EMPLOYMENT TRIBUNALS

Claimants: (1) Mr A. Marshall
(2) Mr B. Gee
(3) Mr A. Alston
(4) Mr J. Ramstein
(5) Mr A. Fernando Macedo
(6) Mr F. Oliveira Silva
(7) Mr J. Bosher
(8) Mr J. Foster

Respondent: The Doctors Laboratory Ltd

London Central remote hearing **On:** 29, 30 July 2020
Before: Employment Judge Goodman

Representation
Claimant: Lord Hendy Q.C.
Mr C.Milson, counsel
Respondent: Mr J. Laddie Q.C.
Mr T. Kibling, counsel

PRELIMINARY HEARING

JUDGMENT

No order is made on the claimants' applications for interim relief.

REASONS

1. This was a hearing of applications for interim relief following termination by the respondent of their employment relationships with the eight claimants on 9 June 2020 by reason of redundancy.

2. All eight have brought claims that they were in fact dismissed by reason of trade union membership or activities. They seek interim relief pursuant to section 196 of the Trade Union and Labour Relations (Consolidation) Act 1978 (TULRCA). Two claimants (Mr Marshall and Mr Gee) also bring claims of dismissal for making public interest disclosures and seek interim relief under section 128 of the Employment Rights Act 1996 (ERA).

3. The claims were presented on 15 June 2020. There were two case management hearings before today, one to list, and one to hear an application by the claimants for specific disclosure.

4. Unusually for an interim relief hearing, the respondent had been able to file the ET3 response before today. This meant that the issues for the final hearing were clear.

Factual Background

5. The respondent is one of the largest providers of clinical laboratory diagnostic services in the UK, supplying both private healthcare providers and the NHS. At the material time it employed 2,130 people, 1,980 of the London. There are 42 laboratories, 13 in London. To transport samples of blood, urine and other tissue, from clinics and hospitals to laboratories, they maintained a force of nearly 160 couriers in London. Of these, 108 used motorcycles, 34 drove vans, 6 used bicycles and 4 delivered on foot. Another 5 delivered by rail.

6. These claims arise from the respondent notifying an intention on 1 May 2020 to make all the bicycles ("pushbikes") and pedestrians ("walkers") redundant, `10 couriers in all. The termination was effective on 9 June 2020. The respondent says there was a downturn in demand, notably from the private sector, as restrictions on air travel meant private patients from overseas were not coming to London, but also in the NHS because of the decision to halt routine NHS work to make space for Covid-19 patients. The respondent says it focused on the non-motorised group, limited to an inner London area around Harley Street, in order to maintain flexibility of the courier group.

7. The claimants were all in the non-motorised group. They maintain that the respondent chose to be rid of this group because of their history of vociferous trade union organisation, or because of disclosures made to management and the press about shortcomings in health protection measures during the pandemic. This history included (1) notification to the respondent in February 2017 that they were seeking recognition of their trade union, International Workers of Great Britain (IWGB), (2) a claim by 5 couriers (including the 1st and 6th claimants) to the employment tribunal that they were employees or alternatively workers, upon which the respondent admitted worker status in the proceedings and conceded that all non-employed couriers were workers, with effect from 1 January 2018, (the employment status claim was not pursued thereafter),(3) a formal application for union recognition to CAC in July 2017, which succeeded in February 2018, following which the respondent negotiated a recognition agreement with the union for the whole courier group in April 2018, (4) tribunal proceedings for holiday pay for workers backdated to the start of engagement with the respondent (5) a demonstration about an offer of employee status, which, if accepted, resulted in a pay cut, if accepted, in October 2018, (6) notice of dispute and a strike ballot, leading to a 2 day strike in May 2019, (7) 3 claimants bringing a tribunal claim for unlawful deductions from wages in respect of unpaid breaks in November 2019 (8) from March 2020, complaints about PPE, pay if self-isolating, and other health concerns of the courier group, some to the respondent, some in national print and online media.

8. The respondent says it had already decided from January 2017 not to replace any non-motorised couriers who left, in order to improve flexibility of the area couriers could cover, and this informed their choice of which couriers to make redundant; the claimants say this coincided with and was because of the claim for trade union recognition.

Conduct of the Hearing

9. The start of the hearing was delayed by clerking difficulties. After the start, doubt was expressed on whether it had been notified to the public, as the hearing was not listed on Courtserve, and the hearing was adjourned while arrangements were made to post a notice of public hearing at Victory House. It transpired in the break that although not published on Courtserve, the case did in fact appear on the press list. The 10 am start having been put back to 11.30, there was a 30 minute lunchtime

adjournment to catch up. There were also some 5 minute breaks during each hearing day.

10. I was provided with a 10 page index to a main bundle of 715 documents, a further 178 page bundle of health and safety materials, and a few late additional documents from the claimant. I was provided with witness statements for all 8 claimants: the first claimant's ran to 25 pages plus some unnumbered exhibits, mainly of media publicity, but also some internal material; the other claimants' statements were 3-5 pages each. There was a statement from a motor cycle courier, R. Hott de Andrade (5 pages plus exhibits) about motor cycle access to some areas, and from a former manager, T. Kerton (5 pages) on use of pedal cycles for courier work and hostility to union organising. The respondent filed statements from Daniel Frayn, the manager said to have made the redundancy decisions (71 pages), Lawrence Harvey, logistics director (4 pages) and Matt Gibbins, head of HR, on courier working patterns (14 pages). No live evidence was taken.

11. Both sides had prepared detailed written submissions and lists of authorities in advance of the hearing. They also made oral submissions and replied to each other. I was referred to 53 authorities, some very familiar to employment judges, others not.

Interim Relief

12. Interim relief is available to employees who claim their dismissal is unfair because of trade union membership or activities, or because they have made protected disclosures.

13. By section 163(1) of TULR(C)A:

> "if on hearing an application for interim relief it appears to the tribunal that it is likely that on determining the complaint to which the application relates that it will find that, by virtue of section 152, the complainant has been unfairly dismissed"…

the tribunal is to order reinstatement, or if the employer is unwilling, make an order for continuation of the employee's contract until the final hearing. (There is also an option of reengagement in another role if the employee consents). There is no provision for refund of wages if in the event the employee does not succeed in his claim.

14. There is a similar provision for whistleblowers (protected disclosures) in section 129 of the Employment Rights Act.

15. The task of the tribunal hearing an interim relief application is:

> "to make an expeditious summary assessment by the first instance employment judge as to how the matter looks to him on the material that he or she has… doing the best he or she can with the untested evidence advanced by each party" – **London City Airport v Chacko (2013) IRLR 610**.

The tribunal is not required to make findings or reach a final judgment on any point - **Parkins v Sodexho Ltd (2002) IRLR 109**, where it was said:

> **"**The Judge is not required (and would be wrong to attempt) to make a summary determination of the claim itself. In giving reasons for her decision, it is sufficient for the Judge to indicate the "essential gist of her reasoning": this is because the Judge is not making a final judgment and her decision will inevitably be based to an extent on impression and therefore not susceptible to detailed reasoning; and because, as far as possible, it is better not say anything which might pre-judge the final determination on the merits".

16. What is meant by "likely" to succeed is clarified in **Taplin v C. Shippam Ltd (1978) ICR 1068**. It means:

> "a greater likelihood of success in his main complaint than either proving a reasonable prospect or a 51 per cent. probability of success and that an industrial tribunal should ask themselves whether the employee had established that he had a "pretty good" chance of succeeding in his complaint of unfair dismissal".

17. This formulation was affirmed in **Dandpat v University of Bath (2009) UKEAT/0408/09/LA,** where it was said:

> "there were good reasons of policy for setting the test comparatively high… if relief is granted the respondent is irretrievably prejudiced because he is obliged to treat the contract as continuing, and pay the claimant, until the conclusion of proceedings: that is not (a) consequence that should be imposed lightly".

In **Ministry of Justice v Sarfraz (2011) IRLR 567** "likely" was said to mean a "significantly higher degree of likelihood", more than "more likely than not", affirming: "the essential point that emerges from **Taplin**: 'likely' connotes something nearer to certainty than mere probability". In **Parsons v. Airplus International Ltd UKEAT/0023/16/JOJ,** it was said that the claim should be "clear cut".

18. In this application the respondent argues a novel point, on which there is as yet no authority, by reference to Article 1 of Protocol 1 of the European Convention on Human Rights. It is that the 'likely' test should be very stringently applied indeed, and that "likely" should be read as "practically certain". Article 1 says:

> **Protection of property**
> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

19. By **Beyeler v Italy (2000) 33 EHRR 1224**, any interference with the right to property (here, the state's right of preemption in a private sale of a painting) must be subjected to a tripartite test: that it is lawful, pursues a legitimate public or general interest, and is proportionate to that aim.

20. The respondent argues that an order for interim relief is an interference with the right to property, given that the money cannot be recovered if in the event a claimant does not succeed; some claimants are very highly paid, and the interval between an interim relief order and a final hearing may be several months, longer if it involves a multi-day hearing as such claims often do. In this case there 8 claimants, and it may be many months before there is a final hearing, so the sum of money at stake is substantial. The respondent says that it is unlikely that the claimants will be required to work if an order is made. Further, the jurisdiction is unique, without the provision for a cross-undertaking as would be made in the High Court in granting an injunction to continue an employment contract – **Mezey v Sout West London and St George's Mental Health NHS Trust (2007) IRLR 241 –** a case in which both sides envisaged the claimant would continue to work- and **Kircher v Hillingdon PCT, HQ 05X01391,** a 2006 decision**,** where a cross-undertaking in damages would meet any "financial drain" on the employer by continuing the contract when the employee would not in fact be working. I was also referred to **FSA v Sinaloa Gold plc and others (2013) UKSC 11,** which concerned an application to vary the cross-undertaking, on freezing the defendant's assets, from one for losses incurred complying with the order, to one for reasonable costs only, should the FSA fail at trial

in stopping what was alleged to be an illegal share scam. There it was held there was a relevant distinction to be made between private litigation, where it was usually fair to require a claimant to bear responsibility for the loss and expense of unsuccessful litigation, and public law enforcement, where the litigation was in the interests of the public and often in pursuit of a public duty, using limited public funds. The point was made that these unfair dismissal claims are private law. The respondent adds there is further injustice even if claimants succeed, in that an interim relief order is a blunt instrument, taking no account of the likelihood of any reduction, if a final award *is* made, for contributory fault or **Polkey**.

21. Moving to the tripartite test, the respondent agrees that an order for interim relief, if made, would be lawful, given the legislative provision, but complains that the aim of the provision is "elusive", and hard to discern. If it *is* in the public interest, that lack of clarity makes it difficult to allocate weight to it when deciding whether the measure is proportionate to the aim. A balance must be struck between the general interests of the community and the protection of individuals' fundamental rights, especially property rights - **Sporrong v Sweden (1982) 5EH RR 35** (a case on planning restrictions), and **Wilson v Secretary of State for Trade and Industry 2004 1 AC 816**, (on the introduction of the Human Rights Act, and its interaction with the 1974 Consumer Credit Act, resulting in a windfall gain to a borrower when a debt became unenforceable due to infringement of moneylending restrictions). The burden on the individual is relevant **- Former King of Greece v Greece (2000) 33 EHRR 516,** on the expropriation of several estates**.**

22. The respondent concedes that if the tribunal agrees that there is a breach of article 1, protocol 1, the tribunal cannot make a declaration of incompatibility, but it is argued that it would 'go with the grain' of the legislation – **Ghaidan v Godin-Mendoza (2004) 2AC 557**- to read "likely", in the statute, as "practically certain".

23. The claimant opposes there being any higher standard than that already set out in the UK cases. What is being ordered, they say, is continuation of a work wage bargain, where there is no deprivation of the respondent, as the claimants will work in return for a wage, and on the evidence, they say, there is work to be done, and no redundancy situation. It is argued that any interference with the right to property by means of an interim relief order when the award is ultimately reduced, or the claimants do not succeed, is proportionate to the aim of protection for trade union members. In **Danilenkov v Russia (2014) 58 EHRR 19**, concerning penalties for striking dock workers in a particular union, even criminal sanctions against those penalising them, who favoured an alternative union, were held by the ECtHR to be insufficient protection of their rights as trade unionists, as anti-union discrimination "may jeopardise the very existence of trade unions".

Discussion and Conclusion

24. This point - what is meant by "likely" in the light of Article 1 Protocol 1 - is one that must be determined by this tribunal, not, as with the other issues, assessed for likelihood at a final hearing. It was advanced by the claimant that the interim relief test that has stood the test of time for 45 years, including nearly 20 years since the coming into force of the Human Rights Act, should not be disturbed now. But just because the point has not been argued before, that is no reason not to consider it now.

25. First, is there deprivation of property? The answer must be that yes, potentially there is, if the claimants are ultimately unsuccessful. The potential injustice was recognised in **Dandpat**. The respondent's assertion that in many cases now payment is made but the employee not reengaged, so they pay wages with nothing in return, must be tempered by the fact that this is the employer's choice. Where there is a senior employee or close relations with colleagues are important, and in

jeopardy because of the dispute, that is relevant, but as with reinstatement and reengagement orders following unfair dismissal findings, it is relevant that couriers, and many other employees who are not senior managers, are capable of working well at their daily duties despite any ongoing employment dispute. That the employer can get work for his wage may be a weaker argument if, as here, there is said to be a redundancy. The respondent asserts a downturn in work, the claimants say work has picked up, and the evidence on that is in contention, as discussed below. In other cases, where individual personal relationships with the employer are important, an order can result in substantial payments without work in return.

26. Examining the tripartite test of whether interference with the right is permitted, the aim of the provision must be something which trade union membership and activity have in common with whistleblowing, as those are the only reasons for dismissal where interim relief is available. The answer that presents itself is that these are activities which for one reason or another are considered to be in the public interest, going beyond the private interest of the individual worker bringing the claim. Trade union membership and organisation has a long and difficult political and legal history in the UK. What the law protecting trade unions recognises is that collective action can benefit workers whose individual bargaining power is inadequate to that of the employer, and that without members, the trade union cannot operate effectively in collective bargaining or in helping members use their legal rights. Individuals need reassurance that they will be protected from dismissal if they join. Recognised trade unions can bring claims if they are not consulted about redundancies or TUPE transfers, but apart from that, (and HMRC's power to enforce the national minimum wage), enforcement of rights in the employment field, including rights to join and be active in trade unions, is left to individuals. Internationally, the right of freedom of assembly, including in a trade union, has also long been recognised internationally, and in the Human Rights Act the UK agreed that the Convention right is to be upheld in law. Similarly, whistleblowing is protected not because it is an individual right, but because society as a whole has an interest in effective enforcement of the law, protection of the environment, and so on, which goes beyond the individual's interests, but requires the protection of individual employees to achieve that. Protecting whistleblowers encourages them to call attention to wrongdoing, recognising that without internal information, public law enforcement bodies (HSE, the Environment Agency, the police, FSA and so on) may be kept in the dark. This recognition that there is a common (public) interest in the activity (whether trade union assembly or calling out wrongdoing by whistleblowing) which can only be effective if the individuals engaged in the activity are protected, is the aim of the measure. In the light of the legislation enacted by Parliament, and the ECHR provisions, and the wide margin of appreciation to member states in deciding what interference with individual rights is in the public interest - **Burden v United Kingdom (2008) 47 EH RR 857** - it must be a legitimate aim. It is in the "general interest", to use the words of the Convention's qualification of the article 1 right.

27. Here also the **Sinaloa** judgment may be relevant. It indicates that the public character of what is to be protected is important. It differs of course in that here public funds are not in play, nor are the claimants under any public duty. It is probably best viewed as a guide to how to weight the public interest against the risk of deprivation of property in the context of the respondent having no protection if the prediction of success is wrong.

28. The focus then is whether making an interim relief order to the test of likelihood as explained in **Taplin, Dandpat, Parsons**, and so on, is proportionate to this aim. The test already recognises the potential injustice to the employer of having an assessment without testing the evidence, as a reason for making it more than balance of probability, but the respondent argues that is not enough. Employment tribunals must factor in the number of contentious issues on which the claimant has to succeed, which may weaken the likelihood of success when a number of hurdles

must be cleared to reach the goal. The claimant's prospects must be "clearcut"; if there are a number of contentious issues to be won, his prospects may be fuzzy. Employers have additional protection, in that for success the protected activity must be the "sole or principal" reason for dismissal, a stricter test of causation than in claims of detriment for trade union activity or whistleblowing, where it need only be shown that the protected activity had a material influence on the outcome. Against that, being dismissed for an impermissible reason puts employees at a disadvantage, being out of work, and having to explain to potential employers, suspicious that they may be troublemakers, why they have been dismissed. This can deters whistleblowers from speaking up, and could deprive trade unions of members. The risk of an interim relief order being made can be an added deterrent to employers who might otherwise dismiss and hope thereby to be rid of the challenging employee, discounting the risk that they are later ordered to pay compensation at a final hearing.

29. The tribunal concludes that the test already enunciated in the UK cases sufficiently balances the weight attached to the legitimate aim with the potential deprivation of the employer's property as protected by article 1. The **Sarfaz** restatement if the **Taplin** test - "something nearer to certainty than mere probability" is adequate protection of respondent employers, and to move to "practically certain", if that is even higher, is not required.

The Issues in These Claims

30. The claimants have to jump a number of hurdles to succeed.

31. Section 152 of TULR(C)A provides:

> **Dismissal of employee on grounds related to union membership or activities**
>
> (1) For purposes of Part X of the Employment Rights Act 1996 (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee—
>
> (a)was, or proposed to become, a member of an independent trade union,
>
> (b)had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time.

There is then a description of *when* these activities may be carried out. It is followed by section 153, about selecting trade union members for redundancy, but for this interim relief is not available, and in any case the claimants argue not that the reason for selecting them was impermissible, but that there was no redundancy at all.

Employee Status

32. The protection of section 152 is for employees, as defined in section 295. Otherwise, as workers, they can claim that termination is a detriment for an unlawful reason, but *detriment* claims do not have the protection of interim relief, and must wait for a final hearing of the evidence for a remedy.

33. All but one of the claimants (the exception is Mr Oliveira Silva, sixth claimant) were not, formally, employees. Their contracts say they are independent contractors. However, the respondent has agreed they are "limb b workers" within section 296(1) of TULR(C)A and section 230(1) (b) of the ERA – the wording in the two statutes is not identical but there is no material difference.

34. In TULR(C)A employee is defined in section 295:

> In this Act - contract of employment means a contract of service or of apprenticeship, and employee means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment,

and worker is defined in section 296 as an individual who works:

> "(a) under a contract of employment, or
> (b) under any other contract whereby he undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of his."

All employees are workers, but not all workers are employees.

Most of the caselaw concerns the ERA test. The claimants say that in fact, rather than the description in the written agreement, they are all within the statutory and common law definitions of employee, rather than workers.

35. The classic test of employee status is in **Ready Mixed Concrete (South East) Limited v MNPI, (1968) 2QB 497**. "The servant" (we now say employee) "must provide his own work and skill in the performance of some service for his master, he agrees that in performing that service he is subject to the other's control, and the other provisions of the contract are consistent with the contract of service". "Freedom to do a job either by one's own hands or by another's is inconsistent with the contract of service, though a limited or occasional delegation may not be". This last refers to substitution clauses. In **Pimlico Plumbers v Smith (2017) EWCA Civ 51**, and **(2018) ICR 1511 (UKSC)**, it was affirmed that an unfettered right of substitution could not be consistent with the requirements of personal service, and could not be implied. That substitution never occurred is not relevant if there is a contractual right that is not 'limited or occasional'.

36. While most unfair dismissal claims are subject to qualifying service of 2 years, there is no such requirement in section 152 claims – it is a day one right. The case law on what happens when a worker has a contract, but is not required to work unless called on and he agrees to do so, is therefore relevant. **James v Redcats (Brands) Ltd (2007) ICR 1066** held that each working assignment (by the employing agency to a third party) can be treated as working under a contract to provide personal service. In that case what was being considered was whether the employee was a worker entitled to national minimum wage, not whether he was an employee. In **McMeechan v Employment Secretary, (1995) ICR 444**, the issue was whether the claimant was an employee, who could make a statutory claim from the redundancy fund on the employer's insolvency; the written contact with an employment agency stated that services to a third party were as a self-employed worker, but it was held the terms of the agreement must be construed in their factual matrix, and the totality of conditions did create a factual matrix showing employment. In **Cornwall County Council v Prater (2006) EWCA Civ 102,** a home tutor who had worked for the council in intermittent periods of engagement, while not obliged in the overarching contract to accept any particular engagement, was an employee *when working*, because there was then mutuality of obligation in the work performed under the contract, the only difference being the discontinuities between engagements. She established continuity of service from the beginning of the arrangement.

37. The first claimants' "courier subcontract agreement" dates from June 2015. It is assumed to be typical of all the seven worker claimants. It was for a term of up to 6 months and terminable on one day's notice. The courier could with prior written approval of the company appoint a suitably qualified and skilled substitute who had completed the respondent's induction training, GMP bloods training, spill kits training and career e-learning modules to perform services, and provided the substitute entered into direct confidentiality undertakings. The courier had to comply with the

company's performance policy and health and safety policy. There was no obligation to provide services in a particular geographical area. The courier had to wear uniform. The company would prepare a fortnightly report of hours worked which would form the basis of an invoice for payment (so that in practice the respondent did the invoicing, as they would a payslip for an employee). The courier supplied his own vehicle (bicycle, motorcycle or van) and had to tax and insure and maintain it where relevant. The arrangement could be terminated for gross misconduct affecting the business of the company, serious or repeated breach of the provisions of the agreement, or refusal or neglect to comply with reasonable direction, or if in the reasonable opinion of the company he was negligent or incompetent performance of services, or was incapacitated from providing services for an aggregate period of 30 days in any 52-week consecutive period. Clause 13, on status, provides that he was an independent contractor, but if it was a contract for the provision of services; he was therefore liable to pay his own tax and national insurance, and must register with HMRC as a self-employed person before he started.

38. There had been some arrangement for rates per job undertaken, but by the time of termination, almost all couriers were paid on an hourly rate. However, worker couriers received a higher hourly rate than employee couriers, because they did not have sick pay or protection from unfair dismissal.

39. Couriers had to provide their own vehicles, but so it seems did some employees.

40. In practice they could elect not to work for periods, provided this was notified to the respondent, and in the period since January 2018, when the respondent conceded that they were entitled to holiday pay as workers, they have still been able to take additional unpaid leave.

41. On occasions, worker couriers could reject individual delivery allocations, for example to a particular customer.

42. Taking an overview, this was a working arrangement very close to classic employment, with close control, a very limited right of substitution, because of the stringent conditions for accepting substitutes, and disciplinary charges being brought (for example, where specimens had not been returned at the end of the day but taken home, and when a courier had said they were working on a particular day but failed to turn up). The differences were the rate of pay (higher for workers), and the worker's ability to take unpaid leave, whereas an employee would be expected to attend work when outside his leave allocation. There was some evidence however that by July 2015 the company was making rules about how many could be off work at any particular time, and an expectation of advance notice of when they would be available or not available for work. For an assessment of the relevance of these differences, there would have to be a detailed examination of the evidence to see to what extent they were significant within the totality of the factual position, but they suggest close integration and control, and mutual obligation once they had agreed to work particular days, which is close to employment, and might be held to be so. If they were employees when working, and this being a day one right, that aids their prospects of success.

43. An unusual feature of this case however is that there is some evidence that until termination the worker couriers did not *want* to be considered employees. They achieved worker status by bringing a claim before the employment tribunal which led to concession by the respondent, and they then abandoned the additional claim to be employees. (Of course, they may have decided they had achieved a right to holiday pay, and protection from detriment and unpaid wages, and discounted what could be achieved by going on against the risk of failure). The respondent offered employment status to all worker couriers in December 2018. Six of the 85 worker couriers, including the sixth claimant, accepted the offer. In June 2019 the union

recommended refusing the offer because it involved a pay cut, and because they were still responsible for the costs of bicycle maintenance, storage, protective equipment and phone, adding that until the company provided employees with a vehicle (it seems this may have been mistaken, as vehicles were offered in the December 2018 proposal) the offer was unacceptable, as couriers needed extra money to maintain their bicycles. The proposal was described as 'coercive'. The claimants argue that the approach taken in 2019 did not mean that they did not want to be employees, or consider themselves to be such, only that they did not want the pay cut that came with it, while, in their view, continuing to incur expenses, even if they were mistaken about the vehicle offer, which narrowed the difference.

44. Status is a matter of fact, not of the contract – as shown in **Nethermere v St Neots (1984) ICR 612**, where the workers were held to be employees despite an agreement to pay their own tax, and in **Autoclenz v Belcher (2011) UKSC 41,** where it was held the tribunal must take a purposive approach, and be astute to examine the facts to determine the extent to which the written agreement was accurate as to "the true agreement between the parties". It was relevant that to consider whether there was an imbalance of bargaining power, as employers could resort to 'armies of lawyers' to draft agreements that did not reflect the real position. The view taken by the parties is of some relevance though: in **Massey v Crown Life insurance (1977) ICR 590**, previously employed people agreed to become self-employed. It was held that if the position was genuinely ambiguous, and it had been ambiguous when they were employed, the parties could stipulate which it was. The claimant's approach to the respondents wish to convert them to employees is a factor to which a tribunal would grant some weight when looking at the position overall. In **Quashie v Stringfellows (2012) EWCA Civ 1735** it was held that while the parties could not *agree* status as a matter of contract, as status is a matter of fact, in deciding whether someone was an employee or worker it was "legitimate to have regard to the way in which the parties have chosen to categorise the relationship".

45. In this case, it may be argued that the would-be employees did have some bargaining power: they negotiated through the union with the employer, the union had called a strike on the issue, and they had informed advice available to them through the union, unlike the **Autoclenz** car valeters, and in a case like this, more weight might be given to the written agreement than in some other cases considered by tribunals. The tribunal would have to assess the evidence on whether there was in fact a pay cut, when the offer to provide and maintain a vehicle was factored in, the relevance of whether there was a pay cut, when balancing the pay and terms of an employee with those of the workers, and whether this suggests that they did consider themselves employees in fact, but did not want a pay cut to formalise it. A tribunal would also have to consider whether not pursuing the earlier tribunal claim to be employees indicates they did not in fact understand themselves to be employees. A tribunal would also have to take account of the respondent's decision to consult with the worker couriers about redundancy as required by statute for employees, and whether the employer itself understood that in reality there was in reality little difference in status.

46. There is a good chance that the worker claimants could establish they were employees in fact, but they would have to get over the refusal of the offer of employee status, which makes it less certain.

Are Workers Entitled to Interim Relief?

47. If the claimants do not succeed in establishing they were employees, they also rely on an argument that in any event interim relief is a remedy which should be extended to workers, relying on Articles 10, 11 and 14 of the European Convention on Human Rights, as given effect in the Human Rights Act 1998, because without interim relief

they have insufficient protection when the detriment is the ending of the worker relationship.

48. The whistleblowing claimants 10 rely on article 10, that:

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

49. The ECtHR accepted that these rights apply in the workplace – **Kudeshkina v Russia (2009) ECHR 2492/0538**, and in **Fuentes Bobo v Spain 2001 31 EHRR 11140:** "article 10 is not only binding in relations between employer and employee which are governed by public law but may also apply where these relations are governed by private law." In the UK, Article 10 was applied by the Supreme Court in **Gilham v Ministry of Justice (2019) 1 WLR 5905**, where otherwise an office holder who was neither an employee nor a worker would be denied whistleblowing protection.

50. All the claimants rely on Article 11 about the right of assembly:

> "Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
> No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others".

51. In **Danilenkov** this was applied, holding: "respect for the principles of freedom of association clearly requires that workers who consider that they have been prejudiced because of their trade union activities should have access to means of redress which are expeditious, inexpensive and fully impartial".

52. The claimants argue that the article 11 right applies to "everyone", not "employees", so includes workers. Further, article 14 prohibits discrimination "on any ground", then lists what would be regarded in the UK as protected characteristics under the Equality Act, and adds, "property, birth or other status". Thus, it would be wrong to discriminate between employees and workers in the enjoyment of their Convention rights and freedoms.

53. As to what is meant by "status", article 14 has been held to prohibit distinction based on military rank – **Engel and others v Netherlands 1979 1 EH 076**, or being a former KGB officer – **Sidabras v Lithuania ECHR 2004 VIII.**

54. The tribunal was referred to the European Court decision in **Wilson and Palmer v UK (2002) IRLR 568**, holding it is not just trade union membership that should be protected, but activities incidental to it, otherwise freedom to belong to a trade union becomes "illusory". This compelled an extension of the protection obtaining at the time under TULRCA. In **Tum Haber Sen v Turkey (2008) EHRR 19**, dissolving a civil service trade union was a breach of the Convention right, although "article 11… leaves each state a free choice of the means to be used to secure the right to be heard". The claimants rely also on **Syndicatul Pastarul Bun v Romania (2014) IRLR 49,** on whether priests who had no contracts with the Bishop could form a trade union. The court held that the ILO recommendation addressed to the employment relationship indicated that status should be assessed "by the facts relating to the forms of work and remuneration of the worker, notwithstanding how the relationship is characterised in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties"; the ILO recommendation included that

national policy should include measures to "combat disguised employment relationships… that hide the true legal status". The claimants rely on the use by the court of the term "employment relationship" as a "work relationship" ("relation de travail") indicating there was no real distinction drawn here between employees and workers. Finally, in **Manole and Romanian Farmers Direct v Romania** application 4 6551/06, self-employed farmers were barred from forming a trade union, held to be an interference with article 11. From all this, the claimants argue that barring workers from protections provided to employees on termination of the work relationship, by discriminating by status (employee or worker), is contrary to article 11 combined with article 14. They point to **Wandsworth London MBC v Vining (2018) ICR 499** which required consultation over collective redundancies to be read compatibly with article 11. Several trade unions have members who are self-employed independent contractors, such as Unite in the construction industry, the National Union of Journalists, and TV and film technicians in BECTU. It is argued there is no legitimate reason distinguishing between the two groups in protecting membership and activity, and that the domestic statute must be construed in accordance with the Convention right, following **Ghaidan**.

55. The respondent argues that workers already have protections for trade union activities and whistleblowing, and **Gilham** was decided because the officeholder otherwise had no whistleblowing protection at all in UK law, not less protection than others. Article 14, it is argued, does not require levelling up to the best protection provided to employees, and there are good public policy reasons to retain flexibility of categorisation between employees and workers in a "carefully calibrated statutory framework". In fact, it is argued, workers benefit from the fact that causation is easier to prove that claim. There is nothing in the European cases to show that something like interim relief is required. The claimants must show the conjunction of both articles 11 and 14 (no discrimination between people of different status), and **Adiatul (IWGB**) **v HM Treasury**, a recent challenge by IWGB members against exclusion of limb (b) workers from furlough, it was held being a limb (b) worker outside PAYE (the reason for exclusion) was: "only in the most extended sense a personal characteristic for the purposes of Article 14" - some status differences are not immutable and might be at the "outer limit of concentric circles" of status, meaning that such differences would be easier to justify. The respondent also argues that no justification defence was advanced in **Gilham,** and that there might be justification for differential treatment - there was, it is said, a legitimate policy aim for the difference between an employee and a limb (b) worker in the obligations of an employer, and in access to welfare benefit and employment rights. This could justify not extending interim relief to limb (b) workers. An interim relief order would continue the employment until final decision limb (b) workers who would otherwise have no expectation of continuous employment, and could be terminated at one day's notice. That they had some protection from detriment meant the lack of interim relief was proportionate to the policy aim of workforce flexibility. There was therefore a justifiable reason for excluding them from the interim relief right.

56. These are complex and novel arguments. The most likely effect of consideration of article 11 and article 14 is a decision to read "employee" broadly, as suggested in the ILO recommendation cited in **Sindicatul**, in a factual context as this case where the distinctions between employees and so-called workers are slight, when the tribunal was considering whether they made any difference. It seems less likely that a tribunal will take the bigger step of holding that interim relief should apply to all limb (b) workers, let alone the self-employed in business on their own account, when such a distinction may be capable of justification as a proportionate means of achieving a legitimate aim, namely, the looser ties and associations with an employer in a contract for services compared to a contact of service. An argument about article 10 protection for the whistleblowers is likely to be similar.

The Reason for Termination

57. The respondent says this was redundancy. The employees say the redundancy reason is a sham. On the redundancy argument, the respondent counters that there was evidence of a downturn in demand for their work. Much reference was made to the volume of work, to figures showing an increase in tasks undertaken by motorised careers following redundancy of the non-motorised group, the fact that some employee couriers had been furloughed, and the rotation of furlough, meaning more could have been furloughed, and whether this choice was because the employer felt that employees were more reliable, unlike worker couriers, or because the worker couriers were union members or activists, and the likely continuation of testing work for laboratories for Covid-19 virus, even if routine work fell off. By the time of redundancy, work had fallen off by 20% overall. The redundant couriers were just over 6% of the courier group.

58. Seen broadly, there is evidence that demand for the respondent's services in the private sector did fall with the beginning of lockdown, particularly in the central London Harley Street area covered by pushbikes and walkers. Whatever has happened since, there appears to be no clear evidence either way – the couriers left may be busier since the redundancy because some have left, not because work has picked up, the fertility clinics were to reopen on 11 May, but it is not clear how much of the central London work they generated. In any case the evidence has also to be judged on what the respondent knew or could predict at the time, when the length and course of the lockdown and its effect on demand were unknown, rather than by what has since proved to be the case. It is still by no means clear that the market for private healthcare, reliant on foreign demand, has recovered, or that the NHS demand for the respondent's services, cut when Covid cases were prioritised within the NHS over routine treatment, has returned. This is a matter for evidence. But it is hard to say that it is *likely* the claimants will be able to establish redundancy was a sham without a clear correlation with union membership or activism and the worker group.

59. The respondents rely on achieving flexibility among the courier group as a reason for choosing to "dismiss" the non-motorised, as they could only furlough (a way to get a temporary reduction in the workforce at low cost) employees on PAYE. They say pushbike work fell from 41% to 29% of courier tasks, and that motorbikes could perform these tasks but not vice versa; sample collection in the pushbike area was down 70%; if demand picked up in some areas, motorbikes could cover all areas but pushbikes and workers could not. There is some evidence that they were reducing the non-motorised group in any event, not having replaced leavers for some time. There is some evidence that this decision coincided with IWGB's first notification to the respondent of their organising, but whether this is causation or coincidence requires more detailed evidence; it will need establishing that the non-motorised group were, or were perceived to be, the ringleaders. Employers *can* use redundancy or another fair reason as a way to disguise a dismissal for another reason, as recognised in **ASLEF v Brady,** "even a potentially fair reason may be the pretext for a dismissal for other reasons") or it can be chance that they are glad to see the back of those who happen to be chosen for some other reason. The cases allow employers some latitude in establishing a redundancy situation within the statutory definition. **Kingwell v Elizabeth Bradley Designs Ltd EAT 0661/02** indicated that there need not be a poor financial situation if a reorganisation is more cost-effective than the existing composition of the workforce. The "need for employees… has ceased or diminished" need not be because of poor finances. **James Cook (Wivenhoe) Ltd v Tipper (1990) ICR 716 CA** discusses investigating whether there was redundancy. **Hollister v NFU (1979) IRLR 238** establishes where there is a change of circumstances requiring reorganisation that can be some other substantial reason justifying dismissal – not redundancy. **McConnell v Bombardier Aerospace (2009) IRLR 201** is a case where redundancy was held more likely to be the reason than trade union activity when refusing interim relief.

60. At a time when demand had fallen, and the future was very uncertain, it is far from clear that the tribunal will find the redundancy decision was a "sham". Strictly speaking, a redundancy situation is when employers need for employees of a particular description has ceased or diminish, or is likely to cease or diminish. If these were not employees but workers, strictly speaking they were not redundant, it is for the claimants to establish is that trade union membership or activity, or whistleblowing, was the reason, not that it was not, strictly speaking, a redundancy. A decision to increase flexibility is not irrational, even though it is not without difficulty, as shown by the parking problems met by motorcyclist couriers when waiting and collecting specimens in central London. The choice of non-motorised couriers is disputed, but it cannot be described as irrational – unless it is likely the claimants can show the reason axe fell on this group is because they were trade union activists. On an assessment of the detailed evidence, it is not "likely" that the claimant will show that the respondent's reason for ending their contracts was a sham, given the evidence of a fall in demand of uncertain duration, and when wanting to retain couriers who could cover a wider geographical range in the uncertainty of the time was not irrational.

Trade Union Activity as the Reason for Dismissal

61. There is some evidence of hostility by the controllers towards *some* of the claimants who were vociferous, and it is possible that this hostility was condoned by managers, for success it is important for the claimants to show that hostility to troublemakers was the reason for cutting the non-motorised group in what was perceived to be a downturn. This requires examination of the respondent's argument that (1) they had no objection to trade union membership (2) they did not know which couriers were members and (3) the claimants did not in fact engage in trade union activity for the purpose of the statute. The respondent asserts that have neither targeted union members, nor a group known to be active in trade union matters. In aid of this they say there is no evidence of hostility to trade unions generally, or to this union in particular. They had recognised IWGB for the entire courier group of 160 people, only 10 of whom were being made redundant. Following the start of tribunal proceedings they accepted the couriers were limb (b) workers, and they wanted to go further and make them all employees. They recognised other trade unions, for example, for their laboratory workers. They were not hostile to IWGB in particular when making staff redundant - they had already made 200 laboratory workers (rather than employees) redundant, where IWGB have no recognition.

62. The respondent argues that that they had already taken a number of other steps to meet the effect of lockdown on their business: overtime cuts, cuts in directors' pay and bonus, laying off laboratory workers not on PAYE (so could not be furloughed), when of the trade union activists were in their sights they would have moved earlier.

63. The respondent also argues that whatever the claimants say about the hostility shown to them personally for their trade union participation, most of the individual claimants did not engage in trade union activity, or were not known to the employer as participating. They only knew the first claimant as an active representative, it is denied that the manager making the decision even knew this until starting redundancy consultation. The third claimant's activity fell after the redundancy consultation had begun. The union's letters to clients in May 2020 was objected to as it breached confidentiality, but occurred after consultation had begun. As to previous union activity, the manager was not aware of a demonstration at the Halo, that Christmas party was for PAYE staff and when next year workers were also invite there was no need to demonstrate about it, and they were surprised by the strike as they had thought employee status was wanted. The employer, with some individual exceptions, did not even know who was a member, as there was no check-off arrangement; the claimants however point out that the 2019 notice of strike ballot

state there were 59 union members in London, and assert the respondent knew the first claimant at least was active, and that they could not have ignored the demonstratation outside the party. The union itself told the respondent in February 2017 it was organising the pushbike couriers. The union states it was known it had coordinated the tribunal claims for worker or employee status, but the respondent says that of the 48 claimants in that claim, 41 were motorcyclists, who were not made redundant. The claimants argue that Mr Kerton, who favoured bicycle couriers 'understood' he was replaced by a Mr Frayne precisely because of his experience with trade unions when in 2017 the union "bombarded" the respondent with demands and caused trouble with tribunal claims. They also point out the respondent has not produced witness evidence from other managers who did deal with the union. The respondents rely on Daniel Frayne who made the decision to dismiss the redundancy did not know about claimant participation. This requires examination, as the claimants' evidence suggest the controllers knew about and were hostile to the first claimant and possibly some others as troublemakers, managers may have known this, and in any case they knew that union executive had made a series of demands, and had claimed to be organising pushbike couriers. There is likely to have been gossip at controller level, as shown by the sixth claimant's evidence about his recruitment attempts. The reason for a dismissal is a set of facts or beliefs known to the employer. If the employer was mistaken about which of the claimants were active, or knew that their targets were within the pushbike/walker group, it may not be necessary to show that individual claimants were themselves active

64. The respondent also disputes as to whether the evidence shows the extent of union activity claimed by the claimants, and whether it was a union activity a defined in the statute. The respondent agrees the first claimant was one of 3 representatives and chaor of the union's couriers branch, but adds that the participation of the others is very unclear, pointing out that when it is said that 'they' began organising in 2015, 3 of them had not been hired at that point, and that there is a suspicious lack of precision about the participation in the party demonstration ("most of them"). They rely on **Therm A Stor v Atkins (1983) ICR 208** to distinguish the activities of the union executive from those of individual employees for, arguing that most communication with respondent came from the union's executive officials, not from the claimants; in that case an individual was dismissed because the union asked for recognition; the claimants argue that this case was narrowly decided; there might be more latitude today – **Morris v Metrolink (2018) EWCA Civ 1358 –** and **Wilson and Palmer v Associated Ports.** Of the other activities, the respondents argue that that strike action is not a trade union activity – **Drew v St Edmundsbury Borough Council (1980) ICR 513**, nor is bringing employment tribunal claims (as all eight had done in the earlier claim about status) as that is about individual rights - **Chant v Aquaboats Ltd (1978) ICR 643.** It remains that some, perhaps most, of the claimants face uphill work establishing their trade union activity, or that it was at such a level that the employer manufactured a reason to get rid of them.

Dismissal for Union Activity - Conclusion

65. Gathering together the conclusions on individual issues together, first the claimants have to establish they were employees, and have a reasonable chance of this. They have a more difficult prospect of success in establishing that if not employees they should nevertheless be entitled to interim relief, because it may well be found that there is justification for the distinction, when they already have some protection from detriment. Next, on the reason for dismissal, that the employer resented IWGB trade union activity is not fanciful, but many of the claimants may have difficulty showing they were themselves active. Trade union membership of itself is unlikely to be found a reason for the dismissal. The claimants' biggest difficulty is showing that there was no redundancy situation, and that the dismissal was manufactured to be rid of them for trade union activity. The respondent undoubtedly faced a sudden downturn in demand, they had taken other measures to cut costs, they faced considerable uncertainty, they used furlough when available, but did not want all employee

couriers on furlough if non-employees could not be relied on to offer their services, and it can be hard to show that an employer should not use its judgment about the future on the facts known at the time to shed staff. Against this, a compelling case that "redundancy" was manufactured to be rid of an activist group has to be shown. They have some chance of showing the decision to reduce the non-motorised group was taken in 2017 when they contacted the respondent, but would still have to explain why motorised couriers were not made redundant when many of them (on the evidence of the 2019 strike notice) were also members. They have to explain away the flexibility argument for choosing this group of limited geographical range, which is undoubtedly plausible, whatever the parking problem in central London. Finally, with the exception of the first claimant, the claimants may not be able to establish that they participated in, or were known by the respondent to have participated in, trade union activity as defined, and that the redundancy of ten should be a manufactured reason to be rid of one trade union representative is a hard argument to win. Their case is arguable, but with so many points to win if they are to succeed at all, and the need to displace the plausible redundancy reason, it cannot be said that their claims of dismissal for trade union activity are "likely" to succeed, to the high standard required to obtain interim relief.

66. This is also the case for the sixth claimant: he does not have to win a status point, but he still has to show that his trade union activity was the reason and redundancy a sham.

Protected disclosures

67. The respondent contends that the items identified as protected disclosures did not qualify for protection. The disclosures were in a letter to the respondent on 17 March 2020 asking for additional pay during the Covid 19 crisis, regular testing, and additional personal protection, including a full body suit. The respondents engaged with these requests, without conceding all of them, setting out reasons why some were being met and others not. The claimants then instructed solicitors and also gave television and other media interviews. The respondent argues that there was a lack of specific information indicating that the claimants held a reasonable belief that there was a breach of legal obligation under section 43 (1)(b) (presumably as to proper risk assessment of and provision for health and safety of workers) and that it could not objectively be read as asserting a breach. Nor, it is argued, can they establish the specific conditions required to make a disclosure to a third party protected, when in a letter of 20 March 2020, before the media interviews, the respondent had explained its position and offered, among other things, additional protective equipment, and loans to self-employed staff, such that once he had had the respondents reply the first claimant could not reasonably have believed that they were breaching a legal obligation to ensure their safety. The second claimant had not made a disclosure to the respondent at all before he gave an interview to the Guardian newspaper.

68. The tribunal concludes the claimants have some difficulty in establishing that the disclosures after 17 March were protected, because not made to the employer, and because responses showed engagement with their concerns, raising difficulty with showing reasonable belief. There is also a difficulty in showing the disclosure to the respondent, or to others, was the reason for the dismissal, with the plausible evidence of the sudden downturn of demand, the lack of flexibility of the pushbike group, and the redundancy of eight others who had not made disclosures. It cannot be said they are "likely" to succeed, in the sense of being clearcut.

69. For these reasons no order is made on the applications for interim relief.

Case No: 2203491/20 and 7 others

Employment Judge - Goodman

Date: 22/08/2020

JUDGMENT SENT TO THE PARTIES ON

24th August 2020.

FOR THE TRIBUNAL OFFICE