (last visited June 28, 2023).

was signed in January 2016. One of the main peculiarities of the bargaining process is an annual review of the CBA's provisions by the social dialogue parties—union and employer—which enables the parties to address the ongoing challenges and trends in the labor market.<sup>8</sup>

The Nova Poshta Union's activities have always been dedicated to harnessing new technologies and current shifts in the world of work to maximize union power in organizing, communications, and bargaining. For instance, the 2020 CBA included a clause on gender-based violence (GBV) protection and prevention for all 31,000+ employees of the company.<sup>9</sup>

### Covid-19 and the Union Reaction to It

At the onset of the pandemic in Ukraine, many unions showcased unprecedented resilience and solidarity through mutual aid and compassionate support to the workers in crisis. As the number of Covid-19 cases in Ukraine were on the rise, workers, and union activists were on the frontline, either battling to save human lives or advocating for better pay and working conditions. As the government's response to the crisis was proving insufficient, trade unions quickly mobilized their efforts to fill in the gaps in workers' needs.

Due to the coordinated efforts of union leadership, the Nova Poshta Union has been among the most dynamic unions in Ukraine, bargaining for better worker protections during Covid-19. In March 2020, the Union rapidly engaged in effective social dialogue and persuaded the employer to provide all workers with personal protective equipment (PPE). Throughout the quarantine, the Union provided timely reports to the employer on shortages of workers' PPE against the coronavirus disease and monitored and secured occupational safety and health (OSH) rules in the field offices all over Ukraine.

<sup>8</sup>In Ukraine, the duration of collective bargaining agreements is agreed upon by the parties. The legislation does not impose a specific or maximum duration. In practice, the average length of a CBA is approximately three years, although there are CBAs covering even longer periods. Every year parties report on the implementation of the CBA's provisions. However, this reporting process normally does not result in amending the CBA because of the lengthy procedure of negotiations.

<sup>9</sup>Under ¶ 3.3 of the CBA, the Administration shall undertake to support prevention (informing, highlighting, interviewing, inspecting (auditing)) of gender-based violence (physical, psychological, sexual, and economic) in the workplace.

All Nova Poshta delivery offices throughout Ukraine were equipped with special transparent barriers to provide better protection for operators working with clients. In addition, during the pandemic, Nova Poshta provided health insurance for one month (with a possibility of extension) for all employees who worked for three months or more. Previously, health insurance was granted only to those Nova Poshta employees who worked one year or more at the company.<sup>10</sup>

Moreover, the Union launched a specialized service for union members. The Union sent out disinfectants to each member, educational materials for the workers' children, and vouchers for 1000 hryvnia for each union member above age 50 and in the Covid-19 risk group.

Remote work<sup>11</sup> (or telework) was not regulated by Ukrainian national legislation before the COVID-19 pandemic. It had become an option only for a segment of the population. Access to technology and technology-driven remote work remains a privilege to most Ukrainians.

The first attempt to modernize national legislation regarding telework was made in March 2020. Two drafts<sup>12</sup> were adopted directly after the first lockdown was imposed in Ukraine. Their main provisions were the following: (1) a company can order employees to work remotely during a quarantine without their consent; (2) in "normal times," remote work is formalized in a written employment agreement at the consent of both parties and (3) employees

<sup>10</sup>Because of the war, the company suspended health insurance for all employees as of April 1, 2022. The Union has initiated the renewal of health insurance programs and currently is negotiating on this issue with the employer.

<sup>11</sup>In pre-pandemic times, "work from home" was mentioned only once (Art. 179) in Ukraine's Code of Labor Laws. Previously, home-based work was regulated by the Soviet Regulations of 1981. However, as work using computers was not envisaged in 1981, provisions of the mentioned Regulations apply mostly to vocational professions and manual work from home.

<sup>12</sup>Проект Закону про внесення змін до деяких законодавчих актів України, спрямованих на запобігання виникнення і поширення коронавірусної хвороби (COVID-19) [On Amendments to Certain Legislative Acts of Ukraine Intended to Prevent Covid-19 Outbreak and Spread] (voted on 17.03.2020), [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_2?pf3516=3219&skl=10](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?pf3516=3219&skl=10); Проект Закону про внесення змін до деяких законодавчих актів, спрямованих на забезпечення додаткових соціальних та економічних гарантій у зв'язку з поширенням коронавірусної хвороби (COVID-2019) [On Amendments to Certain Legislative Acts of Ukraine intended to Ensure Additional Social and Economic Guarantees due to Covid-19 Spread] (voted on 30.03.2020), [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=68479](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=68479).



Nova Poshta car in Ukraine. Photo © AS photo family / Shutterstock

working remotely arrange their work themselves and are not under the employer's work schedule or regulations (unless otherwise provided by the employment agreement).

Although these laws aimed to amend the Labor Code to regulate telework, there were many gaps because the laws were adopted in a rush. For instance, the law made no distinction between remote work and home-based work. They also modified the definition of an employment contract, excluding one of its main features: the requirement of employees to follow the internal workplace regulations. Following critiques from scientists and labor law practitioners<sup>13</sup> in the media concerning the legislative implementation, it became obvious that regulations were required, and that work was needed on a solid draft law amending the Labor Code with separate articles on remote, home-based work and flexible working schedules. Draft law No. 4051<sup>14</sup> (Law No.1213-IX) became law and took effect on February 27, 2021.

The new law introduces two forms of telework—remote

<sup>13</sup> Кухня трудових прав: нариси про важливі інгредієнти: збірник тез (2021), <http://trudovi.org/textEditor/Kuhnia%20trudovykh%20prav.pdf>.

<sup>14</sup> Проект Закону про внесення змін до деяких законодавчих актів щодо удосконалення правового регулювання дистанційної роботи [On Amendments to Certain Legislative Acts on Improving the Legal Regulation of Remote Work], no. 4051 (Sept 4, 2020), [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=69838](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=69838).

(or distant) work and home-based work. Working remotely, an employee independently chooses his/her workplace. It may be any place at the employee's discretion, using communication technologies. Home-based work is performed by an employee outside of the employer's premises, from a designated workplace (place of residence or other pre-selected premises). The workplace is fixed and cannot be changed at the employee's initiative without the employer's consent in the manner specified in an employment contract for home-based work.

From the first days of the quarantine restrictions in Ukraine in 2020, before the adoption of legislative regulations on telework, some of the Nova Poshta workers were transferred to remote work. The Union identified remote workers' needs and, following consultations with the authors of this paper, seized the moment to initiate amendments to the CBA with new telework provisions. After analyzing international and European practices on telework and several online meetings between lawyers and Nova Poshta union leaders, a text of CBA alterations was drafted. Negotiations were not easy, but thanks to the efforts of union leaders, with their exceptional understanding of workers' needs and internal company processes, the Union managed to include their ideas in the CBA.

In December 2020, a new CBA was approved. It contained an innovative clause regarding remote work and relevant employer obligations. Under the CBA,<sup>15</sup> the employer is re-

<sup>15</sup> CBA, ¶ 3.11.

sponsible for providing the employees working remotely with the means of production related to information and communication technologies the employee uses. The employer must also provide appropriate installation and maintenance and pay the associated costs. Further, the employer must provide an equipped workplace (laptop or desktop tower, screen, mouse, keyboard, internet access); furniture, if necessary (desk, chair, shelves, etc.); and the delivery of the relevant equipment to the remote worker's location.<sup>16</sup>

The authors of this paper and the Union deem such an obligation a great accomplishment of the collective bargaining process at the Nova Poshta. While the CBA provisions established the direct obligation of an employer to provide remote workers with necessary means of work, national legislation on telework which was adopted later imposed certain related (though lesser) obligations on an employer unless otherwise provided in an employment agreement.<sup>17</sup> Thus, the CBA provides better protection to remote workers than the national legislation on telework.

Indeed, the authors utilized the Nova Poshta Union CBA

<sup>16</sup> Indeed, such a clause is as progressive as legislative amendments on remote work, which came into force only in February 2021. The legislative amendments state that equipment and other necessities to perform remote work, as well as a reimbursement mechanism, are stipulated by the employment agreement. Labor Code, Art. 60-2, § 8. Otherwise, it will be an obligation of the employer.

<sup>17</sup> Labor Code, Art. 60-2, § 7:

The procedure and terms for providing employees who perform work remotely with the equipment, software and hardware tools, information security tools, and other means necessary to fulfill their duties; the procedure and terms for submitting performance reports by such employees; the amount, procedure, and timing of payment of compensation for use of equipment, software and hardware, information security tools and other means owned or leased by employees; and the procedure for reimbursing other expenses related to remote work shall be determined by an employment contract for remote work.

Labor Code, Art. 60-2, § 8:

In the absence of a relevant provision in the employment contract, the provision of the equipment, software, and hardware tools, information security tools, and other means used by the employee necessary to fulfill his duties shall be the responsibility of the employer, which provides for appropriate installation and maintenance and also pays the associated costs.

provisions and their experience in implementing them in the drafting and passage of Law No. 4051 (Law No.1213-IX) on telework. In the context of vague legislative telework regulations, the CBA served as a guideline for organizing telework in the company. Such fruitful negotiations between union and employer on the issue of telework were enhanced by the high level of commitment to social dialogue principles by the parties. Union leaders have extensive experience as ordinary workers at the company and perfectly recognize problems and challenges faced by their co-workers. In addition, negotiation skills and the ability to find compromises were essential prerequisites for successful negotiations and accomplishing better working conditions.

In terms of other CBA provisions concerning the creation of healthy and safe working conditions in the company, the employer is required to improve the sanitary and material conditions of labor; eliminate the risk of deteriorating health of workers due to consumption of poor-quality drinking water; and purchase individually-packaged drinking water, tea, coffee, and sugar.<sup>18</sup> The employer also agrees to ensure free access to drinking water, tea, coffee, and sugar for all employees of the company, and in the case of employees working remotely or at home, to ensure the delivery of drinking water, tea, coffee, and sugar to their remote workplaces.

In addition, in November 2021, the Union successfully negotiated the inclusion of one more benefit for workers in the CBA. Namely, it enshrined one paid day of extra leave for those workers who were vaccinated and provided a relevant medical certificate (leave is granted on the day following the day of Covid-19 vaccination).<sup>19</sup> Such leave cannot be transferred or compensated.

## Conclusions

Dynamism, the high level of unionization, and responsiveness to the present-day challenges became decisive factors in retaining and expanding health and safety-related Nova Poshta workers' rights during the Covid-19 pandemic, including the ability to memorialize those gains in their CBA.

Due to the constructive social dialogue and the Union's

<sup>18</sup> CBA, ¶ 7.1.26.

<sup>19</sup> *Id.* at ¶ 5.6.

active position, the company did not consider declaring a standstill or providing unpaid leave for all employees during the pandemic restrictions. Nova Poshta employees managed to preserve their wages and benefits during the initial phases of the Covid-19 quarantine.

Even after the active phase of the Covid-19 pandemic, the relevant CBA provisions remained in effect and helped to sustain employment and income until the unprovoked invasion by the government of Russia on February 24, 2022. Thanks to the new national legislation on telework which remains unaltered, and the even more protective CBA clauses, the option to choose telework became a vital tool for maintaining livelihoods for many Nova Poshta workers.

Unfortunately, as of now, enforcement of the majority of the CBA provisions has been suspended by the employer because of the war in Ukraine and related economic hardships.<sup>20</sup> On April 24, 2022, the Nova Poshta company temporarily (during martial law) suspended 30 provisions of the CBA, including provisions about costs for maintaining the remote office, equipment, and connection, and the additional day of vacation for vaccinated workers<sup>21</sup> But the Union constantly monitors the situation and intends to negotiate on CBA restoration, fully or in part to further sustain workplace protection standards and pay for the workers at a time of turmoil. In fact, the Union has already initiated a renewal of the CBA provision regarding the regular provision of specialized uniforms and safety footwear for workers, especially loaders, to protect them against a wide variety of injuries.

Union power, including prompt reaction to various challenges, manifested itself not only during the pandemic but also amid the all-out war in Ukraine. The monitoring of safety and health conditions at the workplace, as well as reacting to labor law violations, remain important Union priorities. Despite the lack of human resources and the absence of a staff lawyer, union leaders with the assistance of the authors of this paper provide legal counsel to their members on numerous war-related issues such as payment of wages, suspension of an employment contract, vacations, sick-leave payment, reprimands, dismissal, and

others.

Furthermore, the Nova Poshta Union has been actively providing humanitarian aid for its members during the war in the form of material aid payment. According to the Union, as of August 1, 2022, about \$256,533 of union funds had been allocated to material assistance for about 3,000 union members in need and their families in this calendar year. By contrast, during the same period in 2021, the amount of material assistance was much smaller—over \$53,000 to over 800 union members.

Moreover, due to the profound efforts of union leadership, the Nova Poshta Union managed to lose very little of its membership during the war. Compared to its pre-war numbers, union membership decreased only by 7% (as of August 1, 2022).

Indeed, the Union is focused on organizing new members during the war. On average, up to 120-150 new members per month join the Union in the western part of Ukraine - the Lviv, Chernivtsi, and Rivne regions. Western and central regions of Ukraine hosted thousands of internally displaced persons during the war and became relatively safe places for many Ukrainians.

In conclusion, to quote the famous phrase of Friedrich Nietzsche, "what does not kill me makes me stronger." Indeed, the Nova Poshta Union demonstrates that an independent and strong union with a real desire to protect workers can be effective and resilient to extreme shocks and formidable challenges, whether it be a worldwide pandemic or a brutal and barbaric war.

<sup>20</sup> Law of Ukraine No.2136, On Organization of Labor Relations during Wartime, art. 11 allows employers to suspend CBA's provisions during wartime unilaterally.

<sup>21</sup> Press release, Profspilka, Зупинено дію окремих положень Колективного договору ТОВ "Нова пошта" (Apr. 22, 2022), <https://profspilka.org/uk/zupyneno-diyu-okremykh-polozhen-kolektyvno-ho-dohovoru-tov-nova-poshta>.

# Remote Work and Telework:

## The Spanish Experience

Francisco Trillo<sup>1</sup>

### Introduction

The organization of society and ways of relating to each other within society have been intensely transformed due to the restrictions on mobility that resulted from measures adopted in response to the COVID-19 pandemic that began in March 2020. Labor relations are no exception. On the contrary, they are an area of life where these transformations are a tangible reality that will persist even beyond this pandemic. The social perception of a return to normal life before the coronavirus is increasingly losing touch with the reality unfolding within labor relations. In this sense, remote work is a good example of the mark that this pandemic is leaving on labor relations, profoundly modifying the ordinary labor dynamics based on the physical presence of workers in the workplace. It is commonly understood that remote work, more specifically telework, is *here to stay*, although what is most frequent is a hybrid form of remote work that combines telework and in-person work. Remote work has become so important that it seems difficult to deny that it has become a part of the current reality of labor relations. Moreover, the impact of remote work has been different depending on the sector or economic activity in question. In this respect, it is worth mentioning professional sectors such as technicians, scientific and intellectual professionals; accounting, administrative, and other office employees; directors and managers; technicians and support professionals; workers in manufacturing industries and construction.<sup>2</sup>

Remote work has changed compared to the way it was carried out in 2020. That year, remote work was prioritized as a measure to ensure both the containment of COVID-19 (public health) and economic activity would continue to

the extent it was possible.<sup>3</sup>

Remote work, in this historical context, could create a balance between the economy, work, and health. Even in the absence of specific regulations on remote work, there was an increase in this form of contracting workers, more specifically telework, from March to October 2020. The improvisation, the absence of training, the lack of necessary work tools, and the non-observance of certain individual and collective rights, such as the effective protection of health and safety or the right to strike, were “accepted,” at this early stage, by workers and their union representatives due to the social fear of contagion of the disease.

On the contrary, the entry into force of Law 28 and 29/2020 has led to a decrease in the use of remote work by businesses, because of the recognition of a set of individual and collective rights. The current moment, therefore, must be understood as the regulatory transition that responds to the urgent need to regulate and plan this way of contracting workers after months of improvisation and the lack of rights, the justification for which was to strike a balance that would guarantee both public health and labor activity.

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<sup>2</sup> La evolución del ‘teletrabajo’ en España, en gráficos, epdata (Mar. 22, 2022). <https://www.epdata.es/datos/teletrabajo-datos-graficos/517>.

<sup>3</sup> “The exceptional measures in relation to the world of work established in this regulation prioritize the objectives of guaranteeing that businesses resume normal activities and work relations after the situation of exceptional health conditions. Specifically, organizational systems will be established that allow businesses to continue functioning by means of alternative mechanisms, particularly by means of remote work, and the company must adopt appropriate measures if this is technically and reasonably possible and if the necessary adaptation effort is proportionate. These alternative measures, particularly remote work, must be prioritized over the temporary cessation or reduction of activity. To facilitate remote work in those sectors, companies or jobs in which it was not foreseen until now, the obligation to carry out a risk assessment, in the terms foreseen in Article 16 of Law 31/1995, of November 8, 1995, on the Prevention of Occupational Risks, will be understood to be fulfilled, as an exception, by means of a voluntary self-assessment carried out by the worker themselves.” Law 8/2020 (B.O.E. 2020, 73), [https://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2020-3824](https://www.boe.es/diario_boe/txt.php?id=BOE-A-2020-3824).

## Regulatory Context

This new scenario of remote work, as we have already pointed out, is the result of the approval of a complete regulation, both of traditional remote work and telework with the use of virtual means, through Law 28/2020, of September 22.<sup>4</sup> The importance of this regulation must be immediately connected with the precedents that existed in the field of remote work, more specifically telework.

First of all, the regulation contained in the [European Framework Agreement on Telework](#) of 2002 should be highlighted.<sup>5</sup> This Agreement contributed to creating the strategy previously known as the [Lisbon European Council](#), based on the transition to a knowledge-based economy and society.<sup>6</sup> In July 1997, the European Commission adopted a series of policy recommendations on the social and labor market dimension of the information society. These recommendations included the promotion of telework in Europe. Thus, in 1998, the Directorate General for Employment, Social Affairs and Equal Opportunities and the Directorate General for the Information Society launched a pilot project involving three forms of part-time telework: telework between the normal office and a home office; mobile telework during official missions; and occasional work in another building.

In this context, the European Trade Union Confederation (ETUC), the Union of Industrial and Employers' Confederations of Europe (UNICE) / the European Association of Craft, Small and Medium-Sized Enterprises (UNICE/UEAPME) and the European Centre of Enterprises with Public Participation (CEEP) signed the Framework Agreement on Telework to provide greater security for employed teleworkers in the European Union. The purpose of the agreement was to develop a general framework at the European level for the working conditions of teleworkers. The agreement provided, as a rule, the same overall protection that employees working on company premises received. The agreement defined telework as a form of organization and/or performance of work using information

<sup>4</sup>Validated in the Congress of Deputies and converted into Law 10/2021, of July 9, on remote work. Law 10/2021 (B.O.E. 2021, 164), <https://www.boe.es/buscar/doc.php?id=BOE-A-2021-11472>.

<sup>5</sup>Framework Agreement on Telework, July 16, 2002, <https://resource-centre.etuc.org/agreement/framework-agreement-telework>.

<sup>6</sup>The Lisbon Special European Council Towards a Europe of Innovation and Knowledge (2000), <https://eur-lex.europa.eu/legal-content/ES/ALL/?uri=LEGISSUM:c10241>.

technology, within the framework of an employment relationship, in which work, which could also have been carried out on the employer's premises, is usually performed away from those premises. Given that telework covers a wide range of situations, the social partners agreed with this definition.

The Framework Agreement highlighted the key areas in telework that needed to be considered, among which the temporary nature of telework stands out. In other words, telework is voluntary for both the worker and the employer, which prevents this type of work provision from being indefinite by definition. Telework may form part of the initial content of the employment contract or be agreed upon with the employer at a later time. In any case, the employer would be obliged, from then on, to provide the teleworker with the relevant written information concerning the conditions of employment; data protection; respect for privacy; activity equipment; health and safety; training of workers; and collective rights.

The Framework Agreement was brought to Spain through Chapter VII of the [Interconfederal Agreement for Collective Bargaining for the year 2003](#).<sup>7</sup> In this agreement, in addition to making references to the Framework Agreement, the social partners made programmatic statements and declarations of intent that Spain should not "remain on the sidelines of the development of the information society." This agreement very generally addressed telework, which resulted in a limited regulation of telework in the collective bargaining carried out subsequently. Among other factors, this was because only 3% of the Spanish working population was present in economic sectors related to information technologies.<sup>8</sup>

<sup>7</sup>Resolución de 31 de enero de 2003, de la Dirección General de Trabajo, por la que se dispone la inscripción en el Registro y publicación del Acuerdo Interconfederal para la Negociación Colectiva 2003 (B.O.E. 2003, 47), [https://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2003-3826](https://www.boe.es/diario_boe/txt.php?id=BOE-A-2003-3826).

<sup>8</sup>There are two types of EU law: "primary" and "secondary" law. Primary law refers to the **treaties**, which form the basis or fundamental rules for all EU action. Treaties are binding agreements between member countries. They set out the objectives of the EU, the rules applicable to its institutions, how decisions are made, and the relationship between the Union and its member countries. According to the treaties, the institutions of the EU can adopt legislation, which the member countries then apply. Secondary legislation arises from the principles and objectives set out in the treaties and consists of regulations, directives, and decisions.

**Regulations:** These are binding legislative acts, which must be applied throughout the Union as soon as they are published.

## Regulation and Analysis of Remote Work and Telework in the Private Sector

Something very similar can be said about the regulation of remote work which, until 2020, was contained in a single statutory provision. Article 13 of the Workers' Statute, even after the amendment introduced by article 6 of Law 3/2012, of July 6, on urgent reforms for the reform of the labor market, contained a laconic definition of remote work, without any reference to telework, telework's voluntary nature and the individual agreement of the contracting parties to define the specific conditions of its realization. In this sense, the regulatory references to payment, training and professional promotion, adequate health and safety protection, or the exercise of collective rights were formulated concerning the principle of equality and non-discrimination for workers whose work was performed in person at the workplace. In other words, it was a regulation that did not have specific content, was dominated by the individual will of the parties, and in which collective bargaining could not be used.

Lastly, it is worth highlighting the progress in regulating remote work made by Law 3/2018, of December 5, 2018, on personal data protection and the guarantee of digital rights.<sup>9</sup> Specifically, this law stated that the rights to privacy and the use of digital devices in the workplace, digital disconnection, and digital collective bargaining constitute a series of rights applicable to labor relations where digital technology is a reality. The interpretation and scope of these rights in the regulations referring to remote work cannot be understood without the dimension and fundamental protection previously granted by Law 3/2018, thus indicating the conformation of a Labor Law characterized by an organization of productive activity with an intense presence of digital technologies.

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**Directives:** These are legislative acts that establish objectives that all EU countries must comply with, but it is up to each country to develop its own laws on how to achieve these objectives, i.e., they must be adopted ("transposed") by the legislation of each country.

**Decisions:** These are binding for the specific addressees to whom they are addressed (an EU country or a specific company) and are directly applicable.

Non-binding legal acts are **Recommendations** and **Opinions**. The ordinary legislative procedure usually takes the form of Directives, which are proposed by the European Commission. See *Procedimiento legislativo ordinario*, PARLAMENTO EUROPEO, [https://www.europarl.europa.eu/infographic/legislative-procedure/index\\_es.html](https://www.europarl.europa.eu/infographic/legislative-procedure/index_es.html) (last visited June 4, 2023).

<sup>9</sup> Law 3/2018 (B.O.E. 2018, 294), <https://www.boe.es/buscar/doc.php?id=BOE-A-2018-16673>.

The definition of remote work as a category or modality of work is expressed in the regulations that resulted from Law 10/2021. In this law, for the first time, the regulations on remote work include both the definition of remote work and telework. This section will not go into the details of the constitutive requirements of the notion of remote work and telework, which incidentally share the same legal regime. We will present the elements that define this modality of labor provision, focusing especially on the concept of telework. We must mention that the difference between in-person work, and remote work has to do with the person who decides the place of the labor provision that, at least, must reach 30% of the working day in a reference period of three months. This is perhaps one of the aspects in which the regulation that appeared in September 2020 has advanced most emphatically, since the classification of remote work is made from the entry into force of Law 10/2021, by the fact that one or the other subject of the employment contract chooses the place where the work is to be performed, which in the case of the worker can vary between their home and any other place decided by them.

To be understood as telework, the work must be performed exclusively or predominantly through computer, telematic, and telecommunication means and systems. This very broad definition of what is to be understood as telework means that it includes a long list of jobs in which technology plays a role to various degrees.

One of the most important innovations in the regulation of remote work is the system of sources where, in general, a transition towards a model of collective regulation of this type of labor provision should be noted. However, individual autonomy will also have a wide margin of action, dedicated to the regulation of the framework agreement on telework (hereinafter, ATW). This legislative move was decisive in that the ATW defines the details that strictly concern the situation of a specific worker. Aspects such as setting working hours and availability, the percentage of time in-person, or the place of work chosen by the worker are decided on an individual basis according to the worker's preferences and the margin for negotiation with the employer.

The fact that remote work is a contractual modality that

is only possible through the agreement of the individual parties to the employment contract seems to not be in dispute. The same applies to its reversibility. The way in which remote work should be carried out, as well as how workers should begin to work in person, is determined by the ATW and, if applicable, the conventional regulation. Therefore, if the employee does not agree to either one of these options, the employer cannot terminate or modify the contract.

However, in addition to the exceptions to this principle related to the right to training and the protection of victims of gender-based violence or terrorism, two issues should now be highlighted from the point of view of the employer's refusal to accept the worker's request to work remotely.

The first issue has to do with the justification of the corporate refusal. That is, whether the employer must accompany its refusal with a series of plausible and relevant arguments to justify such a refusal. The employer must duly justify its refusal in the terms provided by the collective agreement, the answer being similar in terms of its justification to the employer's refusal affecting the fundamental rights of the worker. In this sense, the STSJ of Aragón 1291/2020—whose Chamber reversed the appealed judgment to recognize the violation of the fundamental right to equality and non-discrimination of a female worker because of the employer's refusal to accept the worker's request to telework to take care of her three minor children—needed to express its opinion.

The second issue, closely related to the first, seeks to answer the question of whether—even if the preferential nature of remote work is no longer in force—the employer is mandated to accept remote work, if it is the only possible measure to effectively protect health and safety at work, can be defended.

In the section on precedents in the regulation of telework at the European level, we noted that one of the general principles governing this regulation is the recognition of the same rights for remote workers as those given to on-site workers. Law 10/2021 established that remote workers do not experience any impairment of their labor rights, making express reference to payment, job stability, working hours, training, and professional promotion. The principle of equality extends to the right to flexible working hours and adequate time registration, to digital disconnection, to the right to training and professional promo-

tion, to the right to occupational risk prevention, to the use of digital media, and the protection of privacy and data, as well as collective rights (article 19).

In the area of economic rights, the idea underlying the regulation of remuneration is not to generate any expectation of savings in labor costs concerning remote work. For this reason, the regulations stipulate that remote workers shall be entitled to receive, as a minimum, the total salary established by their professional group, level, position, and functions, as well as the salaries established for those who only provide services in-person, particularly those linked to personal conditions, the results of the company or the characteristics of the job. This is not to be understood in the formalistic sense that there can be no difference in payment between one type of work and another.

There may be certain characteristics of the onsite job that are not present in remote work, which justifies the existence of a supplement exclusively for onsite workers, just as, conversely, there may be certain singularities of remote work that justify the existence of a supplement to be received exclusively by the remote worker. This option for supplements can even be extended to non-wage payments. For example, economic compensation for the worker's commute to the workplace (transport bonus) could be paid only to onsite workers. Of course, this differentiation in the general principle of equal pay between onsite and teleworkers, with the well-founded differences due to the work carried out in one or the other case, will certainly provoke practical discussions in the subsequent practical application of the new rule. To this end, the key, in our opinion, will be found in the application of the principle of equal pay for work "of equal value," regardless of whether it is performed in person or remotely.

A unique element in these cases is that when working remotely, the worker may have certain costs or expenses derived from the work, which are never borne in in-person work. To this effect, it is foreseen that those who work remotely are entitled to the provision and adequate maintenance by the company of all the means, equipment, and tools necessary to carry out their work, in accordance with the inventory incorporated in the remote work agreement. This element also includes the necessary support in the case of technical difficulties, especially in the case of telework.

The right to health and safety at work is regulated in the standard on remote work, providing that the exact place

chosen by the worker to perform his work must be specified in the remote work agreement, thus making it possible to evaluate the occupational risks of the area authorized for the work. The rest of the dwelling or premises where the work is performed do not have to be regulated nor is the whole of the dwelling or premises the employer's responsibility. The employer must receive the necessary information to be able to carry out the evaluation and it can be determined whether a visit by the prevention technician is necessary for this purpose. As a guarantee of the worker's privacy, the worker must allow such a visit and, if such permission is not obtained, the assessment will be carried out with the information obtained from the worker.

The collective rights of remote workers need to be considered, which is why the current regulation has dedicated an express section in which "remote workers shall be entitled to exercise their rights of a collective nature with the same content and scope as the rest of the workers of the center to which they are attached." Specifically, the regulations refer to the exercise of the right to vote in elections for workers' representatives, to participation in activities organized by the representatives, and especially to attendance and participation in the workers' assembly. To achieve these objectives, it is foreseen that the workers' representatives are provided with the necessary technological means to maintain a relationship between representatives and the represented. Therefore, they must have adequate access to the communications and electronic addresses of the workers used in the company, as well as the implementation of the virtual bulletin board. Lastly, we must note the obligation of the employer to guarantee the in-person participation of remote workers in the elections of workers' representatives.

## Brief Note on the Regulation of Telework in Public Administrations

The enactment of Law 29/2020, of September 29, on urgent measures regarding telework in public administrations and human resources in the National Health System to address the health crisis caused by COVID-19 has proceeded to add a paragraph bis to Article 47 of Royal Legislative Decree 5/2015, of October 30, by which the Revised Text of the Law of the Basic Statute of the Public Employee is tested.<sup>10</sup> This regulation is firstly devoted to defining what is to be understood by telework: "that modality of

<sup>10</sup>Legislative decree 5/2015 (B.O.E. 2015, 261), <https://www.boe.es/buscar/act.php?id=BOE-A-2015-11719>.

remote service provision in which the competent content of the job position can be developed, provided that the needs of the service allow it, outside the premises of the Administration, through the use of information and communication technologies."

In this regard, attention should be drawn to the three constituent requirements of the definition offered by the rule: a) telework applies to work relationships that are provided under a labor or civil service relationship with the public administration; b) it is partially carried out outside the premises of the Administration since this modality is provided as a complement to in-person work; and c) the work must necessarily be carried out with the use of information and communication technologies.

As it seems to be clear from the constitutive requirements mentioned, this rule does not articulate a subjective right to telework in the strict sense, since it does not imply a duty either for public employees or for the public administration in question. This absence of a right to telework is based on the purpose pursued by the provision of public services in relation to the general interest that guides the actions of public administrations. Thus, the provision of services through telework is conditioned to the needs and demands of the service. This part of the regulation, ultimately, shows what may be the only argument that denies the possibility that public employees develop their work under the modality of telework: the special characteristics of the work that involves the provision of public services.

The regulation on telework in Public Administrations contains the following characteristics:

- The subjective scope of application extends to both civil servants and labor personnel who provide their services for the Administration, without any reference to temporary staff or managers. In the case of labor personnel, collective bargaining has a transcendental role in formulating the specific conditions for telework.
- Telework in public administrations is voluntary and reversible, except in duly justified exceptional cases. The voluntary character runs up against the need for this modality of service provision to be duly authorized. The only case in which this authorization cannot

be given is when it is motivated by the characteristics and needs of the public service. In addition, telework is perfectly compatible with the in-person provision of the service.

- The personnel who provide their services through telework will have the same duties and rights, individual and collective, contained in the Consolidated Text of the Basic Statute of the Public Employee as the rest of the personnel who provide their services in-person, including the applicable occupational risk prevention regulations, except those that are inherent to the performance of the service in-person.
- Telework in the field of Public Administration must allow the identification of objectives for the provision of services, as well as the evaluation of the fulfillment of the work assigned to the public employee.
- The Administration assumes the expenses generated by this type of service provision exclusively with respect to the technological means necessary for its activity.
- Lastly, Law 29/2020 refers to the regulations issued to carry out said precept, regional legislation, and local regulations in the development of the regulations with the rank of law and collective bargaining, providing six months for the adaptation of said regulations to the provisions of the amendment of art. 47 bis of the TREBEP.

and measures that derive from laws on remote work. In short, even though it has aspects that can be criticized and improved, with this new legal regulation of remote work and telework, our country takes an important step forward in promoting the dignity that the field of remote work and telework urgently deserved and needs.

In addition, current technological possibilities show that, in certain cases, telework can be a suitable option for certain workers who can carry out their activity away from conditions or environments that, for whatever reason, are harmful to their health without detriment to productivity. Lastly, this legislation opens a wide field of action for the intervention of collective bargaining in this area and is the regulatory channel that best allows the legal regulation to be adapted to the needs and specific characteristics of each sector or company. There is debate as to whether the law places too much weight on collective bargaining or establishes an excessively flexible legal framework, or whether it does not generally support the supplementary relationship between the law and the collective agreement (minimum standard for the collective agreement). However, it can also be stated that this Law seeks a certain balance between the interventionism of the legislator in the labor relations of remote workers and the strengthening of the role of collective bargaining, to achieve a regulation of remote working conditions that is closer to the diverse and changing actions of the sectors and the companies.

## Conclusion

Law 10/2021 on remote work takes a balanced approach to remote work, which has been marginalized by our framework of labor relations, but as many experts declare, "here to stay." We are faced with a regulation based on the present time that is oriented to the economic, social, and labor reality of the 21st century. It represents a significant advance in the protection of the rights of remote workers and teleworkers; strengthens and reinforces the principle of equal treatment and opportunities and non-discrimination; progresses in the protection of the safety and health of remote and teleworkers; creates greater certainty and security in labor relations and establishes collective negotiation as transcendental when developing the principles

# Argentina Covid-19 Case Study:

## Covid as an Occupational Disease

Diego Zang<sup>1</sup>

### Introduction

The outbreak of the Covid-19 pandemic and especially some of the new challenges that came with it have posed a major challenge for national economies, characterized by significant internal asymmetries. These challenges include the way in which and the speed with which the virus spread, its persistence, the mortality rates, and the lack of an immediate scientific response that would lead to the reduction and intensity of infections and possibly a cure.

The global economy was also strongly characterized and conditioned by integration and complementarity never seen before in a context that also revealed notable asymmetries between countries. The world of labor, which exists within this globalized economy, did not escape the crisis. This world of labor had until now been characterized by a sustained involution that swept away the subject of rights and dignified work, replacing it with impersonal concepts such as the market and profit, generally consisting of financial speculation rather than productive investment.

Thus, the Covid-19 pandemic was a great opportunity to rethink our discipline as it tested factors of profound relevance for the formulation of national, regional, and even international remediation efforts. We are referring specifically to the fundamental principles and traditional tools of labor law and its historical mechanisms and actors.

From one day to the next, the effective validity of the essential principles and institutes of our discipline. These principles include but are not limited to the indemnity of the worker, the fact that the worker cannot assume the employer's risk, the salary, the effective performance of tasks, and the grounds for exceptions. Likewise, in the short term, the pandemic and especially certain governmental measures designed to ensure the health of the

population, such as quarantines, led to the paralysis of certain sectors of the economy and the violent slowdown of others.

Given the duration of the pandemic, which was marked first by the lack of vaccines and then by the difficulties accessing them, the theoretical and attractive dichotomy between the prioritization of health care and the preservation of economic activity levels proved to be insufficient and misleading when trying to understand and address the human and social dimension of the phenomenon. This dimension undoubtedly required urgent responses capable of focusing on the short-term without forgetting the long-term.

In our field, one of the first problems that arose in the face of this new reality was to determine how and with what resources workers who became infected in the course of their work would be medically treated, given that the causal link between work and disease was often not so clear-cut. Questions such as who would pay lost wages and/or who would be responsible for resulting disabilities also became crucial and challenged the adequacy and suitability of the existing systems to deal with these contingencies sufficiently and sustainably. At the local level, each country responded to the pandemic according to its conditions and the resources it had available. This meant that the situation contributed to a worsening of the inconsistencies and inequalities that each of the economies and societies already had.

### Legal Context

#### Some Relevant Aspects of Labor Legislation in Argentina

Article 14 bis of the Constitution of Argentina establishes "*protection against arbitrary dismissal*."<sup>2</sup> In turn, by vir-

<sup>1</sup> Lawyer, trade union adviser.

<sup>2</sup> Art. 14 bis, CONSTITUCIÓN NACIONAL [Const. Nac.] (Arg.), <http://www.biblioteca.jus.gov.ar/argentina-constitution.pdf>.

tue of Article 31, in harmony with Article 75, paragraph 22, all lower-ranking legislation (national or provincial laws, decrees, etc.) must comply with and respect the constitutional text and the supremacy of international treaties over the latter, which, as far as our matter is concerned, includes the conventions of the International Labor Organization (ILO) received or incorporated by our domestic law after their ratification by a national law sanctioned by the legislative power and promulgated by the executive.<sup>3</sup> In turn, the employment contract is governed by a specific law—Labor Contract Law No. 20,744— (LCT, its acronym in Spanish) which applies to every economic activity except for a few that have special regimes such as, among others, public employment (national and provincial), the construction industry and domestic service.<sup>4</sup> Each of the activities is complemented in its regulatory scheme by Collective Labor Agreement(s) that deal with different issues inherent to the specificity of the tasks and the economic activity in question.

These Collective Bargaining Agreements (CBA), in accordance with ILO Conventions 87<sup>5</sup> and 98<sup>6</sup> and with the constitutional mandate that establishes a free and democratic trade union organization, are negotiated as a priority by the trade union with trade union status and the employer's representation. When CBAs are approved by the national government, they acquire the force of law and are consequently enforceable and binding on all the relevant workers and employers, whether or not they are members or associates of the entity that took part in their negotiation. By law, such CBAs are ultra-active, so that their validity and application are not limited in time *a priori* but remain in force until a new homologated agreement establishes better conditions.

Likewise, the LCT and the applicable CBA result in a non-derogable minimum, a minimum package or standard of rights and conditions. This minimum can be thought of as

<sup>3</sup>*Id.*

<sup>4</sup> Law No. 20744, Mar. 13, 1976, Boletín Oficial, no. 23410, at 2, [https://www.ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=26601](https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=26601).

<sup>5</sup> Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize, July 9, 1948, 68 U.N.T.S. 17, [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:312232](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312232).

<sup>6</sup> Convention (No. 98) Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, adopted July 1, 1949, 96 U.N.T.S. 257, [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C098](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C098).

a basic standard that cannot be reduced or compromised and is transferrable to the individual employment contract, which can improve the basic standard. The law also allows for the negotiation, signing, and approval of company or establishment agreements.

## Measures Adopted by the National Executive Branch Within the Context of the Pandemic

In the southern hemisphere, the outbreak of the pandemic occurred after its appearance in the north. This undoubtedly random circumstance initially allowed the government to try to capitalize on the little experience of other countries regarding the treatment of the progression and effects of a disease caused by a hitherto unknown virus. Thus, like in more powerful economies, the Argentine government initially opted for what was called Preventive and Compulsory Social Isolation (ASPO, for its acronym in Spanish), which meant that all inhabitants of the country, without any distinction whatsoever, would remain in their homes, including not going abroad.<sup>7</sup> There were very few and very well-founded exceptions, which were evaluated with extremely restrictive criteria, and which were mainly related to: a) situations related to food, care of the elderly or health care; and b) work in essential activities that the legislative branch itself defined in a thorough manner. Among the essential activities, the following are worth mentioning: health, security forces, supermarkets, public works personnel, food, and energy industries.

Factors such as the infectiousness of the virus, the mortality rate, the lack of treatments and vaccines, the urgency and immediacy of the crisis, and the unknown duration of the situation played a role in the decisions of the national government. The government opted to protect the health of the population by limiting people's mobility and confining them to their homes for limited periods that began on March 20, 2020 and were later extended. This decision had a lot of support from the population in the early stages and had been previously suggested by a scientific committee composed mainly of prestigious physicians (i.e., infectious disease specialists and health workers) and did not include social scientists (i.e., economists, sociologists, etc.).

Simultaneously, the law established that salaries had to continue to be paid at the employer's expense to formal workers even when, in compliance with the law, they did

<sup>7</sup> Law no. 297, Mar. 19, 2020, Boletín Oficial, no. 34344, at 3, <https://www.boletinoficial.gob.ar/detalleAviso/primera/227042/20200320>.



A delivery worker takes a break in PPE in Argentina. Photo © Connie Guanziroli / Shutterstock

not effectively perform tasks. It also established the use of private and public transportation only by people and activities which were expressly authorized and legally considered “essential.”

In each of these cases, the legislation was issued by the president of the nation as head of the executive branch of government. Given the federal nature of Argentina, in some specific cases, the provinces were invited to adhere to the laws regarding the emergency provisions. This meant that the provisions adopted were based on a state of emergency, which also entailed a limited duration of the law, without prejudice to their possible extension later. All these norms, characterized as “Decrees of Necessity and Urgency” and regulatory ministerial resolutions, constitutionally required ratification or validation by the legislative body, which did not always occur in due time and form because the chambers of the legislative body were not able to meet in person or virtually.

The quarantine was progressively reduced when more was known about the virus’s transmission and the infection rate declined, and also because of the growth of social fatigue from emergency measures, a massive economic downturn, and, ultimately, when vaccines became available and accessible. There was a transition to Mandatory Social Distancing (DISPO, its acronym in Spanish) and more economic activities were permitted. This transition in turn led to increased use of public and private transport and, eventually, the end of the quarantine and opening of almost all economic sectors, after more than a year and a

half since the beginning of the pandemic in Argentina.

In all cases, various anti-Covid protocols were established to take care of workers’ health and avoid infections while they carried out their jobs. In the negotiation and preparation of these protocols, in which the unions played an important role (to which we will refer below) they also included the transfer of the worker from home to work and vice versa.

Moreover, an exception regime was also established based on the scientific recommendations of physicians, health workers, and infectious disease specialists – always in compliance with measures for the protection and prioritization of health and the protocols for specific economic sectors, more of which began to be included in the category of “essential.”

In response to newly available medical information and the purely instrumental nature of the law derived from the pandemic, workers who, after medical verification and certification, were included in “risk groups” were exempted from the obligation to work in their respective workplaces. These “risk groups” included workers with hypertension, diabetes, and heart disease and those over the age of 65 years, among others. Workers in these groups, even if they were exempted from working in person, would continue to receive their salaries from the employer.

When workers were in isolation and when the nature of the work allowed it, many workers began to work from

home online, when they had the necessary means. This is known as “teleworking.” It is a modality of work which had been used before the pandemic but was catalyzed by the latter, which led to the enactment of a specific regulation, Law No. 27,555, which came into force on April 1, 2021.<sup>8</sup>

What has been briefly described in the preceding paragraphs created the need for, among other challenges, a regulatory approach to a set of situations derived from the decision to try to preserve people’s health, beginning with quarantine except for essential activities, and later when the economy was opened. These situations included:

1. the fate of the employment relationships of workers who were unable to work effectively in their workplace due to the restrictions imposed by the government;
2. economic considerations regarding the fate of these labor relationships;
3. efforts to limit the economic impact on workers and companies resulting from the shutdown of activities and the subsequent gradual opening of the economy as a result of the duration of the pandemic;
4. anti-Covid health protocols that employers had to create and workers had to comply with in order to carry out essential activities in a way that prioritized health care; and 5) treatment of Covid-19 as a work-related or work-induced illness.

Because of the unquestionable imperatives of equity and justice, it was also necessary to consider and pay attention at the regulatory level to the unique impacts on other actors who were also vulnerable to the consequences of the pandemic and the decisions adopted by the national government to mitigate its impact on the health of the population. We are referring to workers in the informal economy and self-employed workers, domestic service workers, and the unemployed.

The national government provided economic assistance through compensation from the public treasury for all these groups whose incomes were also affected by the pandemic. To mitigate the impact of the situation on com-

<sup>8</sup> Law no. 2755, July 30, 2020, Boletín Oficial, no. 34450, at 3, <http://servicios.infoleg.gob.ar/infolegInternet/verNorma.do?id=341093>.

panies, the national government established the Emergency Assistance Program for Labor and Production (ATP, for its acronym in Spanish), which granted benefits in the payment of employer contributions such as reductions and postponement of deadlines, as well as a compensatory salary allowance paid by the State to all employees of private companies that recorded a negative change in their nominal turnover due to the pandemic.<sup>9</sup>

All this government investment generated the need for supplementary revenues in the treasury, which led to the adoption of various measures, including the enactment of Law No. 27,605, which established an exceptional, transitory, and progressive tax on large fortunes.<sup>10</sup> In order to try to limit these exceptional circumstances, and always within the framework of the emergency posed by the pandemic for workers in the formal economy, the national government, in line with previous experiences and with the support of trade union organizations that demanded it, established through DNU (Decree of Necessity and Urgency) 329 of 31/03/20, the temporary ban (of 60 days) on dismissals without cause or due to lack or reduction of work or *force majeure*.<sup>11</sup> This ban was extended on different occasions until December 31, 2021, through the enactment of other DNU, namely 487/20,<sup>12</sup> 624/20,<sup>13</sup>

<sup>9</sup> Law no. 332, Apr. 1, 2020, Boletín Oficial, no. 34325, at 2, <http://servicios.infoleg.gob.ar/infolegInternet/anexos/335000-339999/336003/texact.htm>.

<sup>10</sup> Law no. 27605, Dec. 18, 2020, Boletín Oficial, no. 34544, at 3, <https://www.boletinoficial.gob.ar/detalleAviso/primera/238732/20201218>.

<sup>11</sup> Emergency law no. 329, Boletín Oficial, no. 34344, at 7, <https://www.argentina.gob.ar/normativa/nacional/decreto-329-2020-335976>.

<sup>12</sup> Emergency decree no. 487, May 18, 2020, Boletín Oficial, no. 34384, at 3, <https://www.argentina.gob.ar/normativa/nacional/decreto-487-2020-337677>.

<sup>13</sup> Emergency decree no. 624, July 28, 2020, Boletín Oficial, no. 34436, at 3, <https://www.argentina.gob.ar/normativa/nacional/decreto-624-2020-340412>.

761/20,<sup>14</sup> 891/20,<sup>15</sup> 266/21,<sup>16</sup> 345/21, and<sup>17</sup> 413/21.<sup>18</sup>

This last measure, before its entry into force and after its termination, was part of a regime known as “double indemnity,” which because of the “labor emergency” before the pandemic, provides for the aggravation of indemnity as a dissuasive factor at the time of adopting the decision to dismiss, without cause or justification, workers whose labor relationship began before December 13, 2019.

Thus, by virtue of the Necessity and Urgency Decree 34/19 of December 13, 2019<sup>19</sup> and its successive extensions and of DNU 886/21 of December 24, 2021,<sup>20</sup> the aggravated indemnity was progressively reduced from 100 to 25% until the end of the referred regime foreseen for June 30, 2022, with a monetary ceiling of up to five hundred thousand pesos.

In turn, and because of the regulatory framework in question:

1. The ban on employers to suspend personnel and consequently the performance of work due to lack or reduction of work and force majeure for a period of 90 days was first established and then maintained, except for the possibility of agreeing with the workers and the labor unions that represent them to sus-

<sup>14</sup> Emergency decree no. 761, Sept. 23, 2020, Boletín Oficial, no. 34482, at 3, <https://www.boletinoficial.gob.ar/detalleAviso/prime-ra/235299/20200924>.

<sup>15</sup> Emergency decree no. 891, Nov. 13, 2020, Boletín Oficial, no. 34552, at 3, <https://www.boletinoficial.gob.ar/detalleAviso/prime-ra/237309/20201116>.

<sup>16</sup> Emergency decree no. 266, Apr. 21, 2021, Boletín Oficial, no. 34637, at 3, <https://www.boletinoficial.gob.ar/detalleAviso/prime-ra/243363/20210422>.

<sup>17</sup> Emergency decree no. 345, May 28, 2021, Boletín Oficial, no. 34666, at 4, <https://www.boletinoficial.gob.ar/detalleAviso/prime-ra/244929/20210528>.

<sup>18</sup> Emergency decree no. 413, June 25, 2021, Boletín Oficial, no. 34688, at 3, <https://www.boletinoficial.gob.ar/detalleAviso/prime-ra/246102/20210628>.

<sup>19</sup> Emergency decree no. 34, Dec. 13, 2019, Boletín Oficial, no. 34260, at 1, <http://servicios.infoleg.gob.ar/infolegInternet/anexos/330000-334999/333435/norma.htm>.

<sup>20</sup> Emergency decree no. 886, Dec. 13, 2021, Boletín Oficial, no. 34821, at 20, <https://www.boletinoficial.gob.ar/detalleAviso/prime-ra/255071/20211224>.

pend the effective performance of work under the terms of Article 223 bis of the Labor Contract Law (LCT, for its acronym in Spanish).<sup>21</sup>

2. In cases where the employers agree with the workers and/or with the union representing them on suspensions under the terms of article 223 bis, the latter may exceed the time limits established in Labor Contract Law (LCT) and must be approved by the Ministry of Labor before being valid and effective.
3. Suspensions and/or dismissals carried out in violation of these regulations shall be null and void, producing no effect whatsoever, so that labor relations and their normal and customary previous conditions shall in no way become ineffective.

## Intervention

The treatment provided by the emergency legislation issued by the national government for workers who contracted Covid was very important. It involved addressing situations of profound individual and collective relevance, such as: coverage of the medical treatment necessary to treat the pathology; payment of the resulting disabilities and/or death benefits, and payment of wages accrued until medical discharge, among others. Once again, the human dimension of the pandemic was at the forefront and posed current challenges with future implications.

As in many other aspects of the world of work, the pandemic also tested the aptitude and solvency of the tools designed up to that time to adequately contain the complexity of each of the cases and, along with it, the various tensions derived from the exponential growth of these cases. In other words, the pandemic made visible the lights and shadows of the existing social security and labor risk systems (Law 24.557).<sup>22</sup> It demonstrated that as commercial insurance contracted by the employer, it had only been created for formal workers, excluding informal and self-employed workers who were relegated to their own health systems or to the public medical system and

<sup>21</sup> LCT, *supra* note 3.

<sup>22</sup> Law no. 24557, Oct. 3, 1995, Boletín Oficial, no. 28242, at 1, <http://servicios.infoleg.gob.ar/infolegInternet/anexos/25000-29999/27971/norma.htm>.

to possible state aid, meaning their fate was determined by their monetary capacity, with no specific economic coverage for disability or death.

As a result of previous normative decisions, Argentina was clearly obliged to unconditionally recognize Covid-19 as occupational in nature and origin, since, before the pandemic, it had already ratified International Labor Organization (ILO) Convention No. 155 on Occupational Safety and Health<sup>23</sup> in 2002 and its Recommendation No. 187 on the Promotional Framework for Occupational Safety and Health,<sup>24</sup> which establishes a generous definition of accident, occupational disease, or dangerous event (art. 1). It is our view that the Coronavirus falls within this definition, as is particularly evident from the text ILO standards and COVID-19, which became public at the end of March 2020.<sup>25</sup>

Thus, the regulation in force during the pandemic, Law 24.557 in its article 6, established the following as contingencies to be covered by the system:

1. An **occupational accident** is any sudden and violent event occurring because of or during work, or on the route between the worker's home and the workplace, provided that the injured party has not interrupted or altered said route for reasons unrelated to work [...]
2. a) **Occupational diseases** are those included in the list to be prepared and reviewed by the Executive Branch [...] The list shall identify the risk agent, clinical pictures, exposure, and activities capable of determining the occupational disease. The diseases not included in the list, as well as their consequences, shall not be considered compensable, with the sole exception of the provisions of the following subsections: b) Those other dis-

<sup>23</sup> Convention (No. 155) Concerning Occupational Safety and Health and the Working Environment, June 21, 1981, 1331 U.N.T.S. 279, [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C155](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C155).

<sup>24</sup> ILO, PROMOTIONAL FRAMEWORK FOR OCCUPATIONAL SAFETY AND HEALTH RECOMMENDATION (No. 197) (2006), [https://www.ilo.org/dyn/normlex/en/f?p=1000:55:0::NO::P55\\_TYPE,P55\\_LANG,P55\\_DOCUMENT,P55\\_NODE:REC,en,R197,%2FDocument](https://www.ilo.org/dyn/normlex/en/f?p=1000:55:0::NO::P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:REC,en,R197,%2FDocument).

<sup>25</sup> ILO STANDARDS AND COVID-19 (CORONAVIRUS): FAQ (Version 3.0) (2021), [https://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@normes/documents/publication/wcms\\_780445.pdf](https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_780445.pdf).

eases that, in each specific case, the Central Medical Commission determines are caused directly and immediately by work, excluding the influence of factors attributable to the worker or not a part of the work, shall also be considered occupational diseases.<sup>26</sup>

However, during the pandemic, the occupational risk system, Law 24,557, did not provide equal treatment to those infected.

In this sense, we must distinguish between two well-differentiated moments: a) the preventive and obligatory isolation (ASPO) when only essential workers performed their tasks; and b) the progressive renewal of activities until they were completely resumed.

With some delay, considering that Covid appeared in Argentina in mid-March 2020, the national government issued the DNU 367 (B.O. 13/04/20)<sup>27</sup> which, briefly, established that workers who contract Covid in activities exempted from confinement (ASPO) – those defined as “essential” – benefit from the consideration that the disease is occupational but not included in the list of diseases recognized a priori as occupational provided for in section 2b of article 6 of law 24.557 referred to above.<sup>28</sup> It is therefore a non-listed disease and, consequently, workers must go through the evidentiary procedure in administrative proceedings aimed at proving the direct and immediate causality of work before the Central Medical Commission.

Furthermore, in these cases, the Labor Risk Insurance Companies (ART, the acronym in Spanish) could not reject the complaints and were obliged to grant medical and monetary benefits. The affected workers could also benefit from an “evidentiary advantage” consisting of the reversal of the burden of proof of causality, if there were sufficient objective indications of possible infection, including the performance of work.

This last rule differentiated health personnel from other workers in essential activities by stating that if they contracted the virus, it was considered to have a direct and immediate causal relationship with their work and there-

<sup>26</sup> Law no. 24557, *supra* note 21.

<sup>27</sup> Decree no. 367, Apr. 13, 2020, Boletín Oficial, no. 34355, at 3, <https://www.boletinoficial.gob.ar/detalleAviso/primera/227750/20200414>.

<sup>28</sup> Law no. 24557, *supra* note 21.

fore it should be treated as an occupational disease unless the ART itself proved otherwise.

Through DNU 39/2021 (BO: 23/1/2021),<sup>29</sup> and for a term of 90 calendar days (successively extended until 12/31/21 through to DNU 413/21),<sup>30</sup> Covid continued to be considered a “non-listed” occupational disease for all workers included in the scope of Law 24557 (formal workers) who work in their usual workplaces (remote work was excluded).<sup>31</sup> However, as of January 1, 2022, a new change took place and Covid ceased to be an occupational disease not listed in the framework of Law 24557 for almost all workers, except for health workers and members of the security forces performing effective service, who will continue to be covered until 02/28/23.

Consequently, for the rest of the workers as of January 1, 2022, Covid was treated as an “incurable disease” under the terms of the general legislation on the matter (articles 208 to 212 of the LCT) and workers could resort to the Central Medical Commission of Law 24,557 if they believed they were entitled to do so.<sup>32</sup>

Under this system, although the employee’s right to receive remuneration is not substantially affected, the employer is responsible for a period of three months, if their seniority is of less than five years, and six months if it is greater. In cases where the employee has family responsibilities, the periods during which they will be entitled to receive remuneration will be extended to six and twelve months, respectively, depending on whether their seniority is less or more than five years. In addition, as an incurable disease (not related to work), the medical benefits necessary for its treatment are paid by the national health insurance through the union social security (Laws 23,660<sup>33</sup> and 23,661<sup>34</sup>) and disabilities resulting from the

<sup>29</sup> Emergency decree no. 39, Jan. 22, 2021, Boletín Oficial, no. 34568, at 1, <https://www.boletinoficial.gob.ar/detalleAviso/prime-ra/240024/20210123>.

<sup>30</sup> Emergency decree no. 413, June 25, 2021, Boletín Oficial, no. 34688, at 3, <https://www.boletinoficial.gob.ar/detalleAviso/prime-ra/246102/20210628>.

<sup>31</sup> Law no. 24557, *supra* note 21.

<sup>32</sup> LCT, *supra* note 3.

<sup>33</sup> Law no. 23360, Jan. 5, 1989, Boletín Oficial, no. 26555, at 1, [https://www.ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=7984](https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=7984).

<sup>34</sup> Law no. 23661, Jan. 5, 1989, Boletín Oficial, Jan. 20, 1989, at 3, <http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/63/norma.htm>.

virus are paid for by social security, if applicable.

## Analysis

In our view, the decision of the national government to consider Covid-19 an occupational disease, with the limitations described above, was largely correct and in line with the regulations in force, which did not allow for much more. It was a possible and ingenious solution within the framework of an existing system, which it tried to adapt to the critical pandemic situation.

Our doubts were mainly due to the differential treatment of formal versus informal workers: the law was limited to employees, while informal and self-employed workers were provided with lower levels of protection.

Beyond this issue, although the obligation to provide immediate coverage as an illness to those essential workers outside the health sector who were infected was prudent and creative, conditioning the acceptance of the occupational nature of the disease to prove that the infection was caused by or was contracted in the course of their work has complex and reproachable aspects from a legally protective point of view. It should be noted that we are dealing with an invisible and highly transmittable virus, which in some cases makes it impossible to prove.

To avoid this limitation, the regulation resorts to indications, leaving its final assessment subject to the criteria of an administrative body, which is difficult for the worker to deal with because they are not familiar with it, and because it is made of health workers, similar to the Central Medical Commission. This commission defines situations that have legal implications for workers from all over the country even though it is in Buenos Aires, which undoubtedly infringes on the labor rights of workers from other parts of the country.

Moreover, the presumption of unlisted occupational disease does not resolve the issue of the infection that may occur during the worker’s commute from home to the workplace and vice versa, which is also included in the Argentine legislation as an occupational contingency that must be covered. Maybe the existence of an environment and circumstances that facilitated the infection in the transportation system or environment used to get to or

[htm](#).

leave work could be presumed, but once again this is at the discretion of the aforementioned administrative medical body.

These speculations and questions resulted in a tortuous process for the worker to accomplish the recognition of the occupational nature of the pathology, which would have been avoided if Covid-19 had been considered a listed disease. The treatment given to workers who were not a part of the health sector or the security forces who were infected from January 1, 2022, onwards deserves a separate paragraph.

The decision to characterize the infection as not related to work, unless proven otherwise, although it may be reasonable in view of the progressive renewal of activities and the free movement of people, entails the transfer of the costs derived from the contingency to other actors who were already severely affected by the crisis associated with the pandemic, and this could be considered inequitable. We are referring to the employers who, by the legal imperative described above, must pay the wages accrued during the illness and to the trade union social security funds which, as agents of the health insurance system, must provide and pay for **medical** care.

## Conclusion

In general, and taking into account the analysis and observations we have made, the decision to classify Covid-19 as an occupational disease, although it could undoubtedly be improved, was a measure that benefited not only workers but also employers. The measure was adopted by rapidly adapting existing systems and institutions to the dynamics of the pandemic and with a certain level of consensus with the different social actors in the world of work who, for different reasons and interests, were united by the fear of the supposed negative consequences of the pandemic. The open and frank dialogue, with concrete and tangible results from these actors and the government, was one of the main tools to give viability and sustainability to these possible solutions.

# Employers' Safety Obligation in Times of Health Crisis:

Observations Pursuant to the Ruling of the Court of Appeal of Versailles of 24 April 2020

Yassine Mouhib<sup>1</sup>

## Introduction

In the aftermath of the announcement of the lockdown in France on March 17, 2020, the government quickly set up a legal framework to counter the crisis linked to the Covid-19 pandemic. Following the law of March 23, 2020, establishing the "state of health emergency,"<sup>2</sup> a substantial number of laws and an equally substantial number of orders were adopted, setting up a provisional crisis management law. As with other fields of law<sup>3</sup>, labor law had to be adapted to deal with the exceptional context. In doing so, the government tried to reconcile two imperatives from the beginning of the pandemic. On the one hand, several new provisions were taken to preserve the French economic fabric. One example is the modification of the part-time work scheme, designed to develop this mechanism as much as possible, the idea being that suspending the employment contract of some employees during the pandemic would allow the employer to avoid laying off employees.<sup>4</sup> As a matter of fact, since the law on econom-

ic dismissals had not been modified,<sup>5</sup> the main benefit of part-time work was to preserve jobs through the mechanism of "contract suspension": the employment contract survives, but is suspended. Perhaps it is the modification of bankruptcy law that has contributed to the preservation of the French economy.

On the other hand, with regard to the industries whose operations have been maintained, the terms and conditions under which they could be carried on had to be determined. It is agreed that employers' rights have been considerably enhanced during the crisis: in terms of working hours,<sup>6</sup> vacations,<sup>7</sup> and even in terms of the reduction of

<sup>5</sup> As was the case in other European countries. See Julien Icard, *Le licenciement pour motif économique et la crise sanitaire* [Economic Dismissal and the Health Crisis], 2020 DROIT SOCIAL 602.

<sup>6</sup> The law of March 23, 2020, specified, in this respect, that it was a matter of "allowing companies in sectors that are especially necessary for the Nation's security or for the continuity of economic and social life to deviate from the rules of public order and the conventional stipulations relating to working hours, weekly rest and Sunday rest." Order no. 2020-323 of March 25, 2020, on emergency measures concerning paid leave, working hours, and rest days specified some of the aspects of this exceptional working time law. Working days of up to 12 hours were authorized, as well as working weeks of up to 60 hours, weekly working hours calculated over any period of twelve consecutive weeks, and the daily rest period may also be reduced to 9 consecutive hours, subject to the granting of compensatory rest equal to the duration of the rest period not taken by the employee.

<sup>7</sup> Art. 1 of the Ord. of March 25, 2020:

To deal with the economic, financial, and social consequences of the spread of covid-19, by way of derogation from sections 2 and 3 of Chapter I of Title IV of Book I of the third part of the Labor Code and the conventional stipulations applicable in the company, site or branch, a company agreement, or, failing that, a branch agreement may determine the conditions **under which an employer is authorized within the limit of six days' leave and subject to a notice period that may not be reduced to less than one full day, to decide to take paid leave days accrued by an employee, including before the beginning of the period during which they are normally intended to be taken, or to unilaterally modify the dates on which paid leave is taken** (underlining added).

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<sup>2</sup> L. No. 2020-290 of March 23, 2020, for an emergency response to the covid-19 epidemic.

<sup>3</sup> Alain Couret, *Interpréter le droit des sociétés en temps de Covid-19* [Interpreting Corporate Law in the Times of Covid-19], REVUE DES SOCIÉTÉS, Juin 2020, at 331; Cyril Grimaldi, *Quelle jurisprudence demain pour l'épidémie de Covid-19 en droit des contrats?* [Which Case Law Will There Be in the Future for the Covid-19 Epidemic in Contract Law?], 196 RECUEIL DALLOZ, 827 (2020); Francine Macorig-Venier, *La prévention des difficultés et l'état d'urgence sanitaire: suite et bientôt fin?* [The Prevention of Difficulties and the State of Health emergency: continuation and near end?], REVUE TRIMESTRIELLE DE DROIT COMMERCIAL ET DE DROIT ÉCONOMIQUE, Dec. 8, 2021, at 417. The pandemic was also difficult to manage in overseas territories such as New Caledonia, see on this point: L. LERICHE, « *La protection internationale du droit à la santé des peuples autochtones en période pandémique* [The International Protection of the Right to Health of Indigenous peoples in Times of Pandemic], 66 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 97 (2021).

<sup>4</sup> Frédéric Gea, *L'activité partielle, face à la crise* [Part-Time Work, in the Face of the Crisis], REVUE DE DROIT DU TRAVAIL, Apr. 2020, at 250.

the operating time schedule of the social and economic committee (hereafter “CSE”).<sup>8</sup> In industries where telework was possible, this type of work was given priority, without it ever being a formal obligation.<sup>9</sup> On the other hand, there were still several jobs for which in-person work was essential. This type of worker, in the early days of the pandemic, was referred to as a “front-line worker.”<sup>10</sup> These workers—garbage collectors, cashiers, handlers, etc.—were all de facto exposed to the risk of contracting the Covid-19 virus in their workplace. This is why the issue of employee health was particularly relevant during this time of crisis. The decision of the Court of Appeal of Versailles on April 24, 2020, demonstrates this fact.<sup>11</sup>

<sup>8</sup> Décret n° 2020-508 du 2 mai 2020 adaptant temporairement les délais relatifs à la consultation et l’information du comité social et économique afin de faire face aux conséquences de la propagation de l’épidémie de covid-19 [Decree No. 2020-508, May 2, 2020 temporarily adapting the deadlines relating to consulting and informing the social and economic committee in order to deal with the consequences of the spread of the covid-19 epidemic], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], May 3, 2020, no. 0108; V.S. Bernard, I. Taruad & A. Stocki, *Les délais du CSE et d’expertise singulièrement raccourcis* [The Deadlines of the CSE and of Assessment Considerably Shortened], SSL, May 18, 2020, no. 1908, at 5; Frédéric Guiomard, *L’ineffectivité de la garantie du droit à consultation en période de crise sanitaire* [The Ineffectiveness of Safeguarding the Right to Consultation During a Health Crisis], 2020 REVUE DE DROIT DU TRAVAIL 486.

<sup>9</sup> Damien Bondat, *D’un confinement l’autre : demain tous télétravailleurs?* [From One Lockdown to Another. All Teleworkers Tomorrow?], LPA, Dec. 2020, at 6.

<sup>10</sup> Others use the expression “second-line workers,” implying that the first-line workers are the medical profession. Patrice Adam, *Je te promets... le vent !*, DROIT SOCIAL, July/August 2020, at 576.

<sup>11</sup> Court of Appeal, Versailles, 24 April 2020, no. 20/01993; see also Pierre-Emmanuel Berthier, *La participation des représentants du personnel à l’évaluation des risques professionnels: les enseignements de l’arrêt Amazon France Logistique* [The Participation of Staff Representatives in the Assessment of Occupational Risks: Lessons from the Amazon France Logistique Case], REVUE DE DROIT DU TRAVAIL, 2020, at 482; Laurent Gamet, *Exposition des salariés au coronavirus: l’affaire Amazon* [Employee Exposure to Coronavirus: The Amazon Case], LEDICO May 2020, at 1; note Hélène Nasom Tissandier, *Covid 19 et obligation de sécurité de l’employeur: un coup de semonce a retenti pour Amazon* [Covid 19 and the Employer’s Safety Obligation: A Sounding Board for Amazon], JURISPRUDENCE SOCIALE LAMY, no. 499, June 2020, at 3. Caroline Vanuls, *L’obligation de sécurité de l’employeur à l’épreuve de la pandémie de Covid-19* [The Employer’s Safety Obligation in the Face of the Covid-19 Pandemic], GAZETTE DU PALAIS, no. 30, Sept. 2020, at 66; Louis Vogel & Joseph Vogel, *Les enseignements de l’affaire Amazon pour les entreprises* [Lessons from the Amazon Case for Companies], Revue de Jurisprudence Sociale (RJS), July 2020, at 494; Loïc Malfettes, *Coronavirus: Confirmation de la condamnation d’Amazon en Appel* [Coronavirus: Confirmation of Amazon’s Conviction on Appeal], DALLOZ ACTUALITÉ (Apr. 29, 2020).

## Legal Context<sup>12</sup>

Pursuant to article L. 4121-1 of the French Labor Code,<sup>13</sup> an employer is required to comply with a safety obligation towards its employees. The scope of this obligation has long been the subject of much litigation. Based on a doctrinal distinction,<sup>14</sup> the question was whether the safety obligation is one of “result” or of “means.” When a person is bound by an obligation of result, he or she is required to achieve that particular result. Conversely, when a person is bound by an obligation of means, the debtor of this obligation must only do what he or she can, in other words, what is within his or her “means,” without being required to achieve a specific result. Employers’ safety obligation was at one time particularly strong since the Court of Cassation declared in its well-known series of *Asbestos* decisions that “by virtue of the employment contract binding it to its employee, the employer is bound to the latter by an obligation of safety of result, in particular with regard to occupational diseases contracted by this employee as a consequence of the products manufactured or used by the company”.

The *Snecma* decision<sup>15</sup> was also an important step in the development of case law in this area. It removed the safety obligation from the contractual framework, and the basis for this obligation was now statutory—as the grounds for the judgment indicate. Employers were therefore no

<sup>12</sup> The presentation of the provisions relating to the case at hand provides a picture of positive law at the time the case is ruled on. A major reform in the area of occupational health, including the provisions relating to the employer’s safety obligation, was introduced on August 2, 2021. See *infra* 54 on this last aspect.

<sup>13</sup> Code du Travail [C. Trav.] art. L. 4121-1:

The employer shall take the necessary measures to ensure the safety and protect the physical and mental health of workers. These measures include: 1° Actions to prevent occupational risks, including those mentioned in Article L. 4161-1; 2° Information and training activities; 3° The implementation of an appropriate organization and means. The employer shall ensure that these measures are adapted to take account of changing circumstances and to improve existing situations.

<sup>14</sup> Based on the work of René Demogue.

<sup>15</sup> Cour de cassation [Cass.] [supreme court for judicial matters] soc., Mar. 5, 2008, no. 06-45.888; note Pierre-Yves Verkindt, *L’acmé de l’obligation de sécurité du chef d’entreprise* [The Acme of the Safety Obligations of the Company Manager], SEMAINE SOCIALE LAMY (SSL), no. 1346, Mar. 2008, at 11; see also Loïc Lerouge, *La suspension judiciaire d’une réorganisation au nom de la protection de la santé* [The Judicial Suspension of a Reorganization in the Name of Health Protection], 2008 REVUE DE DROIT DU TRAVAIL (RDT) 316.

longer liable only for breaches of contractual obligations but for any failure to comply with the provisions of the Labor Code.<sup>16</sup> Case law has considerably extended the circumstances under which an employer could be held liable for failure to comply with the safety obligation, even outside the scope of occupational accidents and diseases.<sup>17</sup>

However, the well-known *Air France* decision of November 25, 2015, reversed the case law. In this decision, the high court stated that:

an employer who can prove that it has taken all the measures provided for in Articles L. 4121-1 and L. 4121-2 of the Labor Code is not in breach of the legal obligation to take the necessary measures to ensure the safety and protect the physical and mental health of workers.<sup>18</sup>

This statement means that an employer is not systematically liable in case of harm to the physical or mental health of an employee, as the employer can always absolve itself of its liability by demonstrating that it has taken all the necessary measures required by the Labor Code.<sup>19</sup> So, what was the nature of the safety obligation in the aftermath of this decision? Many scholars have endeavored to answer this question.<sup>20</sup> Some considered that the safety obligation had become a “mitigated” obligation of result,<sup>21</sup>

<sup>16</sup> A significant amount of litigation has developed, particularly in the area of harassment.

<sup>17</sup> Alexis Bugada, *L'obligation de sécurité pesant sur l'employeur en matière prud'homale obligation de moyen ou de résultat?* [The Safety Obligation Incumbent on the Employer in Labor Matters - Obligation of Means or of Result], JCP S. 2014. 1450.

<sup>18</sup> Cour de cassation [Cass.] [supreme court for judicial matters] soc., Nov. 25, 2016, *Air France*, no. 14-24.444 note Paul-Henri Antonmattel, DROIT SOCIAL, 2016, at 457; note Franck Héas, *Le devenir de l'obligation de sécurité de résultat en matière de travail* [The future of the safety obligation of result in the workplace], 2016 DROIT OUVRIER 10.

<sup>19</sup> V. *infra* no. 2.4.

<sup>20</sup> Luc de Montlavon, *Le crépuscule de l'obligation de sécurité de résultat* [The Demise of the Safety Obligation of Result], SEMAINE SOCIALE LAMY (SSL), no. 1799, Jan. 2018; Julien Icard, *La nature ambiguë de l'obligation de sécurité de l'employeur* [The ambiguous nature of the employer's safety obligation], CAHIERS SOCIAUX, no. 117r4, Jan. 2016, at 23; Alexia Gardin, *La redéfinition de l'obligation de sécurité de l'employeur*, [Redefining the Employer's Safety Obligation], 2016 REVUE DE JURISPRUDENCE SOCIALE 99.

<sup>21</sup> Geneviève Pignarre & Louis-Frédéric Pignarre, *La prévention: pierre angulaire ou/et maillon faible de l'obligation de santé et sécurité au*

while others referred rather to a “reinforced” obligation of means.<sup>22</sup> Whatever the nature of the obligation, the focus has certainly shifted considerably to the preventive measures put in place by the employer. As the Court of Cassation pointed out in the explanatory note to the *Air France* decision, “the employer's expected result is specifically the implementation of all means to prevent occupational risks.” Prevention is to be defined as “all measures and actions intended to prevent or curb the occurrence of a risk, the infliction of damage or the performance of harmful acts by endeavoring to eliminate the causes thereof.”<sup>23</sup>

To this end, articles L. 4121-2<sup>24</sup> and L. 4121-3<sup>25</sup> are partic-

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*travail de l'employeur ?* [Prevention: the cornerstone and/or weak link of the employer's health and safety obligations at work?], 2016 REVUE DE DROIT DU TRAVAIL 151.

<sup>22</sup> Christophe Radé, *Harcèlement moral et responsabilités au sein de l'entreprise: l'obscur éclaircissement* [Moral Harassment and Responsibilities Within the Company: The Obscure Clarification], 2006 Droit Social 826; Jean Mouly, *L'assouplissement de l'obligation de sécurité en matière de harcèlement moral* [Easing of the Safety Obligation in Connection with Moral Harassment], SEMAINE JURIDIQUE (JCP G.), no. 28, July 11, 2016, at 822.

<sup>23</sup> Franck Héas, *De la sécurité à la santé, les évolutions de la prévention au travail* [From Safety to Health, the Development of Prevention at Work], SEMAINE SOCIALE LAMY (SSL), no. 1655, Dec. 2014.

<sup>24</sup> Code du Travail [C. Trav.] art. L. 4121-2:

The employer shall implement the measures provided for in Article L. 4121-1 on the grounds of the following general prevention principles: 1° Avoiding risks; 2° Assessing risks that cannot be avoided; 3° Combating risks at source; 4° Adapting work to the individual, in particular with regard to the design of workstations and the choice of work equipment and work and production methods, with a view to limiting monotonous work and work at a fixed pace and reducing the effects of such work on health; 5° Taking into account technical developments; 6° Replacing what is hazardous by what is not hazardous or by what is less hazardous; 7° Planning prevention by integrating, as a coherent whole, technology, work organization, working conditions, social relations and the influence of environmental factors, in particular the risks related to moral harassment and sexual harassment, as defined in articles L. 1152-1 and L. 1153-1, as well as those linked to sexist behavior as defined in article L. 1142-2-1; 8° Taking collective protection measures, giving them priority over individual protection measures; 9° Giving appropriate instructions to workers.

<sup>25</sup> Code du Travail [C. Trav.] art. L. 4121-3 (excerpt) :

The employer, taking into account the nature of the site's activities, **shall assess the risks to the health and safety of workers**, including in the choice of manufacturing processes, work equipment, chemical substanc-

ularly useful for the employer. L. 4121-2 lists the “general prevention principles,” which include the need to “avoid risks,” to “assess [those] that cannot be avoided,” and to “combat risks at the source.” L. 4121-3 recalls the two main lines of prevention: on the one hand, risk assessment, and on the other, the implementation of preventive actions. To ensure that the risk assessment is performed adequately, the Labor Code requires the employer to transcribe and update the results of the assessment in a “single risk assessment document.”<sup>26</sup> More specifically, article R. 4121-3 states that this document must be updated either every year or “when any decision is taken concerning major changes in health and safety conditions or working conditions.” But, in such an exceptional context as that of the Covid-19 crisis, what could “implement all means of preventing occupational risks” mean? It is precisely on this ground that a dispute developed at the beginning of the Covid-19 crisis, which is reflected in the decision of the Court of Appeal of Versailles in the *Amazon France Logistique* case.

## Court Case

Amazon France Logistique was widely criticized at the beginning of the health crisis because of the working conditions of employees.<sup>27</sup> The exercise of employees’ right to withdraw from employment by several employees, the filing of a complaint by a trade union for causing danger to life, and the triggering of alerts due to a serious and imminent danger are all evidence of a particularly tense social climate within the company. In this case, as in the others that emerged from the Covid-19 crisis, the unions played a major role in voicing employees’ concerns about their

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es or preparations, in the layout or refitting of workplaces or facilities, in the organization of work and in the definition of work stations. This risk assessment shall take into account the gender-differentiated impact of exposure to the risk. [...] Following this assessment, **the employer shall implement preventive measures** and work and production methods that guarantee a better level of protection for the health and safety of workers.

<sup>26</sup> Code du Travail [C. Trav.] art. (old) R. 4121-1.

<sup>27</sup> *Coronavirus : les syndicats d'Amazon continuent de demander l'interruption du travail* [Coronavirus: Amazon Unions Continue to Call for Work Stoppage], LE MONDE, (Mar. 27, 2020), [https://www.lemonde.fr/economie/article/2020/03/27/coronavirus-chez-amazon-les-syndicats-ne-desarment-pas\\_6034618\\_3234.html](https://www.lemonde.fr/economie/article/2020/03/27/coronavirus-chez-amazon-les-syndicats-ne-desarment-pas_6034618_3234.html); *Un premier cas de coronavirus confirmé chez Amazon à Saran* [First Confirmed Coronavirus Case at Amazon in Saran], LA RÉPUBLIQUE DU CENTRE (Mar. 25, 2020), [https://www.larep.fr/saran-45770/actualites/un-premier-cas-de-coronavirus-confirme-chez-amazon-a-saran\\_13770010/](https://www.larep.fr/saran-45770/actualites/un-premier-cas-de-coronavirus-confirme-chez-amazon-a-saran_13770010/).

working conditions. This role of the unions led the union SUD to apply for interim relief with the Nanterre Court of Justice on April 8, 2020, arguing that there was indeed a “manifestly unlawful disturbance” due to the lack of prevention of occupational risks related to Covid-19 in Amazon’s warehouses.<sup>28</sup> As a reminder, the procedure for interim relief allows, in case of emergency, to obtain a directly enforceable decision. The interim relief judge intervenes either to prevent imminent damage or to stop a manifestly unlawful disturbance.<sup>29</sup> Without being able to rule on the merits of the case,<sup>30</sup> he or she has the power to impose monetary penalties<sup>31</sup> or to demand the payment of costs.

First of all, the union demanded a total halt to the activity of the warehouses, since they contained more than 100 employees in the same closed area. In addition, the union demanded “to stop the sale and delivery of non-essential products, i.e. non-food, non-hygiene and non-medical products, and therefore to reduce the number of employees working at the same time such that it does not exceed 100 employees per warehouse.” By order of April 14, 2020, the interim relief judges granted the union’s additional request, ordering Amazon France Logistique to “restrict the activities of its warehouses to the reception of goods, the preparation and shipment of orders for food products, hygiene products, and medical products until the company has implemented, with the participation of staff representatives, an assessment of the occupational risks inherent in the covid-19 epidemic.”<sup>32</sup> This injunction was

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<sup>28</sup> This is not an isolated action. For an analysis of other interim relief proceedings instituted during the beginning of the Covid-19 crisis, see Frédéric Guiomard, *Les référés, juge de la prévention* [Interim Relief, Judge of Prevention], 2020 REVUE DE DROIT DU TRAVAIL 35; Marc Vériçel, *Santé au travail, rôle du CSE et du syndicat* [Occupational Health, the Role of the CSE and Unions], 2020 REVUE DE DROIT DU TRAVAIL 412.

<sup>29</sup> Code civil [C. civ.] art. 835.

<sup>30</sup> Cécile Chainais et al., PROCÉDURE CIVILE ¶ 1880, at 1396 (35th ed. 2020).

<sup>31</sup> Code civil [C. civ.] art. 491.

<sup>32</sup> TJ Nanterre, ord. ref., 14 April 2020, no. 20-00.503 note Laurent Gamet, *Exposition des salariés au Covid-19: la leçon de l'ordonnance Amazon* [Employee Exposure to Covid-19: Lessons from the Amazon order], JCP S. 2020, no. 17, at 2005; note Bruno Fieschi, *Le risque de la poursuite d'activité dans un contexte d'état d'urgence sanitaire* [The Risk of Continued Activity in a State of Health Emergency], LEXBASE: LETTRE JURIDIQUE (Apr. 29 2020); C. GALLON, *De Lille à Nanterre en passant par Versailles, les points cardinaux du droit à la sécurité en temps d'épidémie* [From Lille to Nanterre and Versailles, the Cardinal Points of the Right to Safety During Epidemics], Droit Ouvrier, no. 862, 2020, at 305; Loïc Malfettes, *Coronavirus: condamnation d'Amazon pour le non-respect de mesures de prévention* [Coronavirus: Amazon Convict-

supplemented by a fine of 1,000,000 euros per day and per observed violation. Having its activity restricted,<sup>33</sup> the defendant company immediately appealed. In a decision dated April 24, 2020,<sup>34</sup> the Court of Appeal of Versailles confirmed the contested order.

## Analysis

The rationale of the Court of Appeal is broken down into four stages. First, based on an enhanced argument compared to that of the interim order, the Court of Appeal considers the prohibition of gatherings, meetings of any kind, or activities involving more than 100 people simultaneously to be inapplicable to companies (A). It then confirms the characterization of the manifestly unlawful disturbance due to the violation of the safety obligation and prevention at the date when the court ruled (B). In so doing, the appeal judges provide a detailed interpretation of the actions to be taken by the employer in terms of health and safety in times of health crisis. The Court of Appeal also ruled on the determination of the manifestly unlawful disturbance at the time of its ruling (C). The magistrates then applied the methodology they had adopted, in order to decide whether the safety obligation was fulfilled in each of the appellant company's warehouses. Finally, after confirming the decision of the interim relief judge, the Court of Appeal specified the measures to be taken to put an end to the manifestly unlawful disturbance. The magistrates of Versailles thus ruled in favor of restricting the activity of the warehouses to the so-called "essential" activities (D).

### The Inapplicability to Companies of the Prohibition on Gatherings of More Than 100 People

In both the first instance and on appeal, the union sought to establish a manifestly unlawful disturbance and imminent harm because of the alleged failure to apply the prohibition on activities involving more than 100 people simultaneously in a closed or open environment.<sup>35</sup> Indeed,

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*ed for Non-Compliance with Prevention Measures*], DALLOZ ACTUALITÉ (Apr. 20, 2020).

<sup>33</sup> As evidenced by the wording of the appeal decision, Amazon decided to close its warehouses between the date of the interim relief and the appeal decision, i.e. for 10 days.

<sup>34</sup> *Supra* note 12.

<sup>35</sup> On this issue, see the highly instructive developments of Louis Vogel

noting that the warehouses brought together more than five hundred employees, the union argued that there was a violation of articles 2<sup>36</sup> of the Order of March 14, 2020<sup>37</sup> and 7<sup>38</sup> of the Decree of March 23, 2020,<sup>39</sup> in the absence of a prefectorial authorization exemption for Amazon.

Amazon considered that this prohibition did not apply to it, since it would have been aimed only at citizens' gatherings. It based its argument on a "finalist" interpretation of several articles. Thus, Amazon first pointed out that articles 2 of the Order of March 14, 2020, and 7 of the Decree of March 23, 2020, were based on the sixth paragraph of article L. 3131-15 of the Public Health Code, which aims to "limit or prohibit public street gatherings or gatherings in a place open to the public, as well as meetings of any kind, excluding any regulation of the conditions of the presence or access to premises used for residential purposes." Amazon's lawyers argued that this article only regulated "public street gatherings" or "meetings of any kind," the latter referring to the freedom of assembly and not to the freedom of enterprise. Therefore, this prohibition cannot be applied to companies.

As did the interim relief order, the Court of Appeal of Versailles accepted this interpretation, considering that:

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& Joseph Vogel, *Les enseignements de l'affaire Amazon pour les entreprises* [Lessons from the Amazon Case for Companies], REVUE DE JURISPRUDENCE SOCIALE, July 2020, at 494.

<sup>36</sup> "Afin de ralentir la propagation du virus covid-19, tout rassemblement, réunion ou activité mettant en présence de manière simultanée plus de 100 personnes en milieu clos ou ouvert, est interdit sur le territoire de la République jusqu'au 15 avril 2020 [In order to slow the spread of the covid-19 virus, any gathering, meeting or activity involving more than 100 people simultaneously in an enclosed or open environment is prohibited on the territory of the Republic until April 15, 2020]."

<sup>37</sup> Arrêté du 14 mars 2020 portant diverses mesures relatives à la lutte contre la propagation du virus covid-19 [Order of March 14, 2020, on various measures relating to the fight against the spread of the covid-19 virus], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], Mar. 15, 2020, no. 0064.

<sup>38</sup> "Tout rassemblement, réunion ou activité mettant en présence de manière simultanée plus de 100 personnes en milieu clos ou ouvert, est interdit sur le territoire de la République jusqu'au 15 avril 2020 [Any gathering, meeting or activity involving more than 100 people simultaneously in an enclosed or open environment is prohibited in the territory of the Republic until April 15, 2020]."

<sup>39</sup> Décret n° 2020-293 du 23 mars 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans le cadre de l'état d'urgence sanitaire [Decree no. 2020-293 of March 23, 2020], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], Mar. 24, 2020, no. 0072.



An Amazon worker in France. Photo © Frederic Legrand - COMEO / Shutterstock

it can be deduced from the combined application of these provisions that the legislator, by prohibiting gatherings, meetings of any kind, or activities involving the simultaneous presence of more than 100 people and by subjecting the maintenance of such gatherings to the authorization of the regulatory authority, restricted the freedom of assembly of citizens but did not intend to prohibit the pursuit of business activities other than those listed in the aforementioned article 8 and which do not concern Amazon's activity.

### Confirmation of the Manifestly Unlawful Disturbance at the Time of the Interim Relief Decision

In response to the rationale set forth by the Court of First Instance, the appellant company presented several elements intended to show that it had not breached its safety obligation. Firstly, it states that it has put in place measures allowing for an adequate risk assessment through three daily actions: control by a safety team, called "Safety"; visits to which the staff representatives were invited; and a telephone meeting with the support functions of all the sites. Secondly, the appellant company argued that it had updated the single assessment document (hereinafter: "DUE") at the beginning of the health crisis. Lastly, it recalled that in the absence of any mention in the Labor Code of the need to consult the CSE on the preparation of the DUE and to involve the staff representatives in the risk

assessment and the implementation of safety measures, the company used several communication channels to keep the CSE and the staff representatives informed.

The Court of Appeal responded to the appellant company in two stages. Based on the logic of the safety obligation,<sup>40</sup> it first focused on the assessment of occupational risks (1) and then on checking the measures implemented to prevent damage to the health and safety of employees (2).

#### On the assessment of occupational risks

First of all, the magistrates acknowledge that there is no specific method for assessing occupational risks. However, referring to a 2002 circular, they adopted a teleological approach, considering that the method adopted must pursue a well-defined objective, that of "apprehending the real conditions of employee exposure to hazards." In order to achieve this objective, the Court of Appeal stated that, because of employees' knowledge of their own working conditions, they deserved to be involved in the risk assessment. Moreover, the fact of having a multidisciplinary approach to occupational risks makes it possible to improve the quality of the assessment that the employer must perform.

After ascertaining that the particularly contagious nature of the virus necessarily entailed a change in the "work organization," the Court of Appeal referred to articles

<sup>40</sup>The two stages are highlighted in article L. 4121-3.

L.2316-1 3° and L.2312-8 4° of the Labor Code to infer the obligation to consult the central CSE on the modification of health and safety conditions, as well as on the modification of working conditions. The Court of Appeal thus deduced that the central CSE had to be consulted both on the risk assessment and on the implementation of the measures, the CSEs of the sites, therefore, having to be associated with this process.

With that said, even if the positive actions implemented by the company<sup>41</sup> and the elements establishing that management tried to establish a dialogue with the staff representatives were noted,<sup>42</sup> the Court concludes that “the first judges have rightly noted that the employer did not assess the psycho-social risks, which were particularly high because of the epidemic risk and the reorganizations resulting from the measures put in place to prevent this risk.” But, far more, the Court noted that even the will to carry out a quality assessment was lacking. It mentions two elements: firstly, the fact that the company could have sought external assistance; and secondly, the absence of modification of the DUE.

### **On the measures implemented to prevent damage to employees’ health**

After noting that the appellant company had put in place

<sup>41</sup> “In this case, it is not disputed that from the beginning of the epidemic declared in France, Amazon took numerous measures that had a direct impact on the situation of employees in their workplace, in particular concerning the reorganization of breaks (spacing of chairs, modification of hours), the reorganization of workstations to restrict the density of people in the same space, the deactivation of security gates at the exit to streamline the movement of people, signage, more frequent cleaning, the provision of a hydro-alcoholic solution, communication on barrier measures, the taking of temperatures offered to employees, and also the creation of a new function to verify compliance with guidelines, to be carried out by health and safety ambassadors, chosen from among volunteer or temporary employees, which was challenged by employee representatives and union representatives.”

<sup>42</sup> “[...] it is established that meetings of the CSE of each site were held from the beginning of March 2020, that these meetings, sometimes convened because of a warning of serious and imminent danger declared by an employee, included on the agenda an item of “information relating to the Coronavirus”, that on these occasions, the staff representatives were able to share with the employer their observations, criticisms, and proposals relating to the measures taken by management. Furthermore, it is proven that visits were organized which, although reported as daily by the employer, were at least, in view of the elements in the file, regular, the employee representatives, invited to attend, sometimes being present. Finally, the management of each site generally took care to give prior notice to the members of the CSE of the measures it was putting in place, this modus operandi cannot be qualified as consultation, but nevertheless demonstrates a desire to inform.”

satisfactory systems for monitoring cases of infection,<sup>43</sup> the magistrates in Versailles focused on three contentious points. Firstly, the Court of Appeal noted the shortcomings of the employer’s action to protect employees’ health at “the entrance to the sites (revolving portal), in the changing rooms, during the interventions of other firms, during the handling of packages and with regard to the necessary social distancing.” Secondly, the absence of an “overall controlled plan” is emphasized, with management simply taking action “on a day-to-day basis.” Lastly, given the large number of temporary employees working in the warehouses of the appellant company,<sup>44</sup> the court also noted that management had fallen short in training them. On this last point, it should be noted that it is important that the training document be distributed individually to each temporary worker.<sup>45</sup>

After noting the inadequacy of the measures implemented to prevent damage to employees’ health, the Court of Appeal of Versailles confirmed the order of the interim relief judge, insofar as it characterized a manifestly unlawful disturbance. It thus adopted the terms of the order, considering that:

the absence of a risk assessment adapted to the context of the pandemic and in consultation with the employees, particularly the members of each site’s CSE, after prior consultation of the central CSE, as well as the inadequacy of the measures taken by Amazon in violation of the provisions of articles L. 4121-1 et seq. of the Labor Code constituted a manifestly unlawful disturbance.

### **Determining a Manifestly Unlawful Disturbance at the Time of the Court of Appeal’s Decision**

The Court of Appeal of Versailles initially agreed that the appellant company had indeed taken measures.<sup>46</sup> However-

<sup>43</sup> After having complied with the instructions of the labor inspectorate.

<sup>44</sup> If we add up the number of all the warehouses, we get a figure of 3,612 temporary workers (out of a total of 10,000 employees).

<sup>45</sup> The broadcasting on television screens and using slides is insufficient, according to the magistrates.

<sup>46</sup> Amazon claims that since the order under appeal, each site has initiated a new risk assessment to which the members of each site’s CSE have been invited, that at the end of two days of assessment, new documents have been drawn up, listing more than 100 points that could

er, it indicates that because of the shutdown of the company following the interim order, the measures launched by management could not “benefit from the essential contribution of feedback, in particular from the employees.” This is followed by an analysis of the determination of a manifestly unlawful disturbance for each of the company’s six warehouses.

In examining each of the warehouses, the Court of Appeal of Versailles systematically looked at two elements. Firstly, it checked whether a risk assessment had been carried out in partnership with staff representatives. This was sometimes the case, for example, for the Boves site, where it was noted that “an assessment of occupational risks was carried out in a satisfactory manner.” For the other sites, either the assessment was still in progress at the time of the Court of Appeal’s decision,<sup>47</sup> or the assessment was deemed unsatisfactory.<sup>48</sup> As the letter of article R. 4121-2 indicates,<sup>49</sup> the Court then checked whether this assessment had led to a modification of the DUE. The Boves site was the only one to meet this requirement. The document had not been updated for the other five sites. However, as the magistrates from Versailles pointed out, the central CSE was not consulted for any of the sites.

Taking up the same wording as before,<sup>50</sup> the Court concluded that:

the absence of a risk assessment adapted to the context of a pandemic and in consultation with the employees after prior consultation of the central CSE, as well as the inadequacy of the measures taken by Amazon in violation of the provisions of Articles L. 4121-1 et seq. of the Labor Code, continue to constitute a manifestly unlawful disturbance, exposing the employees, on each site, to imminent damage from contamination likely to

give rise to questions or particular risks and requesting the members of the CSE to make suggestions for improvement and that all the DUEs were signed by one or more members of the CSE, thus demonstrating the collaboration between the employer and the staff representatives and the latter’s approval of the assessment of risks, including psycho-social risks, and the resulting measures.”

<sup>47</sup> For two of them: Saran and Lauwin-Planque.

<sup>48</sup> For three of them: Montélimar, Brétigny-sur-Orge and Sevrey.

<sup>49</sup> *Supra* no. 2.4.

<sup>50</sup> *Supra* no. 4.11.

be propagated to persons outside the company.

In sum, this decision of the Court of Appeal of Versailles provides a methodology for employers wishing to properly fulfill their safety obligation during a health crisis. Three steps are to be distinguished. First, the central CSE must be consulted on the modification of health and safety conditions in each of the company’s sites. Secondly, even though the Labor Code only refers to the employer,<sup>51</sup> the risk assessment must be performed jointly with the employees and their representatives so that it is as accurate as possible. Finally, the results of this assessment must be duly recorded in the DUE, which must be updated if necessary. It should be noted that the reform of occupational health law of August 2, 2021<sup>52</sup> takes note of the developments resulting from this decision. It further involves employees and staff representatives in the risk assessment process and enhances the DUE.

## The Implementation of Measures to Put an End to the Manifestly Unlawful Disturbance

Following the example of the interim relief judge, the Court of Appeal restricted the activity of the appellant company. It should be noted, however, that the wording used by the Versailles magistrates is somewhat different. The interim relief order mentions an obligation to “restrict the activities of its warehouses to the reception of goods, the preparation and shipment of orders for food products, hygiene products, and medical products.” While similar, the wording of the Court of Appeal’s decision differs in that it asserts the need to “restrict the activities of these warehouses to the reception of goods, the preparation and shipment of orders for essential products or products indispensable for teleworking in particular, which the government intended to favor.” The addition is discreet, but taking note of the prevalence of telework during the lock-

<sup>51</sup> Code du Travail [C. Trav.] art. L. 4121-3.

<sup>52</sup> Loi n° 2021-1018 du 2 août 2021 pour renforcer la prévention en santé au travail [Law no. 2021-1018 of August 2, 2021 to enhance prevention in occupational health] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], Aug. 3, 2021, no. 0178; On this issue, see Sophie Fantoni-Quinton & Pierre-Yves Verkindt, *La loi n° 2021-1018 du 2 août 2021 : évolution ou révolution?* [Law No. 2021-1018 of August 2, 2021: Evolution or Revolution?], DROIT SOCIAL, Nov. 2021, at 870; Marc Véricel, *La loi Santé au travail du 2 août 2021 renforce-t-elle réellement la prévention en santé au travail?* [Does the Occupational Health Law of August 2, 2021 Really Enhance Occupational Health Prevention?], REVUE DE DROIT DU TRAVAIL, Sept. 2021, at 689; Jean-Marc Soulat, *Une loi de plus... Pour préparer la prochaine?* [Yet Another law... To Pave the Way for the Next One?], DROIT SOCIAL, Nov. 2021, at 889.

down, it expands the range of activities that can continue despite the determination of the manifestly unlawful disturbance. After having chosen a broader approach to the activities that can be maintained, the court lists them more precisely as follows: “high-tech, computers, office,” “everything for animals” listed under home, do-it-yourself, pet shop; and “health and body care,” “men,” “nutrition,” “parapharmacy,” listed under beauty, health and well-being, groceries, beverages, and maintenance.”

This list is especially interesting given the government's refusal to say what constituted and what didn't constitute “essential activities,” delegating at the same time to private players, primarily companies, the task of doing so.<sup>53</sup> Admittedly, there have been references here and there to sectors that fall into this category. However, no formal and comprehensive list has been provided by the government. The ambiguity of this silence is in contrast with the government's announcement that the main priority of its action is to protect everyone. The justice system has therefore made up for the lack of a definition from the government. One point seems to be worth emphasizing: the definition of “essential activities” makes it possible to draw a line between activities that must be ceased and those that can be continued. In other words, this definition reflects, in a way, a trade-off between economic interests (the continuation of the activity) on the one hand, and interests linked to employees' health (closure of the warehouses) on the other. It, therefore, seems useful to carry out a threefold analysis: first, the definition given by the Court of Appeal of Versailles concerning some concepts similar to positive law; second, the analysis of this judicial definition with that provided by the respondents; and finally, the analysis of this definition with some lists drawn up by the trade unions. In any event, one must keep in mind that the more accommodating the definition of “essential” activities is, the more it will allow for a consistent maintenance of activities, despite the determination of a manifestly unlawful disturbance.

First of all, the absence of a definition of essential activities is questionable because there was an existing legal mechanism that could have been activated by the government. Indeed, in the Defense Code, there is a title relating to “economic defense” in which there is a chapter two entitled “the protection of facilities of vital importance.” In

<sup>53</sup> For a sociological analysis, see Thomas Coutrot, *Mon activité est-elle essentielle?*, [Is my Business Essential?], LA VIE DES IDÉES, May 15, 2020.

this chapter, there is an article L. 1332-1 which states that:

public or private operators managing establishments or using facilities and works, the unavailability of which could significantly affect the war or economic potential, the safety or the survival capacity of the nation, are required to cooperate, at their own expense, under the conditions defined in this chapter, for the protection of the said establishments, facilities and works against any threat, particularly of a terrorist nature. These establishments, facilities, or works are designated by the administrative authority.

In other words, this article refers to some facilities or activities that must be subject to special protection. The decree of February 23, 2006, specified the objective sought by these “sectors of vital importance.” This specification may refer to:

1° the production and distribution of essential goods or services: a) the meeting of essential needs for the very existence of the population; b) or the exercise of State authority; c) or the functioning of the economy; d) or the maintenance of defense potential; e) or the nation's safety; as long as these activities are difficult to substitute or replace; 2° or may present a serious danger to the population.

Annex 1 of the order of June 2, 2006<sup>54</sup> modified by an order of July 3, 2008<sup>55</sup> establishes the list of “sectors of vital importance.” It mentions 12 sectors, divided into four main themes: human, regal, economic and technological.<sup>56</sup> If this mechanism were to be used, it would be up to each

<sup>54</sup> Order of June 2, 2006, *establishing the list of sectors of vital importance and designating the coordinating ministers of said sectors.*

<sup>55</sup> Order of July 3, 2008, *amending the order of June 2, 2006, establishing the list of sectors of vital importance and designating the coordinating ministers of said sectors.*

<sup>56</sup> Here is the list: Civil activities of the State (Minister of the Interior); Judicial activities (Minister of Justice); Military activities of the State (Minister of Defense); Food (Minister of Agriculture); Electronic communications, audiovisual and information (Minister in charge of Electronic Communications); Energy (Minister of Industry); Space and research (Minister in charge of research); Finance (Minister in charge of Economy and Finance); Water Management (Minister in charge of Environment); Industry (Minister in charge of Industry); Health (Minister in charge of Health); Transport (Minister in charge of Transport).

minister responsible for the identified sectors to draw up a list of activities that should be maintained. It is clear that the government has not activated this mechanism. Thus, even though the war rhetoric was used by the President of the Republic during the first hours of the health crisis,<sup>57</sup> it would seem that this rhetoric was not translated into the concrete mobilization of legal mechanisms.

Secondly, the respondent union had given a negative interpretation of what it meant by “essential activities” before the interim relief judge.<sup>58</sup> In its summons, the issue was, additionally, “to stop the sale and delivery of non-essential products, i.e. non-food, non-hygiene and non-medical products.” This understanding of “essential activities,” which could be described as “restrictive,” seems to be driven by the desire to protect as well as possible the health of employees, by exposing them as little as possible to the risk of contamination.

Finally, although it has taken several precautions,<sup>59</sup> the CGT has also drawn up an indicative list of essential activities. It mentions 35 areas qualified as “vital.” However, the union is cautious to specify that this list cannot follow a “top-down” approach and be applied as is. The CGT invites us to engage in dialogue with employees based on this list, by asking them two questions: “Is our activity essential?” and if so, “Are all products essential?” This dialogue clearly shows that the unions have understood the importance of defining what falls within or outside the scope of essential activities in order to protect the health of employees. Moreover, it also shows the concern to arrive at a definition that can reflect the voice of the employees.

Three views of “essential activities” emerge. The first would have been the government’s, had it used the Defense Code. This adoption would have clarified its position. The second, put forward by the union in the first instance case, is the one that would have led to the reduction of Amazon’s activity to a bare minimum. The last one, which the CGT called for, would have led to a concerted vision

<sup>57</sup> During his television address on March 16, 2020, the President of the Republic said “we are at war” six times.

<sup>58</sup> This is not the case for all union summonses on the grounds of a manifestly unlawful disturbance. See the interim relief order in the *La Poste* case. The plaintiff union calls for the “identification of all postal activities, both essential and non-essential to the life of the Nation.”

<sup>59</sup> “This list is not comprehensive. It must therefore be compared with the realities and specificities of employees in companies and services by business and sector. The approach is therefore based on the business and not on the profession.”

of the “essential activities” shared with the main stakeholders. The Court of Appeal of Versailles thus delivers a half-hearted definition, which does not correspond exactly to any of these three views<sup>60</sup>.

## Conclusion

Ultimately, the Court of Appeal of Versailles’ decision provides two lessons, one being the consequence of the other. The first is the guidelines it provides to employers wishing to protect the health and safety of their employees. These guidelines can be summarized in three simple propositions: **consult, assess, and inform**. The main innovation, which is lacking in the Labor Code, lies in the fact that the assessment is necessarily “participatory” by nature since it must be conducted in partnership with the employees and their representatives. The second lesson is merely a lineament to the first: the health and safety of employees cannot be ensured unless they are involved in this process in person or through their representatives. This observation notwithstanding, the decision also provides a definition of what constitutes “essential activities.” More than the “broad” view given by the decision, the government’s silence on this concept reveals a certain ambiguity in the management of the health crisis. In a way, it is the trade-off between economic and social issues that do not seem to have been very clearly established by the government.

<sup>60</sup> At the same time, the Court of Appeal reduced the amount of the monetary penalty to 100,000 euros instead of 1,000,000 euros.

# Role of Trade Unions in Protecting Workers' Rights During Covid-19 in India

Gunjan Singh<sup>1</sup>

## Introduction

On account of Covid-19, a national lockdown was announced by the Prime Minister of India on March 24<sup>th</sup>, 2020, at a short notice of about four hours. There is no public document to suggest whether any consultation was done by the government before announcing the lockdown.<sup>2</sup> This announcement led to the complete shutdown of the economy. Eight out of ten workers in urban areas lost their job during the pandemic.<sup>3</sup> Informal workers<sup>4</sup> were worst hit by the ill-planned lockdown as abrupt loss of livelihood and income directly threatened their access to food, rented accommodation, and healthcare. More than 90 % of the total workforce in India is in the informal sector, where existing labor regulations are not strictly applicable.<sup>5</sup> During Covid, they were left at the mercy of the government.

Lack of support from the government and uncertain future led to the return of millions of migrant workers from cities to rural areas. They started to return home. An exodus of this scale was reminiscent of the 1947 partition of

India.<sup>6</sup> While returning home, they not only faced a lack of support from the government but also faced police brutality.<sup>7</sup> Workers were stripped of their dignity and treated in inhuman conditions.<sup>8</sup> The main challenge for workers was to return home and the government failed to arrange transportation. Desperate attempts to return home also led to outbursts and violent protests by migrant workers.<sup>9</sup> Trade Unions, Bollywood actors,<sup>10</sup> and students<sup>11</sup> pitched in to help migrant workers return home.

The government's apathy led civil society members to approach the Supreme Court seeking relief for migrant workers. The initial response of the Supreme Court to the migrant workers' crisis was disappointing. When petitions were filed the court completely absolved the government of its responsibility to handle the crisis and refused to

<sup>1</sup> Gunjan Singh is a Delhi based lawyer and specializes in labor laws.

<sup>2</sup> Ravi Srivastava, Understanding Circular Migration in India: Its Nature and Dimensions, the Crisis Under Lockdown and the Response of the State (Inst. for Hum. Dev., Ctr. for Emp. Stud., Working Paper Series, WP04, 2020).

<sup>3</sup> Ayan Pramanik, 8 out of 10 Workers Lost Jobs in Urban India During Lockdown: Azim Premji University Survey, ECON. TIMES (May 12, 2020), [https://economictimes.indiatimes.com/jobs/8-out-of-10-workers-lost-jobs-in-urban-india-during-lockdown-azim-premji-university-survey/articleshow/75701810.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/jobs/8-out-of-10-workers-lost-jobs-in-urban-india-during-lockdown-azim-premji-university-survey/articleshow/75701810.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst).

<sup>4</sup> Informal workers are defined as a worker with no written contract, paid leave, health benefits, or social security.

<sup>5</sup> Govindan Raveendran & Joann Vanek, *Informal Workers in India: A Statistical Profile*, WIEGO STATISTICAL BRIEF, no. 24, Aug. 2020, at 2, [https://www.wiego.org/sites/default/files/publications/file/WIEGO\\_Statistical\\_Brief\\_N24\\_India.pdf](https://www.wiego.org/sites/default/files/publications/file/WIEGO_Statistical_Brief_N24_India.pdf).

<sup>6</sup> Joanna Slater & Niha Masih, *In India, the World's Biggest Lockdown has Forced Migrants to Walk Hundreds of Miles Home*, WASH. POST (Mar. 27, 2020), [https://www.washingtonpost.com/world/asia\\_pacific/india-coronavirus-lockdown-migrant-workers/2020/03/27/a62df166-6f7d-11ea-a156-0048b62cdeb51\\_story.html](https://www.washingtonpost.com/world/asia_pacific/india-coronavirus-lockdown-migrant-workers/2020/03/27/a62df166-6f7d-11ea-a156-0048b62cdeb51_story.html).

<sup>7</sup> Shaid Tantray & Ahan Penkar, *A Lockdown and a Hard Place*, CARAVAN (Mar. 31, 2020), <https://caravanmagazine.in/labour/in-photos-migrant-workers-face-police-violence-and-hunger-escaping-delhi-during-lockdown>.

<sup>8</sup> Qazi Faraz Ahmad, *Chemical Sprayed on Migrants to 'Sanitize' Them, Bareilly DM Orders Action against 'Over-active' Officials*, NEWS 18 (Mar. 30, 2020) <https://www.news18.com/news/india/chemical-sprayed-on-migrants-in-bareilly-to-sanitise-them-dm-orders-action-on-over-active-official-2557353.html>.

<sup>9</sup> Sumit Khanna, *Migrant Workers Throw Stones at Police in India in Protest Against Lockdown*, REUTERS (May 9, 2020), <https://www.reuters.com/article/us-health-coronavirus-india/migrant-workers-throw-stones-at-police-in-india-in-protest-against-lockdown-idUSKBN22L-OJZ>.

<sup>10</sup> Sonu Sood, *the 'Messiah' of Migrant Workers, Bags UN Honour*, NEW INDIAN EXPRESS (Sept. 29, 2020), <https://www.newindianexpress.com/entertainment/hindi/2020/sep/29/sonu-sood-the-messiah-of-migrant-workers-bags-un-honour-2203485.html>.

<sup>11</sup> Nalini Ravichandran, *During Lockdown, Law Students Across the Country Chip in to Help the Underprivileged*, WIRE (June 19, 2020), <https://thewire.in/rights/covid-19-lockdown-law-students-help-underprivileged-during-lockdown>.

pass any directions granting relief to migrant workers.<sup>12</sup> It not only failed to grant relief to workers but merely acceded to the false statement made by the Solicitor General of India that fake news led to panic among workers and no worker was walking on the road as of March 31, 2020. In reality, thousands of workers walked home on foot.<sup>13</sup> In the absence of any concrete evidence, the court unnecessarily directed the media to refrain from running unverified news.<sup>14</sup> Workers continued returning back home and their suffering continued.<sup>15</sup> Many died.<sup>16</sup> It was only after sharp public criticism that the Supreme Court registered a new case concerning migrant workers on May 26, 2020.<sup>17</sup> This case is discussed later in this paper.

## Introduction of Labor Codes and Suspension of Labor Laws

During Covid, two major developments took place in the labor law field. First, new Labor Codes were introduced by the central government, and second, certain provisions of labor laws were diluted and suspended by various state governments. The introduction of new Labor Codes—Code on Wages, 2019, Industrial Relations Code, 2020, Code on Social Security, 2020, and Occupational Safety, Health, and Working Conditions Code, 2020—has been criticized for being employer-friendly.<sup>18</sup> The Supreme Court had earlier held that the policy of hire and fire deserves no constitutional sympathy.<sup>19</sup> However, new Labor

<sup>12</sup> See Order, Writ Petition (Civil), *Srivastava v. India*, No. 468 of 2020, decided on Mar. 31, 2020 (SC) [https://main.sci.gov.in/supremecourt/2020/10789/10789\\_2020\\_0\\_1\\_21581\\_Order\\_31-Mar-2020.pdf](https://main.sci.gov.in/supremecourt/2020/10789/10789_2020_0_1_21581_Order_31-Mar-2020.pdf).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Stranded Workers Action Network, 21 DAYS AND COUNTING: COVID-19 LOCKDOWN, MIGRANT WORKERS, AND THE INADEQUACY OF WELFARE MEASURES IN INDIA (2020), [https://www.thehindu.com/news/resources/article31442220.ece/binary/Lockdown-and-Distress\\_Report-by-Stranded-Workers-Action-Network.pdf](https://www.thehindu.com/news/resources/article31442220.ece/binary/Lockdown-and-Distress_Report-by-Stranded-Workers-Action-Network.pdf).

<sup>16</sup> *Indian Migrant Deaths: 16 Sleeping Workers Run Over by Train*, BBC NEWS (May 8, 2020), <https://www.bbc.com/news/world-asia-india-52586898>.

<sup>17</sup> *Read: What Senior Lawyers Told the Supreme Court Before it Spoke on Migrants*, WIRE (May 27, 2020), <https://thewire.in/law/supreme-court-migrant-workers-lawyers-letter>.

<sup>18</sup> Ramapriya Gopalakrishnan, *Changes in Labour Laws Will Turn the Clock Back by Over a Century*, WIRE (May 20, 2020), <https://thewire.in/labour/labour-laws-changes-turning-clock-back>.

<sup>19</sup> See *Saluja v. Air India Ltd.*, (2013) 15 SCC 85.

Codes afford greater flexibility for employers.<sup>20</sup>

In April-May 2020, many states invoked section 5 of the Factories Act, 1948, and issued notifications exempting factories from observing their obligation towards workers relating to daily working hours, weekly hours, and payment of overtime wages.<sup>21</sup> These notifications were initially issued for three months. Many expired with the efflux of time and some were withdrawn.<sup>22</sup> However, the Gujarat government extended the notification in July 2020 for another three months. The constitutional challenge to the Gujarat notification before the Supreme Court is discussed later in this paper. Some states also took drastic steps and suspended the application of labor laws for three years.<sup>23</sup> Such moves were against the principles of the International Labor Organization (ILO) and had the potential to push workers into the situation of bondage.<sup>24</sup>

## Role of Trade Unions

During Covid, trade unions sprang into action by distributing relief measures<sup>25</sup> like food, health kits, and securing shelter; arranging transportation for migrating workers; filing claim petitions for pending wages and against mass retrenchments; organizing protests against the suspension of labor laws;<sup>26</sup> and intervening before the High

<sup>20</sup> Ramapriya Gopalakrishnan, *The Industrial Relations Code, 2020: Implications for Workers' Rights*, LIVE LAW (Oct. 24, 2020), <https://www.livelaw.in/columns/the-industrial-relations-code-2020-implications-for-workers-rights-164921>.

<sup>21</sup> *State Brief - Relaxation of Labour Laws*, PRS LEGISLATIVE RESEARCH, <https://prsindia.org/bills/states/state-brief-relaxation-of-labour-laws> (last visited June 27, 2023).

<sup>22</sup> In Karnataka, the notification was withdrawn by the state government while the challenge was pending before the High Court. The state admitted before the court that the notification had no legal basis.

<sup>23</sup> *Madhya Pradesh, Uttar Pradesh Stay Labour Laws for 3 years in the Name of COVID-19 Pandemic*, NATIONAL HERALD (May 8, 2020), <https://www.nationalheraldindia.com/india/madhya-pradesh-uttar-pradesh-stay-labour-laws-for-3-years-in-the-name-of-covid-19-pandemic>.

<sup>24</sup> Betwa Sharma, *UP Govt's Suspension Of Labour Laws Could Green-light Bonded Labour: Here's Why*, HUFFPOST (May 8, 2020), [https://www.huffpost.com/archive/in/entry/up-govt-s-suspension-of-labour-laws\\_in\\_5eb558a5c5b6a6733541543e?ncid=other\\_twitter\\_cooo9wqtham&utm\\_campaign=share\\_twitter](https://www.huffpost.com/archive/in/entry/up-govt-s-suspension-of-labour-laws_in_5eb558a5c5b6a6733541543e?ncid=other_twitter_cooo9wqtham&utm_campaign=share_twitter).

<sup>25</sup> The documentation of relief work by trade unions remains limited on account of their limited resources. However, a few trade unions like the Centre of Indian Trade Union has a comparatively better record and their website is updated. For this reason, reference is made only to CITU.

<sup>26</sup> Manan Kumar, *Unyielding Protests by Workers Across the Country*, LABOUR FILE: CURRENT NEWS <http://www.labourfile.com/news-detail>.

Courts in different states and the Supreme Court of India. On account of pandemic-imposed constraints, they adopted strategies of writing a memorandum of appeals and protests, demanded dialogue with the government, and sought the intervention of ILO.<sup>27</sup> Protesting against the decision of the state governments to suspend labor laws, a group of central trade unions of India jointly wrote a letter to the ILO seeking intervention. ILO showed “deep concern” over the dilution of labor laws and appealed to the Prime minister to intervene and safeguard the legal protection of workers.<sup>28</sup> Country-wide protests by the trade unions forced the central government to caution state governments against suspension of labor laws and disregarding ILO conventions.<sup>29</sup> Unions organized country-wide protests against Labor Codes and demanded their rollback.<sup>30</sup> They also organized country-wide protests against the government’s failure to provide sufficient relief measures to workers. Rejecting the hollow promises made by the prime minister, workers raised interesting slogans such as “Bhasan Nahi, Ration Chahie, Prabachan Nahi, Betan Chahie, 7500 Rupiya Sabko Chahie” in the protest.<sup>31</sup> This was prompted by the prime minister’s failure to provide relief measures for workers while making strange appeals to the nation to bang utensils and light candles during the lockdown to appreciate workers.<sup>32</sup>

[php?aid=15](#) (last visited June 27, 2023).

<sup>27</sup> K. R. Shyam Sundar, *COVID-19, and State Failure: A Double Whammy for Trade Unions and Labour Rights*, 63 INDIAN J. LAB. ECON. 97 (2020).

<sup>28</sup> Prashant K. Nanda, *India: In response to Trade Unions’ Complaint, ILO Expresses ‘Deep Concern’ Over Labour Law Amendments*, BUSINESS & HUMAN RIGHTS CENTRE: LATEST NEWS (May 24, 2020), <https://www.business-humanrights.org/en/latest-news/india-in-response-to-trade-unions-complaint-ilo-expresses-deep-concern-over-labour-law-amendments/>.

<sup>29</sup> Shanker Arnimesh, *Modi Govt Says Suspension of Labour Laws Not Reform, Raises Concern Over States Changing Laws*, THEPRINT (May 27, 2020), <https://theprint.in/india/modi-govt-says-suspension-of-labour-laws-not-reform-raises-concern-over-states-changing-laws/429644/>.

<sup>30</sup> *10 Central Trade Unions to Burn Copies of Labour Codes on April 1*, HINDU (Mar. 24, 2021), <https://www.thehindu.com/news/national/10-central-trade-unions-to-burn-copies-of-labour-codes-on-april-1/article34153216.ece>.

<sup>31</sup> The slogan roughly translated means “Give ration not speeches. Need Wages not sermon. We demand Rs. 7500 for every worker.”

<sup>32</sup> *Millions of Indians Respond to PM’s Appeal; Light Candles, Diyas, Turn on Mobile Phone Torches*, ECON. TIMES (Apr. 5, 2020), <https://economictimes.indiatimes.com/news/politics-and-nation/millions-of-indians-respond-to-pms-appeal-light-candles-diyas-turn-on-mobile-phone-torches/articleshow/74997232.cms>.

## Legal Context

Labor is under the concurrent list of the Constitution of India, meaning both the Central and State legislatures can legislate on the issue. The legal protection for workers in India is two-fold: (a) the Constitution of India and (b) Labor Laws.

### Constitutional Scheme

Besides the issue of the subject matter of jurisdiction with respect to labor, certain rights of laborers and duties of the state are also constitutionally protected under fundamental rights, and the Directive Principles of State Policy under Parts III and IV of the Constitution, respectively. Fundamental Rights are enforceable rights in courts, meaning, any violation of fundamental rights can be brought before the court and the court shall protect it. Fundamental rights such as equality before the law, the right to form associations, the right to life, and the right against exploitation have often been relied on by courts to interpret and give full meaning to labor statutes and to strike down offending statutes or policies. On the other hand, the Directive Principles of State Policy are non-enforceable rights and are considered guiding principles for state policies. Part IV provides the right to an adequate means of livelihood, the right to free legal aid, the right to work, the provision of a living wage and just and humane conditions of work, and the participation of workers in the management of Industries. The principles stated under part IV of the Constitution have also been relied upon by the courts in several cases to grant relief to workers and interpret social welfare legislation like labor laws.<sup>33</sup>

### Statutory Framework of Labor Laws

The statutory framework of Indian labor laws is often considered complex and daunting.<sup>34</sup> There are hundreds of labor laws both at the central level and the state level. Since labor is primarily a concurrent list subject, both state and union governments can make laws on labor and implement them. Multiple labor laws are enacted by industry and subject. There are separate laws relating to industrial relations, wages, social security, conditions of service and employment, equality and empowerment of women, and

<sup>33</sup> See *Morcha v. Union of India*, AIR 1984 SC 802; *Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Mazdoor Sabha*, (1980) 2 SCC 593.

<sup>34</sup> Richard Mitchell, Petra Mahy & Peter Gahan, *The Evolution of Labour Law in India: An Overview and Commentary on Regulatory Objectives and Development*, 1 ASIAN J. L. & SOC’Y 413 (2014).

prohibitive labor laws.

## Dispute Resolution Under Labor Laws

The primary statute providing for the dispute resolution mechanism and labor disputes is the Industrial Disputes Act, 1947. The labor dispute resolution mechanism is framed to discourage adjudication of disputes and encourage an amicable internal settlement between workers and the employer, as far as possible. It provides three stages of a dispute resolution system: negotiation,<sup>35</sup> conciliation,<sup>36</sup> and adjudication.<sup>37</sup> The first forum for adjudication of labor disputes is Labor Courts, which is a quasi-judicial adjudicatory forum. The award passed by the Labor Courts is binding on the parties.

## Other Constitutional Remedies

After the award of the Labor Court, the Industrial Dispute Act provides no mechanism for appeal of the award. However, the High Courts (HC) may hear a representation against the award through a writ petition under Article 226 or 227 of the Constitution. Under Article 227 the HC exercises supervisory jurisdiction over lower courts in its respective state. However, the scope of review to be done by the HC under Article 227 is very limited, and courts have held that such power is to be used sparingly.<sup>38</sup> Finally, an appeal under Article 136 of the Constitution by way of a Special Leave Petition (SLP) may be made to the Supreme Court from the order of the High Court or directly from the award of the labor court.

One can also begin a direct proceeding before the High Court and the Supreme Court in the form of Public interest litigation (PIL), under Article 226 and Article 32 of the Constitution, respectively. PIL can be filed where the fundamental rights of citizens are violated. An example of a prominent labor rights PIL is *Bandhua Mukti Morcha v. Union of India*,<sup>39</sup> where a social cause organization approached the Supreme Court through a letter requesting the Supreme Court to investigate the existence of inhuman conditions in certain mines where numerous persons were working as forced/bonded laborers. The Supreme

<sup>35</sup> Industrial Disputes Act, 1947, § 3.

<sup>36</sup> *Id.* at § 4.

<sup>37</sup> *Id.* at § 7.

<sup>38</sup> See *Maharashtra v. Labour Law Practitioners' Assn.*, (1998) 2 SCC 688; *M/s. Pepsico India v. Pandey*, (2015) 4 SCC.

<sup>39</sup> *Morcha v. India*, AIR 1984 SC 802.

Court, relaxing the “locus standi” requirement held that PILs can be filed in a representative capacity, where the affected party belongs to a weaker section of the society.

## Court Cases

During Covid, several High Courts played a significant role in protecting the rights of workers.<sup>40</sup> However, for the sake of brevity, we shall limit our analysis to three legal interventions made before the Supreme Court. These cases broadly cover the main issues impacting workers during Covid, namely relief measures, non-payment of wages, and suspension of labor laws.

*In Re: Problems and Miseries of Migrant Labourers*,<sup>41</sup> the Supreme Court, on May 26<sup>th</sup>, 2020, took “suo motu”<sup>42</sup> cognizance of the migrant workers’ crisis and registered a petition. After two months of its own refusal to pass an order, the Supreme Court acknowledged that the migrant worker crisis persisted and the steps taken by the governments were inadequate.<sup>43</sup> Several trade unions intervened in the case and presented data on the sufferings of workers from different parts of the country. The Court, *inter alia*, passed orders for free transportation of workers, free supply of food and water, and withdrawal of cases registered against workers for violating lockdown.<sup>44</sup> Though interim orders brought some relief to workers, the response

<sup>40</sup> For example, see Manoj Harit, *Coronavirus and the Constitution – XXXIV: The Bombay High Court*, INDIAN CONST. L. & PHIL. (July 14, 2020), <https://indconlawphil.wordpress.com/2020/07/14/coronavirus-and-the-constitution-xxxiv-the-bombay-high-court-guest-post/>; Gautum Bhatia, *Coronavirus and the Constitution – XXVIII: Dialogic Judicial Review in the Gujarat and Karnataka High Courts*, INDIAN CONST. L. & PHIL. (May 24, 2020), <https://indconlawphil.wordpress.com/2020/05/24/coronavirus-and-the-constitution-xxviii-dialogic-judicial-review-in-the-gujarat-and-karnataka-high-courts/>.

<sup>41</sup> *Suo Motu Writ Petition (Civil)*, No. 6 of 2020. Disclaimer: The author represented a worker’s union in this case.

<sup>42</sup> *Suo motu* means Courts on its own motion.

<sup>43</sup> Order, *Suo Motu Writ Petition (Civil)*, No. 6 of 2020, decided on May 28, 2020, [https://main.sci.gov.in/supremecourt/2020/11706/11706\\_2020\\_34\\_24\\_22239\\_Order\\_28-May-2020.pdf](https://main.sci.gov.in/supremecourt/2020/11706/11706_2020_34_24_22239_Order_28-May-2020.pdf).

<sup>44</sup> See Order, *Suo Motu Writ Petition (Civil)*, No. 6 of 2020, decided on May 28, 2020, [https://main.sci.gov.in/supremecourt/2020/11706/11706\\_2020\\_34\\_24\\_22239\\_Order\\_28-May-2020.pdf](https://main.sci.gov.in/supremecourt/2020/11706/11706_2020_34_24_22239_Order_28-May-2020.pdf); Order, *Suo Motu Writ Petition (Civil)*, No. 6 of 2020, decided on June 9, 2020, [https://main.sci.gov.in/supremecourt/2020/11706/11706\\_2020\\_34\\_1501\\_22499\\_Order\\_09-Jun-2020.pdf](https://main.sci.gov.in/supremecourt/2020/11706/11706_2020_34_1501_22499_Order_09-Jun-2020.pdf); Order, *Suo Motu Writ Petition (Civil)*, No. 6 of 2020, decided on July 31, 2020, [https://main.sci.gov.in/supremecourt/2020/11706/11706\\_2020\\_35\\_23\\_23191\\_Order\\_31-Jul-2020.pdf](https://main.sci.gov.in/supremecourt/2020/11706/11706_2020_35_23_23191_Order_31-Jul-2020.pdf).



Migrant workers and their families travel back home on foot amidst a nationwide lockdown due to Covid. Photo © Manoj Paateel / Shutterstock

of the Supreme Court to the crisis was very late. The Court also did not pass any order regarding payment of cash assistance, free distribution of food, and an increase in the guaranteed number of days for employment under the Employment Guarantee Act,<sup>45</sup> as prayed by the counsels of workers. Suggestions of the experts to pay compensatory wages or income assistance were also not considered by the Supreme Court. Unions argued the worker crisis was the result of the longstanding failure of the state to ensure coverage of workers under labor statutes. Therefore, workers must be registered by issuing identity cards under different statutes. In June 2021, the court delivered the final judgment directing the state authorities to ensure the registration of workers under different labor statutes by the end of 2021.<sup>46</sup>

In *Ficus Pax Private Ltd. v Union of India*<sup>47</sup>, the Supreme Court examined the validity of notification<sup>48</sup> issued by the

<sup>45</sup> The Act guarantees at least 100 days of wage employment in a financial year to every rural household whose adult members volunteer to do unskilled manual work.

<sup>46</sup> See Judgment, *Suo Motu Writ Petition (Civil), No. 6 of 2020*, decided on June 29, 2021, [https://main.sci.gov.in/supremecourt/2020/11706/11706\\_2020\\_36\\_1501\\_28166\\_Judgment\\_29-Jun-2021.pdf](https://main.sci.gov.in/supremecourt/2020/11706/11706_2020_36_1501_28166_Judgment_29-Jun-2021.pdf).

<sup>47</sup> Writ Petition (Civil), No. 899 of 2020.

<sup>48</sup> Order No. 40-3/2020-DM-I(a), Ministry of Home Affairs, Mar. 9, 2020, [https://www.mha.gov.in/sites/default/files/MHA%20Order%20restricting%20movement%20of%20migrants%20and%20strict%20enforcement%20of%20lockdown%20measures%20-%2029.03.2020\\_0.pdf](https://www.mha.gov.in/sites/default/files/MHA%20Order%20restricting%20movement%20of%20migrants%20and%20strict%20enforcement%20of%20lockdown%20measures%20-%2029.03.2020_0.pdf).

government of India on March 29<sup>th</sup>, 2020 directing all employers and shop owners to pay wages to workers without any deduction for the period their establishments remained closed during the lockdown. Trade unions relying upon this notification sought payment of wages from the employers for those 50 days. Employers challenged the notification before the Supreme Court, on the ground that the government cannot impose financial obligations on the private sector. The government of India supported the notification and argued before the court that it was issued in the public interest. However, the court noted lockdown also had financial implications for employers and, therefore, stayed the operation of the notification.<sup>49</sup> The Court further directed the parties—i.e., employers, employees, and trade unions—to explore an option of a mutual settlement regarding payment of wages for the lockdown period.<sup>50</sup> The experience during the lockdown showed that employers were unwilling to pay wages to the workers. Considering the wide power gap between employers and workers and, trade unions' limited collective bargaining powers, this order in effect meant there would be no payment of wages to workers. Before the said notification was stayed by the Supreme Court, trade unions were suc-

<sup>49</sup> See Order, Writ Petition (Civil), No. 899 of 2020, decided on June 4, 2020, [https://main.sci.gov.in/supremecourt/2020/10983/10983\\_2020\\_35\\_314\\_22410\\_Order\\_04-Jun-2020.pdf](https://main.sci.gov.in/supremecourt/2020/10983/10983_2020_35_314_22410_Order_04-Jun-2020.pdf).

<sup>50</sup> See Order, Writ Petition (Civil), No. 899 of 2020, decided on June 12, 2020, [https://main.sci.gov.in/supremecourt/2020/10983/10983\\_2020\\_36\\_1502\\_22526\\_Judgment\\_12-Jun-2020.pdf](https://main.sci.gov.in/supremecourt/2020/10983/10983_2020_36_1502_22526_Judgment_12-Jun-2020.pdf).

successful in ensuring the payment of wages in some areas. Referring the parties to explore the opportunity of settlement, the Supreme Court once again missed the opportunity to grant timely relief to workers.

In *Gujarat Mazdoor Sabha v. State of Gujarat (GMS)*,<sup>51</sup> the Supreme Court examined the validity of the notification<sup>52</sup> issued by the state of Gujarat, invoking section 5 of the Factories Act, 1948. The notification exempted the factories from observing their obligation towards workers relating to daily working hours, weekly hours, and payment of overtime wages. Gujarat Mazdoor Sabha, a trade union, challenged this notification primarily on the ground that Covid is not a “public emergency” within the meaning of section 5 of the Act. The government defended the notification on the ground that Covid has caused extreme financial exigencies, therefore, it is a public emergency within the meaning of section 5 of the Act. The Court explained the meaning of the term “public emergency” in section 5 and held that the power under section 5 of the Act can only be used where there is a grave emergency implicating an actual threat to the security of the state.<sup>53</sup> The court concluded that Covid does not threaten the security of the state, therefore, it is not a public emergency. Rejecting the state’s economic loss argument, the court held:

Unless the threshold of economic hardship is so extreme that it leads to disruption of public order and threatens the security of India or of a part of its territory, recourse cannot be taken to such emergency powers which are to be used sparingly under the law.<sup>54</sup>

The court quashed the notification and held “financial losses cannot be offset on the weary shoulders of the laboring worker, who provides the backbone of the economy.”<sup>55</sup> It further directed the employers to pay overtime wages to workers who worked during the lockdown period.

<sup>51</sup> *Sabha v Gujarat* (2020) 10 SCC 459.

<sup>52</sup> Notification, Lab. & Emp. Dept, Apr. 7, 2020, [https://prsindia.org/files/covid19/notifications/3373.GJ\\_Lockdown\\_Relaxations\\_Factories\\_Apr%2017.pdf](https://prsindia.org/files/covid19/notifications/3373.GJ_Lockdown_Relaxations_Factories_Apr%2017.pdf).

<sup>53</sup> *Sabha v Gujarat* (2020) 10 SCC 459, ¶ 24.

<sup>54</sup> *Id.* at ¶ 30.

<sup>55</sup> *Id.* at ¶ 49.

## Analysis

The above discussion shows how trade unions and civil society organizations actively used the judicial forums to protect the rights of workers during the pandemic. Legal intervention by trade unions across the country was possible because of their wide presence and network. Their presence in industrial pockets helped gather data<sup>56</sup> and point out lacunae in governments’ policies<sup>57</sup> before the courts.

PILs acted as an important tool for advancing workers’ rights during the pandemic. The Supreme Court has a rich history of safeguarding the constitutional rights of workers through developing PIL jurisprudence.<sup>58</sup> The PILs have advanced the wider meaning of the right to life under Article 21, the cornerstone of the Indian constitution, which includes the right to livelihood,<sup>59</sup> equal pay for equal work,<sup>60</sup> and occupational safety and health.<sup>61</sup> The striking feature of PIL is that it is mainly judge-led and often judge-induced.<sup>62</sup> Thus, the outcome in many cases heavily depends upon the configuration of a particular bench. Unfortunately, PIL jurisprudence has also provided judges with unbridled power which has been deployed in capricious ways.<sup>63</sup>

The failure of the Supreme Court to provide a timely response to the workers’ crisis during the pandemic can also be attributed to the growing influence of the majoritarian government on the Indian judiciary.<sup>64</sup> In recent times, the

<sup>56</sup> In *Indian Federation of Trade Unions v State of Haryana*, Special Leave Petition (Civil) Diary No.10863/2020, the petitioner union presented a list of four thousand workers seeking immediate relief during the lockdown before the Supreme Court.

<sup>57</sup> In *Sou Motu Writ Petition (Civil) 6 of 2020*, unions highlighted the problem of online registration through smartphones for availing the transportation facility. Many workers did not have smartphones.

<sup>58</sup> Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 4 *THIRD WORLD LEGAL STUD.* 107 (1985).

<sup>59</sup> *Tellis v. Maharashtra*, 1985 SCC (3) 545

<sup>60</sup> *Punjab v Singh* (2017) 1 SCC 148

<sup>61</sup> *Bhikusa Yamasa Kshatriya (P) Ltd. v. India*, AIR 1963 SC 1591.

<sup>62</sup> Baxi, *supra* note 57, at 111.

<sup>63</sup> For a detailed critique of PIL, see Anuj Bhuvania, *COURTING THE PEOPLE: PUBLIC INTEREST LITIGATION IN POST-EMERGENCY INDIA* (2016).

<sup>64</sup> Aakanksha Saxena, *Coronavirus and the Constitution – VIII: A Critique of the Supreme Court’s Migrants Order*, *INDIAN. CONST. L. & PHIL.* (Apr.

Supreme Court has failed to question the action of the state and act independently.<sup>65</sup> However, the *GMS* shows if the courts adhere to the constitutional principles and give beneficial construction to social welfare legislation, the judiciary can put a check on exploitative executive actions.

In *GMS*, the court highlighted the importance of the constitutional provisions for the protection of workers. It noted the Factories Act symbolizes the constitutional vision of social and economic democracy in India and *labor welfare is an integral element of that vision*.<sup>66</sup> The Supreme Court had earlier held the judiciary must adopt a *goal-oriented approach* while interpreting social welfare legislation and act as an *activist catalyst in the constitutional scheme*.<sup>67</sup> Justice Chandrachud adhered to this approach and examined the purpose of the Factories Act in the backdrop of the constitutional scheme of the Indian welfare state.

The recognition of the historical struggles of trade unions in the passing of the Factories Act<sup>68</sup> and inequality in the bargaining power between workers and their employers,<sup>69</sup> follows the judicial precedent of giving beneficial construction to social welfare legislations. The emphasis of the judgment on the Directive Principles of State Policy under part IV of the Constitution is a good example of the application of constitutional jurisprudence in the area of labor laws. The court notes that the Factories Act is an integral element of the vision of state policy as envisaged under part IV of the Constitution.<sup>70</sup> Though these rights are non-enforceable, *GMS* rightly notes they are guiding principles<sup>71</sup> and *cannot be reduced to oblivion by a sleight of interpretation*.<sup>72</sup> The constitutional significance is also

4, 2020), <https://indconlawphil.wordpress.com/2020/04/04/corona-virus-and-the-constitution-viii-a-critique-of-the-supreme-courts-migrants-order-guest-post/>.

<sup>65</sup> Gautam Bhatia, *The Executive(s) Court: On the Legacy of Justice A.M. Khanwilkar*, *Wire* (July 29, 2022), <https://thewire.in/law/justice-khanwilkar-teesta-setalvad-watali-fcra-uapa>.

<sup>66</sup> (2020) 10 SCC 459, ¶ 39.

<sup>67</sup> See *Authorised Officer, Thanjavur v Ayyar*, (1979) 3 SCC 466.

<sup>68</sup> (2020) 10 SCC 459, ¶ 31.

<sup>69</sup> *Id.* at ¶ 32.

<sup>70</sup> *Id.* at ¶ 45.

<sup>71</sup> *Id.* at ¶ 44.

<sup>72</sup> *Id.* at ¶ 48.

reflected in the finding of the court that the said notifications denying humane working conditions and overtime wages to the workers are violative of workers' right to life and right against forced labor under articles 21 and 23 of the Constitution. On the importance of overtime wages, the Court notes it is a *bulwark against the severe inequality that may otherwise pervade a relationship between workers and the management*.<sup>73</sup> Noted Indian jurist, Justice Krishna Iyer stated the *economics of law forms the basis of labor jurisprudence*, where capital shall be the brother and keeper of labor.<sup>74</sup>

Unfortunately, a goal-oriented approach was not applied by the Supreme Court in *Ficus*, when it had the opportunity to do so. The decision to refer the matter for conciliation and explore settlement negated the power imbalances between workers and owners of the factory, particularly during the pandemic. While in *GMS*, the court acknowledged workers' *"feeble bargaining power stands whittled by the pandemic"*,<sup>75</sup> in *Ficus*, the Supreme Court left workers at the mercy of the employers.

The media, through extensive reporting of the migrant worker crisis, also played a crucial role in protecting the rights of workers. The wide media reporting of the exodus of migrant workers pushed the Supreme Court to take "suo motu" cognizance of the workers' crisis. Trade unions also used social media extensively to reach out to workers and provide relief measures. For example, the Centre of Indian Trade Unions, one of the central trade unions in India, appealed to its committees to create and use social media handles to reach out to its grassroots workers. Similarly, All India Central Council of Trade Unions, another central trade union, actively used Twitter to connect activists with stranded workers in different parts of the country. Though the media played an important role in highlighting the problems of migrant workers, barring a few exceptions, it largely remains subservient to the ruling Bharatiya Janata Party (BJP).<sup>76</sup>

The firm control over the media and brute majority in the

<sup>73</sup> (2020) 10 SCC 459, ¶ 43.

<sup>74</sup> See *Gujarat Steel Tubes Ltd. V. Gujarat Steel Tubes Mazdoor Sabha*, (1980) 2 SCC 593

<sup>75</sup> (2020) 10 SCC 459, ¶ 46.

<sup>76</sup> Why India's 'Godi Media' Spreads Hatred and Fake News, *Clarion* (Apr. 24, 2020), <https://clarionindia.net/why-indias-godi-media-spreads-hatred-and-fake-news/>.

parliament emboldened BJP to ignore trade unions and suspend labor laws during the pandemic. From 1989 to 2014, India had a coalition government, which allowed the blocking of major labor law reforms to some extent. The change in labor laws was in the pipeline for many years. In 2002, the Second National Commission on Labor, formed by the BJP government called provisions of labor laws vague and outdated and recommended its consolidation.<sup>77</sup> Scholars criticized the Commission's approach of invoking competitive capitalism in the wake of globalization while recommending the consolidation of labor laws.<sup>78</sup> Some scholars supported flexible labor regulations to meet the competitive efficiency in the wake of globalization.<sup>79</sup> There had also been a long-standing demand from employers to relax the provisions of labor laws. However, one of the top industrialists and philanthropists, Azim Premji, criticized the suspension of labor laws by governments and rejected the notion labor laws were a constraint for business.<sup>80</sup>

Thus, it is clear with restrictions on gatherings and protests during the pandemic, the state used it as an opportunity to implement the changes in labor laws. Silencing trade union protests against these changes by initiating criminal action against them ran contrary to the prime minister's promise that the trade unions would be consulted on policy formulations.<sup>81</sup> Also, the economic loss argument advanced by the government was nothing but a façade to enforce the long-standing demand from employers to relax the provisions of labor laws. *GMS* unmasked this unholy nexus of the Gujarat government when it called the action of the state "indicative of the intention to capital-

<sup>77</sup> National Commission on Labour Report, 2002, clause 1.18, <https://vgnli.gov.in/sites/default/files/Report%20of%20the%20Second%20National%20Commission%20on%20Labour%20Vol.%20I.pdf>.

<sup>78</sup> Anjan Chakrabarti & Byasdeb Dasgupta, *Disinterring the Report of National Commission on Labour: A Marxist Perspective*, 42 *ECON. & POL. WKLY.* 1958 (2007).

<sup>79</sup> T. S. Papola & Jesim Pais, *Debate on Labour Market Reforms in India: A Case of Misplaced Focus*, 50 *INDIAN J. LAB. ECON.* 61 (2007).

<sup>80</sup> Azim Premji: *The Interests of Workers, Businesses are Deeply Aligned, Especially in These Times of Crisis*, *ECON. TIMES* (May 16, 2020), [https://economictimes.indiatimes.com/news/economy/policy/view-the-interests-of-workers-businesses-are-deeply-aligned-especially-in-these-times-of-crisis/articleshow/75765702.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/news/economy/policy/view-the-interests-of-workers-businesses-are-deeply-aligned-especially-in-these-times-of-crisis/articleshow/75765702.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst).

<sup>81</sup> *Trade Unions Write to Amit Shah Expressing Dismay over FIR Against Protestors*, *TIMES OF INDIA* (Aug. 17, 2020), [http://timesofindia.india-times.com/articleshow/77591151.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](http://timesofindia.india-times.com/articleshow/77591151.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst).

ize on the pandemic.<sup>82</sup> This stands true for other states in India, as well.

## Conclusion

The reliance of trade unions on courts for the protection of workers is a positive development, but also a worrying trend. It is positive because the application of constitutional jurisprudence in the matter of workers' rights has been ignored by courts in recent times. Post-liberalization in 1991, the judicial landscape changed considerably, and neo-liberal judicial trends started. The Supreme Court judgments emphasized principles of globalization and the free-market undermining workers' interests.<sup>83</sup> In many cases, it reversed its own judgments, which adversely impacted millions of workers.<sup>84</sup> Some judges cautioned against such an approach and held that the mantras of globalization cannot be used to deny workers their statutory rights.<sup>85</sup> Some judges highlighted the importance of the application of constitutional jurisprudence in the area of labor law jurisprudence for maintaining industrial peace and harmony.<sup>86</sup> This gains importance in the backdrop of violent protests by workers demanding wages reported during the lockdown.<sup>87</sup> Unfortunately, judges promoting the application of constitutional jurisprudence in labor rights cases are few.

The reliance of trade unions on courts is a worrying trend for two reasons: first, courts on their own cannot bring social reform,<sup>88</sup> and second, trade unions are being sidelined by the government in matters of policy formulation and courts cannot direct the government to ensure their participation in policy matters. Policy formulations are executive functions and courts generally refrain from it. The author G.N. Rosenberg argues courts' power to bring social

<sup>82</sup> (2020) 10 SCC 459, ¶ 38

<sup>83</sup> G. Singh, *Judiciary Jettisons Working Class*, 7 *COMBAT LAW: HUM. RTS. & L. BIMONTHLY*, 24. (2008).

<sup>84</sup> *Id.*

<sup>85</sup> See *Singh v. Punjab State Warehouse* (2010) 3 SCC 192.

<sup>86</sup> See *Saluja v. Air India Ltd.* (2013) 15 SCC 85.

<sup>87</sup> Raakhi Jagga, *Ludhiana: Over 300 mill Workers Booked After Clash with Police, District Officials*, *INDIAN EXPRESS* (May 13, 2020), <https://indianexpress.com/article/cities/ludhiana/ludhiana-mill-workers-booked-clash-with-police-6407548/>.

<sup>88</sup> For a detailed critique of the Court's role in bringing social reform, see G.N. Rosenberg, *THE HOLLOW HOPE* (2008).

reform is limited by multiple constraints and the lack of conducive conditions.<sup>89</sup> This argument may hold true in the Indian context. Some of the most significant judicial orders are the result of strong social movements where the state did not take an adversarial position.<sup>90</sup> The sidelining of trade unions can only be stopped through a robust trade union movement and not through judicial orders.

The sidelining of trade unions is indicative of the erosion of the tripartite system, which India has adopted.<sup>91</sup> State governments unilaterally, without consulting trade unions, diluted and suspended labor laws. Scholars have called it a worrying trend.<sup>92</sup> It is suggested that trade unions must engage at a regional level where major reforms are taking place.<sup>93</sup> Scholars have also suggested trade unions must move beyond conventional issues like privatization and liberalization and focus on other important issues like workers' safety and occupational health.<sup>94</sup>

The interventions made by the trade unions on behalf of workers during Covid highlight their relevance and importance. With a growing Indian economy and labor market, it becomes more important that unions are actively involved in policy decisions and rule-making concerning workers. Any departure from a tripartite consultation and social dialogue will only fracture the existing labor regime and lead to industrial unrest. Though post liberalization, trade union membership sharply fell.<sup>95</sup> Recent studies

have suggested their growing membership.<sup>96</sup> It is hoped the recent formation of trade unions in Starbucks and Amazon in other parts of the world may encourage trade union movements in the Global South, too. As Kathryn Sikkink, a human rights scholar, says "amidst this pessimism we need hope, resilience, and the belief that we can make a difference."<sup>97</sup>

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<sup>89</sup> *Id.*

<sup>90</sup> The landmark *Right to Food case* [Writ Petition (Civil) No.196 of 2001] is a good example. Before the Supreme Court passed landmark orders, the petitioner People's Union of Civil Liberties, ran a strong social movement on the issue of hunger and starvation. It eventually led to the enactment of The National Food Security Act, 2013, which entitles adequate access to food to every citizen.

<sup>91</sup> India has ratified the Tripartite Consultations (International Labour Standards) Convention, 1976 (C.144)

<sup>92</sup> K.R. Shyam Sundar, *No Dialogue with Trade Unions, India's Labour Laws Are Now a Product of Unilateralism*, WIRE (July 7, 2020), <https://thewire.in/labour/labour-laws-trade-unions>.

<sup>93</sup> For example, much before the provisions relating to lay-off retrenchment and closure were relaxed in the Industrial Relations Code, 2020, similar provisions were incorporated in Rajasthan labor legislation in the year 2014.

<sup>94</sup> K.R. Shyam Sundar, *COVID-19, and State Failure: A Double Whammy for Trade Unions and Labour Rights*, 63 INDIAN J. LAB. ECON. 97 (2020).

<sup>95</sup> E.M. Rao, *The Rise and Fall of Indian Trade Unions: A Legislative and Judicial Perspective*, 42 INDIAN J. INDUST. RELS., 678 (2007)

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<sup>96</sup> V. Badigannavar, J. Kelly & M. Kumar, *Turning the Tide? Economic Reforms and Union Revival in India*, 52 INDUST. RELS. J. 364 (2021).

<sup>97</sup> Kathryn Sikkink, EVIDENCE FOR HOPE: MAKING HUMAN RIGHTS WORK IN THE 21ST CENTURY 248 (2017).

# Maritime Covid-19 Case Study:

## Abandoned at Sea

Jonathan Warring<sup>1</sup>

### Introduction

At the height of the travel restrictions imposed during the Covid-19 pandemic, it was estimated that around 200,000 seafarers were trapped on the vessels that move the world's cargo as they travelled around the world. Every month, around 100,000<sup>2</sup> crew members become due for replacement. Not only were they unable to come ashore to access the travel that would allow them to return home, but they were also denied the ability to come ashore to take leave (and in turn access to shore-based welfare facilities), access medical care and, in many cases, even collect their wages. All of these are requirements under the Maritime Labour Convention, 2006, as amended (hereinafter "MLC"), a convention ratified by 101 countries covering more than fifty percent of the world's seafarers and three-quarters of the world's seagoing vessels.<sup>3</sup>

The need for seafarers to have access to these rights and facilities is vital. While at sea, seafarers work ten to twelve hour shifts every day. Working under such conditions causes fatigue. Fatigue increases the likelihood of accidents. Accidents at sea can be economically damaging, environmentally disastrous, and often fatal.

As this pandemic continued, the world and its governments, including those that register vessels under their flags and are responsible for the regulation of those vessels, failed to take appropriate actions to resolve what be-

came known as the "crew change crisis"<sup>4</sup> and seemed to turn a blind eye to their obligations under MLC, other core human rights conventions, and to the suffering of the crew stuck on board the vessels that move around ninety percent of the world's cargo.

While states and companies were able to claim that providing the rights required by the MLC was impossible, unions—including the International Transport Workers' Federation (ITF)—repeatedly stated that *force majeure* did not exempt those parties from enforcing the MLC and sought the proper recognition of seafarers' rights through advocacy, casework and the introduction of new measures designed to highlight issues at sea.

Despite repeated calls for the situation to change, states moved incredibly slowly, and the result was a mass breach of human rights, which raised concerns about forced labour and stands as an example of the invisibility of seafarers' rights in a world that relies so heavily on their labour.

### Legal Context

The Maritime Labour Convention, 2006, as amended, came into force in 2013 and is often referred to as the "seafarers' bill of rights". It is considered the fourth pillar of international maritime law along with the International Convention for Safety of Life at Sea (SOLAS), Standards of Training, Certification, and Watchkeeping (STCW), and the International Convention for the Prevention of Pollution from Ships (MARPOL).

Following a 2001 resolution calling for the creation of a set of appropriate global standards, the International Labour Organization (ILO) brought together and updated the myriad conventions and recommendations dealing with various maritime labour issues that had been adopted

<sup>1</sup> Senior Legal Assistant, International Transport Workers' Federation.

<sup>2</sup> Joint Open Letter from Guy Platten & Stephen Cotton, Int'l Chamber of Shipping, to ILO, Int'l Maritime Org. & UN Conf. on Trade & Dev. & WHO (Mar. 19, 2020), <https://www.itfglobal.org/sites/default/files/node/news/files/Joint%20open%20letter%20to%20UN%20agencies%20from%20global%20maritime%20transport%20industry%20and%20seafarers.pdf>.

<sup>3</sup> *Ratifications of the Maritime Labour Convention*, ILO: NORMLEX, [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEX-PUB:11300:0::NO::P11300\\_INSTRUMENT\\_ID:312331](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEX-PUB:11300:0::NO::P11300_INSTRUMENT_ID:312331) (last visited July 17, 2023).

<sup>4</sup> *What is the Crew Change Crisis?*, INSTITUTE FOR HUMAN RIGHTS & BUSINESS (IHRB): EXPLAINERS, <https://www.ihrb.org/explainers/what-is-the-crew-change-crisis> (last visited July 17, 2023).

between 1920 and 1996. The new convention aimed to establish a level playing field for countries that ratify the convention and for shipowners who wish to provide decent working and living conditions for seafarers, but who tend to be undercut by unfair competition from those who operate substandard ships.<sup>5</sup>

The MLC is made up of sixteen articles and the Code. The Code is then divided into five titles and each title into regulations, which in turn contain mandatory standards and guidelines, which should be taken into consideration when implementing the mandatory standards, but are not strictly mandatory.

### Article III

The articles of the MLC set out helpful definitions and provisions on how the convention will be applied and enforced. Perhaps most pertinent to the issue of forced labour is Article III, which states:

Each Member shall satisfy itself that the provisions of its law and regulations respect, in the context of this Convention, the fundamental rights to:

- a. freedom of association and the effective recognition of the right to collective bargaining;
- b. the elimination of all forms of forced or compulsory labour;
- c. the effective abolition of child labour; and
- d. the elimination of discrimination in respect of employment and occupation.

Article III is of particular importance in the MLC as it requires that fundamental rights recognised in other conventions must be respected when implementing the MLC. Of particular relevance during the pandemic is Article III(b), which refers to the elimination of forced labour.

ILO Convention 29 defines forced labour as “all work or service which is exacted from any person under the men-

<sup>5</sup> *Basic Facts on the Maritime Labour Convention 2006*, ILO: LABOUR STANDARDS, [https://www.ilo.org/global/standards/maritime-labour-convention/what-it-does/WCMS\\_219665/lang--en/index.htm](https://www.ilo.org/global/standards/maritime-labour-convention/what-it-does/WCMS_219665/lang--en/index.htm) (last visited July 17, 2023).

ace of any penalty and for which the said person has not offered himself voluntarily.” The “menace of a penalty” entails a variety of acts, from physical violence to psychological coercion to retention of papers, among others.

In this context, it is also important to consider regulation 2.1 of the MLC, which provides for the need for seafarers to receive advice on the agreements which they are signing.

#### Regulation 2.1 – Seafarers’ employment agreements

...

Seafarers’ employment agreements shall be agreed to by the seafarer under conditions that ensure that the seafarer has an opportunity to review and seek advice on the terms and conditions in the agreement and freely accepts them before signing.

### Repatriation and Abandonment

The MLC establishes the right of seafarers to be returned to their home countries (or such other place they might choose) by their employer when they complete a contract or a period at sea. The right is established in regulation 2.5, which states that “seafarers have the right to be repatriated at no cost to themselves in the circumstances and under the conditions specified in the Code.”

The Code (standard A2.5.1) then sets out those conditions and states clearly that a seafarer must be repatriated upon the expiry or termination of their employment agreement, or “when the seafarers are no longer able to carry out their duties under their employment agreement or cannot be expected to carry them out in the specific circumstances.”

Also important in this context is the maximum allowable service period. Standard A2.5.1, paragraph two stipulates that the maximum period a seafarer can spend on board is twelve months. However, this standard must be read in conjunction with standard A2.4, paragraph 2, which provides that annual leave shall be accumulated at a rate of two and a half days per month. So, for example, over a twelve-month service period, a seafarer will accumulate thirty days of leave. Taking these thirty days at the end of the period would mean that a seafarer is unable to serve more than eleven months on board before being entitled to annual leave. To reinforce this right, standard A2.4, paragraph 3 prohibits the ability to forgo the minimum period

of leave, except in specific circumstances. It should also be noted that standard A2.4, paragraph three prevents the waiving of annual leave.

Standard A2.5.1 also covers how repatriation shall be achieved should the shipowner fail to make arrangements to return the crew home. Paragraph five of the standard sets out cascading responsibilities. Should the shipowner fail, the flag authority of the state in which the ship is registered is obliged to make the arrangements. If the flag state fails, the responsibility falls to the state in which the seafarers find themselves, or the state in which they are nationals. The costs for the repatriation then run back up the cascade with the intention that the flag state must then recover the costs from the shipowner.

Of particular importance in the right to repatriation are two paragraphs towards the end of standard A2.5.1:

7. Each Member shall facilitate the repatriation of seafarers serving on ships that call at its ports or pass through its territorial or internal waters, as well as their replacement on board.

8. In particular, a Member shall not refuse the right of repatriation to any seafarer because of the financial circumstances of a shipowner or because of the shipowner's inability or unwillingness to replace a seafarer.

It would seem, then, that both the right to repatriation and the mechanism for achieving that right is comprehensively covered by the MLC. Unfortunately, in practice, this right is not enforced. The phenomenon of abandonment of seafarers is an issue that has plagued the industry for decades. This issue became so serious, that in 2014, only a year after the MLC entered into force, the first amendment to the code was passed to deal with the issue. The amendment defines abandonment and establishes the requirement for a financial security system to provide relief to those that find themselves abandoned.

Standard A2.5.2 states:

For the purposes of this Standard, a seafarer shall be deemed to have been abandoned where, in violation of the requirements of this Convention or the terms of the seafarers' employment agreement, the shipowner:

- a. fails to cover the cost of the seafarer's repatriation; or
- b. has left the seafarer without the necessary maintenance and support; or
- c. has otherwise unilaterally severed their ties with the seafarer including failure to pay contractual wages for a period of at least two months.

The standard further requires that vessels carry a policy of insurance which, in the event of an abandonment, will cover the costs of the seafarer's repatriation, up to four months of unpaid wages, and the costs of their food, accommodation, medical treatment, and any other necessities until they reach home.

As a further step in trying to resolve cases of seafarer abandonment, the ILO and IMO have jointly created a database of cases. When cases are reported to the database, concerned parties should collectively seek to resolve the matter. While the case will only be considered completely resolved once the crew has returned home and been paid all outstanding wages, the case can also be concluded as "disputed," meaning that, while the crew returned home, they did not receive all of their owed wages. It is clear then, that the focus of the system is the repatriation of the seafarer.

## Shore Leave and Medical Care

Other pertinent rights granted to seafarers in the MLC are contained in Title 4 of the MLC's Code, dealing with health protection, medical care, welfare, and social security protection.

The MLC guarantees free medical care to seafarers and requires that signatory states "shall ensure that seafarers on board ships in its territory who are in need of immediate medical care are given access to the Member's medical facilities on shore."<sup>6</sup> The importance of access to medical care, especially in the context of a global pandemic, is self-evident.

In addition, regulation 4.4 requires that seafarers be afforded access to shore-based welfare facilities, usually in

<sup>6</sup> Maritime Labour Convention, Feb. 23, 2006, 2952 U.N.T.S. 3 (hereinafter MLC), reg. 4.1, ¶ 3, <https://treaties.un.org/doc/Publication/UNTS/Volume%202952/Part/volume-2952-I51299.pdf>. 3

the form of seafarers' centres where everything from internet access to pastoral care may be provided. Not only should access be provided, but also states are obliged to "promote the development of welfare facilities in appropriate ports."<sup>7</sup>

Shore leave for seafarers is vital. Regulation 2.4 requires that seafarers be granted shore leave for their health and mental well-being. There is a wealth of research into fatigue in seafarers and the connections between lack of rest, reduced wellbeing, and accidents.<sup>8</sup>

## Flags of Convenience

One of the issues in enforcing human rights at sea is the current system for the registration of ships. All seagoing vessels in international trade need to be registered under the flag of a country. All countries have the right to run a registry of ships. Traditionally, vessels would be registered in the country in which they were owned. For much of modern history, however, certain countries have run "open registries" which means that shipowners are able to register their vessels in countries to which they have no real link. This fact has led to the modern system referred to as "flags of convenience," or FOCs, in which vessels are registered in countries that typically have minimal regulation, low compliance costs and taxes, and weak labour standards.

The International Transport Workers' Federation, the global union federation which represents seafarers at the international level, lists forty-two countries as flags of convenience.<sup>9</sup> While several countries allow the registration of foreign owned ships, the system is dominated by a few big flags. Panama, Liberia, and the Marshall Islands together cover more than forty percent of the world's fleet by tonnage, with Malta and the Bahamas, the next biggest FOCs, amounting to about eight and a half percent.

<sup>7</sup> MLC, standard A4.4, ¶ 2.

<sup>8</sup> Andy Smith, Paul Allen & Emma Wadsworth, SEAFARER FATIGUE: THE CARDIFF RESEARCH PROGRAMME (2006), <https://orca.cardiff.ac.uk/id/eprint/48167/>; MI News Network, *Seafarer Fatigue: The Importance Of Good Night Sleep*, MARINE INSIGHT (Aug. 11, 2019), <https://www.marineinsight.com/marine-safety/seafarer-fatigue-importance-good-night-sleep/>; PROJECT HORIZON: A WAKE-UP CALL (2012), <https://www.nautilusint.org/en/news-insight/resources/nautilus-reports/project-horizon/>.

<sup>9</sup> *Flags of Convenience*, INTERNATIONAL TRANSPORT WORKERS' FEDERATION, <https://www.itfglobal.org/en/sector/seafarers/flags-of-convenience> (last visited July 17, 2023).

FOC registries are run in countries with maritime traditions, such as Panama and Malta. These countries serve landlocked countries, such as Mongolia, and countries that have no capacity to accommodate the vessels they register in a port, such as the Cook Islands. Many of these registries are essentially run as a business and may not even have their main offices in the country that they represent (for example, both the Liberian and Marshall Islands registries are run from the USA).

While most of the large FOCs have ratified the Maritime Labour Convention, they rarely provide conditions that exceed the requirements of the MLC and allow for the employment of workers from low wage economies. In addition, FOCs tend to not be as attentive to ensuring the strict application of the MLC. Those vessels registered in the countries where they are genuinely owned, on the other hand, generally must observe the labour laws that prevail in the country of registration.

In the event that the requirements of the MLC are breached by a company, port authorities will have the ability to prevent a ship from sailing. This stoppage can be a costly penalty in terms of missed revenue and is something most operators will seek to avoid.

When a country fails to properly implement and enforce the MLC, seafarers' organisations, such as unions, need to make representations and complaints through the ILO's reporting mechanisms.

## Making the MLC Work During a Global Pandemic

During the pandemic, international travel was almost completely halted, stranding tourists and travellers around the world. The same was true for the world's seafarers who found themselves unable to return home at the conclusion of their contracts.

Initially, and perhaps fairly, it was declared impossible to comply with the requirements for the repatriation of seafarers. As the situation developed, it became clear that travel would be possible with certain risk management measures in place. Some travel did become possible. Systems were set up for airline crew that would allow them to carry on their jobs, but seafarers were left out, despite calls from industry and unions and the development of repatriation protocols by the IMO.

By the middle of June 2020, it was estimated that between 150,000 and 200,000 seafarers were trapped on board vessels<sup>10</sup> with as little as 25% of normal crew changes taking place.<sup>11</sup> Seafarers found themselves either working on board vessels with an expired employment contract, working under extensions to their original contracts, or waiting on board to be sent home. Often, those working beyond their original contracts found themselves on board beyond the legal limit of 11 months.

During the course of the pandemic, reported incidents of abandonment rose dramatically. In 2019, the database recorded 35 cases of abandonment. In 2020, that jumped to 86 cases, and then to 95 in 2021. Abandonment cases are reported almost exclusively by the ITF.<sup>12</sup>

One of the worst examples of a complete failure to comply with the MLC occurred in Djibouti, early in the pandemic. The crews of two vessels anchored off the coast, Ptolemeos and Arrybas, found themselves abandoned before the pandemic had even begun. The introduction of restrictions would lead to a nightmare situation. At the end of 2019, Djiboutian authorities had reportedly filed a court case against the Greek owners of the vessels for unpaid debts and bills, allowing the vessels to be detained.<sup>13</sup> At this point, the crew had been on board for around 8 months and had been unpaid for two and a half months. By the end of February 2020, the crew was still on board, still unpaid and the case had garnered the attention of the international community.

As the international community became more interested in the case, with the ITF, the International Chamber of Shipping, UN agencies, and the flag state and governments of the individual seafarers involved and exerting pressure, authorities in Djibouti became less and less responsive. The main issue was that the crew was due for replacement, but local authorities were unwilling to allow

<sup>10</sup> Press release, ILO, More Than 150,000 Seafarers Trapped on Board Ships Due to COVID-19 (June 8, 2020), [https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS\\_747293/lang-en/index.htm](https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_747293/lang-en/index.htm).

<sup>11</sup> *The COVID-19 Pandemic: The Crew Change Crisis*, INTERNATIONAL CHAMBER OF SHIPPING: CURRENT ISSUES IN SHIPPING, <https://www.ics-shipping.org/current-issue/the-covid-19-pandemic-the-crew-change-crisis/> (last visited July 17, 2023).

<sup>12</sup> *Database of Reported Cases of Abandonment*, ILO, <https://www.ilo.org/dyn/seafarers/seafarersbrowse.home> (last updated July 14, 2023).

<sup>13</sup> *Ship Auction*, DJIBOUTI PORTS & FREE ZONES AUTHORITY: NEWS (Apr. 28, 2020), <https://dpfza.gov.dj/ship-auction>.

the crew to leave without replacement, as this would leave the vessels unmanned and create a safety risk. None of the parties involved were willing to arrange a replacement crew. The emergence of travel restrictions created a further excuse to keep the crew on board. As the pandemic wore on, there were issues with the supply of food, water, and fuel to the vessels. Things reached a low point when one of the crew ran out of vital heart medication he relied on. Local authorities refused to allow the seafarer ashore for medical treatment citing quarantine requirements. This occurred despite the requirements of the MLC, and the fact that the crew had been isolated on board the vessel for months before the pandemic even started. The case wore on until November 2020, when a buyer for the vessels was found and the crew was replaced.

By early 2021, most states were claiming that they were open to facilitating the repatriation of seafarers. In practice, this was not the case. In general, seafarers are granted temporary visas to travel through a country in order to join or leave a vessel. With many states requiring quarantine periods at either end of travel, seafarers found themselves needing to stay in the country from which they would travel home longer than normal. For several Schengen visa states, this situation meant a Schengen visa would be required. Many seafarers were unable to meet these requirements.

As late as November 2021, the ITF was dealing with cases in which seafarers were unable to be repatriated.

The vessel Archon, flagged in the Marshall Islands, was found to have several Chinese seafarers, who, despite repeated requests to be allowed to travel home, remained on the vessel. Many of the crew were working with expired contracts and some were beyond the legal limits for length of service set out in the MLC. The crew was told by their employer that repatriation was not possible. ITF inspectors in Spain became aware of the issues while the vessel was in Barcelona and contacted the vessel. The master produced contract extensions for all crew on board (despite some not having completed their original contracts). Spanish port authorities seemed unconcerned by the claims of the crew that they had never signed the extensions. A plan was made between Spanish and Marshall Islands authorities for the crew to be repatriated by the end of the year. In reality, the crew reached home in mid-January 2022. Unfortunately, the flag state chose to ignore the ITF's repeated requests for the MLC to be observed in this case and continued to insist that the shipowner had the

right to ignore the MLC in the circumstances.

In late 2021, the *Duyen Hai 1*, a Panamanian flagged vessel, was detained in Malaysia over the owner's unpaid debts. The crew contracts expired in September 2021, after which point the crew should have been sent home. Because the crew was Vietnamese, the owners claimed that they were unable to send the crew home because the borders of Vietnam were closed. While the crew waited onboard for the conclusion of legal actions, nothing was done by the flag state. The crew suffered issues with the supplies of food, water, and fuel. Wages were paid inconsistently. Throughout this period the crew were expected to work to maintain the vessel and keep it safe. Interestingly, when the Vietnamese borders were opened in mid-March 2022, the crew were not immediately sent home but were forced to remain on the vessel until the conclusion of the court case, making it clear that pandemic restrictions were never the real reason for the failure to repatriate. Throughout the time the crew was on the vessel, the ITF repeatedly called on the flag state to intervene and for the vessel's insurers to declare the crew abandoned. Both parties refused to take action. The crew was eventually sent home on May 6, 2022.

The cases of the *Duyen Hai 1* and *Archon* are just two of the hundreds of cases in which the ITF assisted crew who were stuck on vessels during the pandemic. It should be noted that the number of abandonment cases reported to the ILO rose dramatically during this period, with virtually all cases reported by the ITF. This was a further demonstration that flag and port states are relatively unconcerned with using the ILO apparatus to ensure seafarers' rights are upheld.

In late 2020, the maritime industry saw the emergence of the "no crew change" clause. The clause was being included in chartering agreements (the contracts used to hire commercial vessels) and required that crew were not to be changed during the term of the hire. This development would mean that any crew who reached the end of their contract during the course of the hire would not be able to be sent home, or that shipowners would have to ensure that all crew on board would remain within the contract for the duration of the journey. Such clauses are clearly at odds with the requirements of the MLC and could potentially leave shipowners stuck between compliance with legislation and private contracts. While such clauses were opposed by shipowners' and seafarers' organisations and UN agencies, no countries have taken steps to make such

clauses explicitly illegal.

Unfortunately, issues with access to medical care are continuing.<sup>14</sup> Issues reported include seafarers being refused onshore medical care despite broken limbs<sup>15</sup> and severe illnesses.<sup>16</sup> Indeed, there have even been reports of governments refusing to take the remains of deceased seafarers, forcing crew members to keep the remains of their deceased colleagues on board in the kitchen freezer<sup>17</sup>.

## Responses

In March 2020, a statement was published by the officers of the Special Tripartite Committee of the Maritime Labour Convention, 2006, as amended (the "STC"). The STC is the body established under the MLC that is able to amend the Convention. It is made up of representatives from governments, industry, and workers. In the context of the MLC, the workers are represented by the International Transport Workers' Federation.<sup>18</sup> The statement pointed out the "dire circumstances" that were developing and called for states to declare seafarers as essential workers, so that they may be exempted from the travel restrictions that were in place and so that crew changes could take place.

The statement called for a "pragmatic approach" to seafarers who had stayed on board vessels longer than their contract had envisaged, or even beyond legal limits. The statement also warned of the potential increase in abandonments as a result of the pandemic.

<sup>14</sup> Press Release, International Chamber of Shipping, ICS Urges Governments to Act After UN Report Highlights Countries Denying Seafarers Urgent Medical Care (Mar. 2, 2022), <https://www.ics-shipping.org/press-release/ics-urges-governments-to-act-seafarers-denied-medical-care/>.

<sup>15</sup> *Seafarers' Denied Access to Medical Care a Global Health Emergency*, NAUTILUS INTERNATIONAL: NEWS (June 3, 2020), <https://www.nautilusint.org/en/news-insight/news/seafarers-denied-access-to-medical-care-a-global-health-emergency/>.

<sup>16</sup> *Video: China Refuses Medical Attention to the Dying Seafarer*, MARITIME POST (Jan. 17, 2021), <https://themaritimepost.com/2021/01/video-china-refuses-medical-attention-to-the-dying-seafarer/>.

<sup>17</sup> Drew Hinshaw, Vipal Monga & Joe Parkinson, *The Ship's Captain Died at Sea: Six Months Later, His Body Was Still in the Freezer*, WALL STREET JOURNAL (Nov. 19, 2021), <https://www.wsj.com/articles/the-ships-captain-died-at-sea-six-months-later-his-body-was-still-in-its-freezer-11637332406>.

<sup>18</sup> International Transport Workers' Federation, [www.itfglobal.org.uk](http://www.itfglobal.org.uk) (last visited July 17, 2023).

On June 12, 2020, a statement was issued by the Secretary General of the United Nations,<sup>19</sup> calling on states to recognise seafarers as essential workers and ensure that crew changes could take place safely.

A few days later, on June 16, 2020, Kitack Lim, secretary-general of the International Maritime Organization (IMO), used a speech to repeat a call for governments to take action to tackle the issue.

In order to promote safe crew change, the IMO published the Coronavirus (COVID-19) Recommended Framework of Protocols for ensuring safe ship crew changes and travel during the Coronavirus (COVID-19) pandemic. The Recommended Framework was originally issued in October 2020 and was subsequently updated in April 2021.

The issue of crew change was even discussed in the UN General Assembly, which on December 1, 2020, issued a resolution calling for seafarers to be declared essential workers and for states to cooperate in facilitating crew changes.<sup>20</sup>

A week later, a similar resolution was issued by the ILO's governing body. It again called for an essential worker designation and called for states to "adopt without delay the necessary measures to fully implement the Convention in law and practice during the COVID-19 pandemic."<sup>21</sup>

This resolution was followed in the same month by an expression of concern from the ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR), which included an unequivocal statement to the effect that *force majeure* could no longer be invoked by states to explain their failures to comply with the MLC.<sup>22</sup>

<sup>19</sup> Press Release, UN Secretary-General, Secretary-General Says Governments Should Allow Seafarers to Repatriate, Join Ships, as Hundreds of Thousands Remain Stranded at Sea by COVID-19-Related Travel Restrictions (June 12, 2020), <https://www.un.org/press/en/2020/sgsm20121.doc.htm>.

<sup>20</sup> G.A. Res. 75/17 (Dec. 7, 2020), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N20/341/37/PDF/N2034137.pdf?OpenElement>.

<sup>21</sup> ILO, *Resolution Concerning Maritime Labour Issues and the COVID-19 Pandemic*, GB.340/Resolution (Rev.2) (Dec. 8, 2020), [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_760649.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_760649.pdf).

<sup>22</sup> ILO, *General Observation on Matters Arising From the Application of the Maritime Labour Convention, 2006, as Amended (MLC, 2006) During the COVID-19 Pandemic* (Nov./Dec. 2020), [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/publica-](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publica-)

While the CEACR accepted that genuine situations of *force majeure* may have existed in the early days of the pandemic, it clearly stated that difficulty in applying the requirements of the MLC was not sufficient to claim *force majeure*:

The Committee stresses that the notion of force majeure may no longer be invoked from the moment that options are available to comply with the provisions of the MLC, 2006, although more difficult or cumbersome, and urges ratifying States which have not yet done so, to adopt all necessary measures without delay to restore the protection of seafarers' rights and comply to the fullest extent with their obligations under the MLC, 2006.<sup>23</sup>

Following their session in November and December 2021, the CEACR was forced to reiterate its comments.<sup>24</sup> The Committee acknowledged that some states were continuing to invoke force majeure to avoid their MLC obligations and pointed out the dangers of doing so. The comments of the CEACR relied heavily on submissions from the ITF pointing out the many failures in respect of the MLC implementation during the pandemic.

With calls for government action falling on deaf ears, another tool was launched. In May 2021, the UN Global Compact, along with other UN bodies and in consultation with industry, including the ITF, launched a maritime human rights due diligence toolkit.<sup>25</sup> The toolkit aimed at ending the crew-change crisis by asking cargo owners and charterers of ships to look for issues and check compliance with the MLC. To support this measure, ITF also offered to support companies in conducting checks on the ships used to move their goods. This toolkit and additional support helps to ensure compliance with the MLC and improve union coverage of workers at sea.

[tion/wcms\\_764384.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_764384.pdf).

<sup>23</sup> *Id.*

<sup>24</sup> *COVID-19 and Maritime Labour Issues*, ILO (Feb. 10, 2022), [https://www.ilo.org/global/standards/maritime-labour-convention/WCMS\\_836883/lang--en/index.htm](https://www.ilo.org/global/standards/maritime-labour-convention/WCMS_836883/lang--en/index.htm).

<sup>25</sup> *Seafarers' Human Rights Due Diligence*, INTERNATIONAL TRANSPORTATION WORKERS' FEDERATION, <https://www.itfglobal.org/en/focus/supply-chains/seafarers-human-rights-due-diligence> (last visited July 17, 2023).

Following the pandemic, the International Transport Workers' Federation, as the global union federation which represents transport workers, including seafarers' unions, and fulfills the role of the workers' group with the MLC Special Tripartite Committee, proposed several amendments to the MLC. Included in the proposed amendments were provisions to:

- Provide seafarers with personal protective equipment;
- Ensure that drinking water must be provided free of charge;
- Improve the protections on the right to repatriation in cases of seafarer abandonment;
- Ensure that seafarers would have better access to medical care ashore;
- Provide seafarers with free access to the internet; and
- Improve practices in recruitment and manning services.<sup>26</sup>

The ITF was successful in that many of the proposed amendments were passed in some form. Seafarers must now be provided with personal protective equipment that fits; drinking water shall now be free of charge; port and flag states must take more action to repatriate abandoned seafarers; seafarers can no longer be denied medical care ashore on the pretext of "public health concerns"; manning agents must provide seafarers information on how to access assistance in the event that the shipowner fails to meet their obligations.

Unfortunately, amendments to make internet access free of charge and to ensure seafarers would not be left to cover the costs of quarantine during repatriation were rejected by the shipowner's group. Following the experiences of the crew change crisis, it was disappointing that shipowners would take such an approach to these particular improvements to the conditions for seafarers.

<sup>26</sup> ILO, *Fourth Meeting of the Special Tripartite Committee of the Maritime Labour Convention, 2006 (MLC, 2006) - Part II (May 5 - 13, 2022)*, [https://www.ilo.org/global/standards/maritime-labour-convention/events/WCMS\\_778090/lang-en/index.htm](https://www.ilo.org/global/standards/maritime-labour-convention/events/WCMS_778090/lang-en/index.htm).

## Analysis

There is a clear link between the concept of abandonment, the crew change crisis, and forced labour. It is no coincidence that during the pandemic and the crew change crisis, reported abandonments reached record highs.

Signatories to international human rights conventions are required to respect and fulfill the expectations of those conventions through various state apparatuses and to actively protect against human rights abuses. The obligations extend to abuses within the state's territory or jurisdiction, including vessels that fly the flag of the state.

The UN Guiding Principles on Business and Human Rights (UNGPs) confirm that states are in breach when they fail to take effective steps through policy and regulation to prevent abuses before they occur. States must also "review whether [the] laws provide the necessary coverage in the light of evolving circumstances and whether, together with relevant policies, they provide an environment conducive to business respect for human rights." As noted by the UN Working Group on Business and Human Rights, the state's duty to protect human rights applies both under normal circumstances and in times of crisis.

Throughout the pandemic, many flag states have claimed that compliance with the MLC was rendered impossible, excusing failures to properly implement the convention under the generally accepted definition of *force majeure* provided in the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts. While the ILO initially called for a pragmatic approach that would allow for contract extensions where necessary, this call was backed by an expectation that crew changes would soon return to normal and be limited to a "reasonable [extension] period," and conditional on the "fundamental requirement...in all cases" of the seafarer's free consent in conditions that allow a review and the seeking of advice.

It is important also to note that seafarers are in a considerably more vulnerable position than many other workers. There are many factors contributing to this vulnerability, including their nature as travelling workers away from their homes, language and cultural differences, and their dependence on their employers for food, fuel, and support. Also contributing is the nature of international shipping and the flag of convenience system, which encourages ambiguous corporate arrangements and a lack

of transparency. It is a system in which a Filipino seafarer may work on a ship that is flagged in Panama, owned by a German company, managed by a Cypriot ship manager, and trading between Europe and North America.

These factors leave seafarers in a state of isolation and susceptible to coercion by their employers. Coupled with other factors such as fatigue and stress, which were exacerbated during the pandemic, seafarers were left open to exploitation.

In the circumstances of the pandemic, seafarers were told that they would be abandoned in a foreign port without the possibility of repatriation if they did not agree to a contract extension. In not signing extensions, seafarers faced the additional risk of loss of future job prospects. Additionally, it has proved difficult for seafarers to withdraw consent to extensions once granted. Attempts to cut short signed extensions may result in the seafarer being forced to pay for their own passage home and the costs of replacement. These significant risks constitute a clear penalty for the purposes of Convention 29. Further, wherever consent to work is given under the threat of a penalty, there can be no voluntary offer. Seafarers were given no effective choice but to sign the contract extensions.

In addition to having reduced choice on whether to extend contracts, seafarers also faced the threat of abandonment. The abandonment provisions in the MLC acknowledge that seafarers may not be paid for their labour and sets up a mechanism to rectify the situation. Unfortunately, a lack of action from the states responsible for implementing these requirements sees many abandonment cases dragging on for months without the crew being paid or repatriated. The MLC requires that a financial security system be in place to compensate crew. In practice, many of the providers of such financial security seek to avoid paying out on the policies issued. While a small group of better-intentioned providers does exist, many crews are not lucky enough to have employers who seek this more robust cover, and even if they are so lucky, the financial security is only required to cover four months' worth of wages. With crew reportedly remaining on vessels for periods exceeding 17 months (recalling the 11 months maximum), the financial security may not be sufficient to cover all of the outstanding wages.

When combined with both a physical impossibility and a state-enforced inability to leave a vessel, the forced labour implications here are clear.

## Conclusion

The actions of the world's governments have not enhanced seafarers' rights over the course of the first two years of the Covid-19 pandemic. Instead, they have been attacked. Good employers have been denied the ability to properly provide the necessary rights for their crew and bad employers have been given an excuse to ignore those same rights.

With abandonments continuing to rise and crew continuing to remain on vessels well beyond legal limits, it is clear that states have failed to adhere to their obligations under the Maritime Labour Convention. This failure is clearly evidenced by the experience of organisations like the ITF and by the repeated comments of the ILO's Committee of Experts, including their statements that *force majeure* was not applicable as an excuse for failures to properly implement labour and human rights conventions.

In general, and while some fine tuning may be required (as evidenced by recent amendments), the MLC contains the necessary measures to protect seafarers. In the context of the pandemic, compliance with the convention was forgotten. Governments prioritised keeping trade routes open and protecting land-based citizens to the detriment of the rights and well-being of those at sea. Seafarers have long been what might be called invisible workers and the pandemic has proved the extent to which the world's governments are prepared to ignore their rights.

Flag states, port states, and labour supplying states must do more to effectively implement the conventions and guidance issued by various organisations to ensure that seafarers are not made victims of forced labour, abandonment, and other crimes.



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*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.*