British Judges and Workers' Rights

Susan CORBY

Introduction

This chapter focuses on how British judges have interpreted legislation on the rights of employees and workers. It begins by setting out the context: the legislation largely enacted by Conservative governments and the court system. Then it explains how on the one hand, judges have bolstered the employer's prerogative, that is the employer's right to manage unilaterally in respect of dismissal and have not used their discretion to maintain tripartism. Moreover, mostly they have interpreted draconian legislation on strikes and industrial action short of a strike in the employer's favour.

On the other hand, British judges have stopped the government from charging hefty fees for Employment Tribunals thus enabling access to justice, as well as furthering the rights of some workers on zero hours contracts in the gig economy. Accordingly, this chapter finds that British judges have a mixed and varied record in respect of furthering workers' rights and concludes by making some observations on the future direction of British labour law.

I. Background

A. The legislative context

The Conservative party has been in power for most of the last 40 years and, as a result, British workers now have less rights in respect of industrial action than many workers in other European countries. Even when the Labour party was in power from 1997-2010, it merely simplified certain provisions on union ballots for strikes; it did not repeal the laws curtailing strike action that had been introduced by their Conservative predecessors. These include restrictions on picketing and on sympathy strikes (1980 Employment Act); employers being given the right to sue unions for damages (1982 Employment Act); secret ballots before industrial action (1984 Trade Union Act); enabling union members to seek injunctions if there had not been a pre-strike ballot (1988 Employment Act); restrictions on time off with pay for union duties (1989 Employment Act); the closure of loopholes in respect of sympathy action (1990 Employment Act); provisions in respect of unions giving the employer seven days' notice of strike ballots and industrial action (1993 Trade Union Reform and Employment Rights Act).

When the Conservatives resumed power after a period in coalition, they passed the even more restrictive 2016 Trade Union Act which, *inter alia*, required that:

– trade unions give 14 days' notice of strike action, (instead of seven days as before);
– in « important public services »[1],(not just « essential » public services) at least 40 per cent of those entitled to vote must vote in favour of action, (instead of a simple majority as before);
– any affirmative ballot can only validate industrial action for six months, beginning with the date the ballot closes.

As can be seen from this summary, (which includes some, but by no means all of the provisions), a union now has to meet intricate conditions for lawful industrial action and the Trades Union Congress has described the 2016 changes as making « *legal strikes close to impossible* »[2].

Strikes apart, other restrictions by Conservative governments include cutting the period by half during which the employer is required to consult with workers' representatives over redundancy: from 90 days to 45 days. Also, it doubled the period before which an employee could claim unfair dismissal on certain grounds. Until 2012 the employee

---

1 Specified as health, education, transport, border security and fire-fighting.

2 Trades Union Congress, press releases, 12 May 2015, 16 December 2015.

could claim unfair dismissal for conduct, capability or redundancy or some other substantial reason after one year of continuous employment with the same employer. The Conservatives changed this to two years continuous employment.

Table 1 shows an index of the strictness of employment protection calculated by the Organisation for Economic Cooperation and Development (OECD).

Table I. OECD index of employment protection[3]

Country	Individual & collective dismissals (regular contracts)	Temporary employment
France	2.36	3.63
Germany	2.68	1.13
Italy	2.66	2.00
Netherlands	2.82	1.00
United Kingdom	1.10	0.38

Unsurprisingly, the index demonstrates that employment protection in the United Kingdom is lower than that of many other European countries.

B. The court system

Figure 1 below displays the civil court system in the United Kingdom. At the base are Employment Tribunals. Unlike the *conseils de prud'hommes*, they cover the public sector as well as the private sector and civil servants at all levels. Moreover, almost a third of the cases they hear include a discrimination claim[4] as there is no mediation body akin to the French *Défenseur des Droits*. An appeal from the Employment Tribunal goes to the Employment Appeal Tribunal, but only on a point of law. Permission is necessary to appeal further and again it is only on a point of law.

3 Source: OECD https://www.oecd.org/employment/emp/oecdindicatorsofemploymentprotection.htm.
Index calculated as for 2013. [accessed 3.12.2019]. For more details see https://www.oecd.org/els/emp/All.pdf.
The indicators have been compiled using the OECD's Secretariat's own reading of statutory laws, collective bargaining agreements and case law, as well as contributions from officials from OECD member countries and advice from country experts.

4 Ministry of Justice, *Employment Tribunal Receipts*, Tables Annex C, 2019.

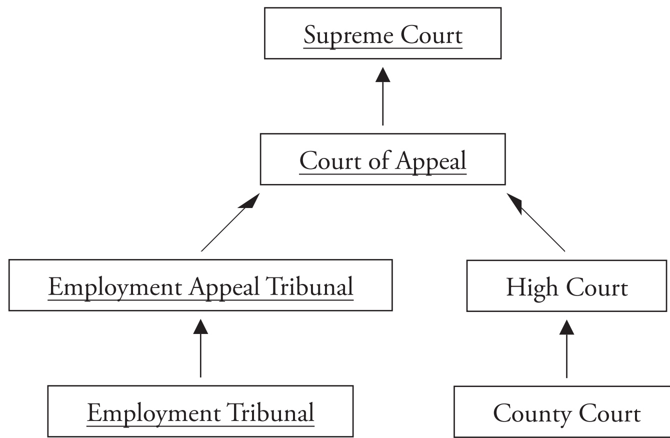

Figure I. The civil court system in the UK

The Supreme Court (formerly known as the House of Lords) comprises 12 judges. At the time of writing, three are women, including the President. It covers the entire United Kingdom, but there are some variations by country in the lower courts, both in nomenclature and in substance[5].

A key factor differentiating the UK from continental Europe is the fact that the UK is a common law country and there is a doctrine of precedent, where a decision of the higher court *binds* the courts below it. Under a civil law system, as in France, Italy, and Germany, the decision of the higher court *guides* the decisions of the courts below. Another differentiating factor is that in the UK there is no career judiciary. A person has to have been legally qualified and have had at least five years of legal experience before becoming a judge. In practice most judges have had more than five years' experience and generally start on a part-time basis before they apply to be a full-time salaried judge. This should in theory make judges more rooted in the real world.

5 Most employment law cases go to the courts underlined. Northern Ireland does not have an Employment Appeal Tribunal; its Employment Tribunals are called Industrial Tribunals and it has a Fair Employment Tribunal to deal with claims of discrimination on grounds of religion or political opinion. Scotland has a Court of Session, instead of a Court of Appeal and its Sheriff court replaces the County Court and High Court.

II. The limitation of workers' rights

A. Dismissal

This chapter has already shown that British workers enjoy less employment protection than many others in Europe. Partly this is because of the legislation. Also, however, it is because of the way British judges have interpreted the legislation on individual dismissals to allow employers a large amount of leeway, thus bolstering the employer's prerogative. To look in detail: there has been legislation on dismissal for the potentially fair reasons of conduct, capability, redundancy or some other substantial reason since 1971 and the current legislation (Employment Rights Act 1996, s.98) provides as follows:

> *(4)* […] *the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)*
> *a) depends on whether in the circumstances* […]*, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and*
> *b) shall be determined in accordance with equity and the substantial merits of the case.*

Nevertheless, British judges, in a long line of cases, have put a gloss on the legislation and ruled that the employer is allowed a considerable degree of scope in determining what is reasonable. A seminal decision was by the Court of Appeal in *British Leyland UK Ltd v. Swift* as far back as 1981 when it held: « *The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair* […] *Both views may be quite reasonable* »[6].

This was challenged 20 years later as a departure from the legislation in two cases that were decided together by the Court of Appeal: *Post Office v Foley / HSBC Bank v. Madden.* In these cases, the employee had been dismissed for misconduct. Mr Foley, a postal worker, was given permission to leave his shift early to deal with a domestic problem. About an hour later, an off-duty manager reported seeing him in a nearby public house (pub). Mr Foley maintained that he had gone to the pub to call for a taxi and had left some time before the alleged sighting. The employers rejected that explanation and decided to dismiss him. An Employment Tribunal dismissed Mr Foley's complaint of unfair dismissal. It found that the decision, though « harsh », was not unreasonable and was « *mindful that we must not impose our decision*

6 Court of Appeal, *Industrial Relations Law Reports*, 1981, p. 93.

upon that of a reasoned on-the-spot management ». The Employment Appeal Tribunal allowed Mr Foley's appeal against that decision on the grounds that there had been no consideration as to what was the range of reasonable responses to the conduct in question.

Mr Madden was dismissed by the bank after internal investigations indicated that he had been involved in the misappropriation and fraudulent use of three customers' debit cards. An Employment Tribunal found that the dismissal was unfair as the internal investigator's conclusions had been accepted by the employer too readily and uncritically. The employer's appeal was dismissed by the Employment Appeal Tribunal: it said that the Employment Tribunal was allowed to substitute its own view of what was reasonable for the employer's view.

The Court of Appeal upheld the appeals by the two employers. It held that the band of reasonableness approach was binding, despite the fact that the Employment Appeal Tribunal had expressed unease at the fact that it had provided employers with a wide latitude. It said that the disapproval of the band of reasonableness was an « *unwarranted departure from binding authority* »[7]. Also, the Court of Appeal confirmed that the Employment Tribunal was not allowed to substitute its own view of what is reasonable, for the employer's view of reasonableness. It must base its decision on « *the objective standards of the hypothetical reasonable employer which are imported by the statutory references to 'reasonably or unreasonably', and not by reference to their own subjective views of what they in fact would have done as an employer in the same circumstances* »[8]. This contrasts with France, where *conseillers* may consider how the case on which they are adjudicating might be decided if there were similar facts in their own workplace.

It should be noted that up to now a case on the test of reasonableness of a dismissal has never gone to the Supreme Court, as the President of the Supreme Court has remarked. She added: « *There may be very good reasons why no-one has challenged the test before. It follows that the law remains as it has been for the last 40 years and I express no view about whether that is correct* »[9].

Yet the latitude given to the employer under the test of reasonableness is not the only way that British judges have watered down the unfair dismissal provisions. The Employment Rights Act 1996 s.112 provides that the primary remedy for unfair dismissal is reinstatement or re-engagement,

7 Court of Appeal, *Industrial Relations Law Reports*, 2000, p. 829.

8 *Ibid.*, p. 831.

9 Supreme Court, *Reilly v. Sandwell Metropolitan Borough Council*, *Industrial Relations Law Reports*, 2018, p. 562.

but the judges nearly always award monetary compensation. In less than 1 per cent of successful cases is reinstatement or reengagement ordered[10].

Moreover, judges have held that monetary compensation for unfair dismissal can only be awarded in respect of financial loss and not injury to feelings, (unlike discrimination in Britain or compensation for unjustified dismissal in New Zealand). The key case was *Dunnachie v. Kingston upon Hull City Council*[11]. Mr Dunnachie was bullied and harassed by a colleague over a prolonged period. His employer failed to take any action, so Dunnachie resigned and claimed constructive unfair dismissal. The Employment Tribunal found for Dunnachie and, in assessing compensation, awarded extra damages for injury to feelings arising from the manner of the dismissal. The case was then appealed to the Employment Appeal Tribunal, which held that damages for non-financial loss were not recoverable, but on a further appeal, the Court of Appeal said that such damages were recoverable, as the law did not specify financial loss only. Finally, the case went to the House of Lords (now known as the Supreme Court), which held that the word « loss » in the legislation means financial loss only, so damages for injury to feelings were not recoverable.

Yet another example of judges allowing employers a considerable degree of scope is in respect of closures of a workplace as the judges have said that it is not their task to inquire into the reasons for the closure. This was illustrated in *Moon and other v. Homeworthy Furniture (Northern) Ltd*[12]. In that case, the company's factory in Sunderland was subject to a number of industrial disputes, after which the company closed the factory, saying it was not economically viable. The workers, who had all lost their jobs, argued that it was not a genuine redundancy and that the factory was economically viable. The Employment Appeal Tribunal, however, held that « *No power is given to investigate the reasons for creating a redundancy. What may be done is to investigate the operating of a redundancy situation* ». Similarly, the Court of Appeal held in a later case concerning the voluntary liquidation of a shipyard that « *it is not open to the court to investigate the commercial and economic reasons which prompted the closure. It may be that in order to ensure fairness for the workforce the court should have this power, but in my view it does not have this power at present* »[13].

10 Weightmans, https://www.weightmans.com/insights/supreme-court-judgment-reminds-employers-of-the-risk-of-reinstatement-orders/ accessed, 3.12.2019.

11 House of Lords. *Industrial Relations Law Reports*, 2004, p. 727.

12 Employment Appeal Tribunal, *Industrial Relations Law Reports*, 1976, p. 298.

13 *James W Cook & Co (Wivenhoe) Ltd v. Tipper and Others*, *Industrial Relations Law Reports*, 1990, p. 392.

B. Tripartism and judicial discretion

When Employment Tribunals were first established in 1964, they comprised a professional judge and two lay members, one with experience as an employee and one as an employer. Slowly, however, Parliament legislated to ensure that decisions were by the professional judge alone. First, in 1993 it legislated to enable the professional judge alone to adjudicate cases on the rights of employees where the employer had become insolvent and on deductions from wages. In 1998 it legislated to enable the professional judge alone to adjudicate cases on redundancy payments; in 1999 on national minimum wage claims and in 2009 on holiday pay. Then in 2012, amid some furore, it was decided that a professional judge alone could determine unfair dismissal cases.

Nevertheless, the professional judge has discretion to enable the Tribunal to become tripartite, that is to include two lay members on certain specified grounds. These are set out in the Employment Tribunals Act 1996 s.4(5) and include where « *there is a likelihood of a dispute arising on the facts, which make it desirable for the proceedings to be heard* » on a tripartite basis. Although in many cases the facts are in dispute, professional judges very rarely exercise their discretion[14].

C. Industrial action

This chapter has already referred to the onerous legislation relating to strikes and industrial action short of a strike. Against that legislative backdrop, a key hallmark of the British system is an injunction, a court order, granted by a judge alone, that can be obtained by a directly aggrieved party to compel another party to refrain from (or do) a specific act. In the industrial relations context, it enables employers to obtain a court order to compel unions to desist from organising industrial action, pending a full hearing of the legal issues at a later date, when the injunction can be confirmed or rescinded. With this interim injunction, the burden of proof is not onerous, merely focusing upon whether an arguable case exists and any potential harm to the employer is such that an award of damages would not be a sufficient remedy. If an employer obtains an injunction, the union will have to suspend organising the strike and any other industrial action and may have to rerun a strike ballot. On the second occasion however, members may have changed their minds and not give the necessary approval.

14 The author interviewed 12 Employment Judges, i.e. judges who sit full-time in Employment Tribunals, as part of a project funded by Hans-Böckler-Stiftung. None had exercised their discretion to sit with lay members in the previous two years.

Accordingly, in effect an employer who obtains an injunction for the most part prevents the strike from occurring. Full hearings are exceptional.

Gall[15] examined employer applications for injunctions in respect of industrial action 2005-2014. He found that of the 65 applications, 36 (55 per cent) were granted and 21 (32 per cent) refused. He referred to some notable cases where judges granted an injunction and consequently the employer succeeded because of a technicality. They include:

- 2007, a Royal Mail strike was injuncted because the union did not tell the employer exactly how many employees were employed;
- 2008, a Metrobus drivers' strike was injuncted because the union took too long (48 hours) to fax the ballot result to the employer;
- 2009, a British Airways (BA) strike was injuncted because some members had already agreed to take voluntary redundancy;
- 2010, a Milford Haven port strike was injuncted because the notice of « continuous » and « discontinuous » action was given on one, not two sheets of paper.

There have, however, been a few decisions by judges on injunctions that have been less favourable to employers. In the case of the *National Union of Rail, Maritime and Transport Workers v. Serco*[16], the employer failed to obtain an injunction. The Court of Appeal said that « *The starting point should be that the 1992 Act should be given a likely and workable construction in the normal way and not strictly against unions* ».

Similarly, the employer failed to obtain an injunction in *Balfour Beatty v Unite The Union*[17] where the High Court said : « *It cannot be right for a judge to hold that all reasonably practicable steps have not been taken merely because he or she would (as an outsider) have done something different. There must be leeway permitted for those who are familiar with the membership, and with the union's particular problems of record keeping* ».

It should be noted that these judgments were made before the more onerous provisions of the 2016 Trade Union Act were introduced, since when employers have had some success and some failures in respect of injunctions. For instance, in 2019 British Airways sought an injunction against its pilots (who had voted overwhelmingly for strike action), arguing that there were flaws in the way the union had organised the ballot and reported the results to the employer. The High Court, however, refused to grant an injunction

15 Gregor GALL, « Injunctions as a legal weapon in collective industrial disputes in Britain 2005-2014 », *British Journal of Industrial Relations*, 2017, 55(1), p. 187-214.

16 Court of Appeal, *National Union of Rail, Maritime & Transport Workers v. Serco Ltd t/a Serco Docklands and Associated Society of Locomotive Engineers & Firemen v. London & Birmingham Railway Ltd t/a London Midland*, *Industrial Relations Law Reports*, 2011, p. 400.

17 High Court, *Industrial Law Reports*, 2012, p. 452.

and the Court of Appeal dismissed the employer's appeal[18]. On the other hand, in 2019 Royal Mail won an injunction against the Communication Workers' Union. The employer claimed that the vote for industrial action (supported by 97 per cent on a 76 per cent turnout) was invalid because members had been encouraged to open their voting papers at work before they were delivered to their homes, thus there was *de facto* a workplace ballot which is unlawful[19].

III. Promoting workers' rights

So far this chapter has considered how judges, particularly those in the Court of Appeal, have limited workers' rights. Now this chapter focuses on how judges have advanced workers' rights, beginning with fees for Employment Tribunals.

A. Fees for Employment Tribunal claims

From its establishment in 1964 claims in the Employment Tribunal and appeals to the Employment Appeal Tribunal could be brought without paying any fee. By the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013[20] however, the Lord Chancellor introduced fees as from July 2013. To start a claim at an Employment Tribunal, an « issue fee » was payable; additionally, a « hearing fee » was payable when the claim was listed for hearing. The amounts of the issue fee and hearing fee varied depending on whether the claim was brought by a single claimant or a group, and on whether the claim was classified as type A or type B. There were over 60 types of claim defined as type A, while type B included unfair dismissal, equal pay, and discrimination claims. Type B claims were generally regarded as being more complex and taking more tribunal time (although they would not necessarily result in a higher monetary award than a type A claim). The total fees for a single claimant bringing a type A claim were £390 (approximately 456 €); for a type B claim £1,200 (approximately 1 400 €). In the Employment Appeal Tribunal, further total fees of £1,600 (1 869 €) were payable, again in two stages. Unsurprisingly, the number of claims fell

---

18 The Telegraph, https://www.telegraph.co.uk/news/2019/07/31/british-airways-loses-court-appeal-bid-block-pilots-strike-action/ accessed 3.12.2019.

19 Reuters https://uk.reuters.com/article/uk-britain-election-royal-mail/royal-mail-union-loses-appeal-to-overturn-injunction-halting-strike-idUKKBN1Y222A accessed 4.12.19.

20 SI 2013/1893 (made under s.42 of the Tribunals, Courts and Enforcement Act 2007).

after the fee system was introduced. In the year before fees were introduced there were 195,570 claims. In the following year there were 74,979 claims, a fall of 62 per cent[21].

The government argued that the fee system prevented vexatious claims and provided that the user paid some of the cost of the Employment Tribunal system. There was, however, provision for full or partial remission of fees for claimants and appellants who satisfied certain statutory criteria relating to disposable capital and monthly income and statistics[22] indicated that 30 per cent of those pursuing a type B claim received fee remission in full or in part. Employment Tribunals and the Employment Appeal Tribunal had a discretionary power to order unsuccessful parties to pay the fees paid by the successful party, but recovery is a convoluted process.

Unison, a large public sector union, challenged the fees arguing that they interfered with the right of access to justice as statistics demonstrated, frustrated the operation of Parliamentary legislation granting employment rights, and unlawfully discriminated against women and other protected groups. Unison also pointed out that the majority of successful Employment Tribunal claims resulted in modest financial awards, and that some claims did not have a monetary value but were to enforce employment rights (such as a claim for written particulars of employment).

The challenge was rejected by the Divisional Court and the Court of Appeal and the case went to the Supreme Court, which quashed the fees with immediate effect[23]. The seven Supreme Court judges who heard the case unanimously held that the fees impeded access to the courts and, importantly, it said access to justice was a right under common law and not just European Union law.

> ***In order for courts to perform their constitutional role, people must in principle have unimpeded access to them*** […] ***People and businesses need to know, on the one hand, that they will be able to enforce their rights if they have to do so, and on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them. When Parliament passes laws creating employment rights it does so not merely in order to confer benefits on individual employees, but because it has decided that it is in the public interest that those rights should be given effect.***

It was also held that the Fees Order was indirectly discriminatory against women because the higher fees for type B claims (which include

21 Ministry of Justice, *Review of the Introduction of Fees*, 2017, p. 79.

22 Ministry of Justice, *Review of the Introduction of Fees*, 2017, p. 84.

23 *R. (on the application of UNISON) v. Lord Chancellor*, *Industrial Relations Law Reports*, 2017, 911.

sex discrimination claims) put women at a particular disadvantage in that a higher proportion of women bring type B than type A claims, and it had not been shown that charging of higher fees was a proportionate means of achieving the aims of the Fees Order.

One result was that the government not only ended the fee regime immediately, it also put in place a scheme to refund the fees paid, plus 0.5 per cent interest for each year that had passed. From the launch of the fee refund scheme in October 2017 to 31 March 2019, refunds worth £17,296,733 (approximately 20 380 580 €) were made.[24]

It should be noted that the Supreme Court did not rule out fees completely. Its decision related to the high level of fees and the Conservative party is said to be wanting to reintroduce fees, albeit at a lower level[25].

B. Zero hours workers

While the Supreme Court was the only court to declare that Employment Tribunal fees were unlawful, all the courts have played some part in giving certain employment rights to so called zero hours workers, that is casual workers. The number of zero hours workers has increased significantly as the gig economy has mushroomed with new digital platforms being developed. There were 225,000 people in the UK on zero hours contracts in 2000, but by 2018 this had risen to 780,000, an increase of 29 per cent[26].

Under a zero hours contract, the employer is not obliged to provide a minimum number of hours. In law, however, the question is whether those on zero hours contracts are self-employed, that is an independent contractor, whether they are « workers », or whether they are « employees ». If they are classed as workers, they are entitled to the minimum wage, holiday pay and statutory sick pay on the same terms as employees. If they are classed as employees, they have in addition a right to redundancy pay and to claim unfair dismissal. To be a worker, a person must have to provide the service him/herself and cannot provide a substitute and has to be subject to the control of the employer.

A key decision was that by the Supreme Court in 2018[27] in a case brought by Mr Smith, who was a plumbing and heating engineer and undertook

24 Ministry of Justice, *Statistics on Employment Tribunal Fee Refunds*, 20 October 2017-31 March 2019, Table ETFR 1.

25 BPE Solicitors LLP, https://www.lexology.com/library/detail.aspx?g=326570e3-8b1c-4e1d-b311-3625a6eeb6a3, accessed 2.12.2019.

26 Statista, https://www.statista.com/statistics/414896/employees-with-zero-hours-contracts-number/, accessed 2.12.2019.

27 Supreme Court, *Industrial Relations Law Reports*, 2018, p. 872.

work for Pimlico Plumbers Ltd, which conducted a plumbing business in London. Mr Smith complained, *inter alia*, of unlawful deductions from wages, failure to pay statutory annual leave, and disability discrimination. The Supreme Court held that Mr Smith was a worker, despite the « carefully choreographed » contractual documentation which referred to him as an independent contractor. Mr Smith could only substitute another Pimlico operative, (not any other qualified plumber), was required to wear the branded Pimlico uniform, drive its branded van to which Pimlico applied a tracker, carry its identity card and closely follow the administrative instructions of Pimlico's control room.

Similarly, the Employment Appeal Tribunal decided that Mr Lange and others, who were mini-cab drivers for Addison Lee, were workers[28]. Although they were described in the documentation as independent contractors and could choose the days and times that they logged on to the platform, they were trained by the company, which also checked their credentials. Furthermore, in practice, drivers had to accept a job straight away when notified of it. If they did not, and could not provide an acceptable reason, they could face sanctions. The Employment Appeal Tribunal also held that the whole of the time when the drivers were logged on was working time, and thus was covered by minimum wage calculations, even though for some of that time they were not actually carrying passengers.

Moreover, the Employment Tribunal, the Employment Appeal Tribunal and the Court of Appeal ruled that Uber drivers are workers, not independent contractors. The Court of Appeal, said: « *The notion that Uber in London is a mosaic of 30,000 small businesses linked by a common 'platform' is to our minds faintly ridiculous* »[29]. At the time of writing Uber has lodged an appeal with the Supreme Court.

Similarly, Employment Tribunals have ruled that Hermes van delivery drivers were workers, not independent contractors[30], that bicycle couriers at E-Courier were workers[31], as was a City Sprint delivery person, although since that decision City Sprint changed its contract to allow substitution[32].

All the above cases are fact sensitive and judges have looked at what happens in practice, rather than the words in the written contract, but

28 Employment Appeal Tribunal, *Industrial Cases Reports*, 2019, p. 637.

29 Court of Appeal, *Uber BV v. Aslam and others*, *Industrial Relations Law Reports*, 2019, p. 257.

30 The Guardian, https://www.theguardian.com/business/2018/jun/25/hermes-couriers-are-workers-not-self-employed-tribunal-rules, accessed 10.12.2019.

31 Employee Benefits, https://employeebenefits.co.uk/tribunal-workers-employees-tupe/, accessed 4.12.19.

32 The Guardian, https://www.theguardian.com/business/2017/nov/15/citysprint-employment-rights-courier-minimum-wage-holiday-pay, accessed 10.12.19. See also, *Dewhurst v. Citysprint UK Ltd ET/220512/2016*.

not every judicial decision has been as progressive as those above. For instance, the right to provide a substitute was fatal in a case brought by the Independent Workers Union of Great Britain seeking a judicial review of the decision of the Central Arbitration Committee (CAC) turning down the union's application for recognition for collective bargaining by Deliveroo in respect of a group of delivery « riders » in London. Under British law, a trade union can seek recognition from an employer only in respect of workers. The application foundered on the CAC's finding that the Deliveroo (meal delivery) riders were not « workers' » because the substitution clause in their contracts, which allowed them to pass a job on to others, was genuine and operated in practice. The High Court dismissed the union's challenge to the CAC's decision. It said: « *The restriction of collective bargaining to those in an employment relationship was rationally connected to the objective of preserving freedom of business and contract by limiting the cases in which* the burden *of collective bargaining should apply* » (author's emphasis)[33]. This description of collective bargaining as a « burden », is an indication of judicial anti-collectivism.

Conclusions

Parliament has passed legislation restricting workers' rights, particularly in respect of strikes and contested dismissals. As a result, workers have less rights than those in neighbouring countries. Against that background judges have a mixed record. On the one hand, judges in the Court of Appeal have made illiberal decisions in respect of contested dismissals and redundancy and, with a few exceptions, judges in the Court of Appeal and in the High Court have made anti-union decisions in respect of industrial action. On the other hand, the Supreme Court importantly struck down the legislation on fees to Employment Tribunals on the grounds that they restricted access to justice, and judges in all the relevant courts have extended the rights of workers on zero hours contracts in the gig economy, appraising the reality of the contract and not the contract's wording. These decisions, however, have turned on their facts and neither the judges, nor Parliament have set out general principles.

Moreover, there are dark clouds ahead. The Conservative party has just won a general election. Although its manifesto says it will « *raise standards in areas like workers' rights* », at the same time it has said it « *will ensure that*

---

33 High Court Queen's Bench Division, *R (on the application of Independent Workers' Union of Great Britain) v. Central Arbitration Committee*, *Industrial Relations Law Reports*, 2019, p. 530.

regulation is sensible and proportionate, and that we always consider the needs of small businesses »[34]. More ominously, its manifesto commits to further restrictions on strikes saying, « *we will require that a minimum service operates during transport strikes* […] *it is not fair to let the trade unions undermine the livelihoods of others* »[35].

34 The Conservative and Unionist Party, *Manifesto*, 2019, p. 33.

35 *Ibid.*, p. 27.