

# LABOUR CONSTITUTIONALISM: EFFECTIVE JUDICIAL PROTECTION AS A CONSTITUTIONAL PRINCIPLE IN UK LABOUR LAW

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## I Courts and Enforcement: A Paradox

The position of courts in the architecture of enforcement in UK labour law presents something of a paradox. On the one hand, the courts are almost completely invisible as enforcement actors in the United Kingdom Labour Market Enforcement Strategy developed by the Director of Labour Market Enforcement (DLME) .<sup>1</sup> On the other hand, the landmark judgment in *R (UNISON) v Lord Chancellor* affirmed the common law constitutional right of access to the courts.<sup>2</sup> This fundamental common law right has significant affinities with the general principle of effectiveness in EU law,<sup>3</sup> and Article 47 of the EU Charter of Fundamental Rights which protects the right to an effective remedy before a tribunal.

The first Strategy document of the DLME for 2018-19 is a tour de force. It provided an evidence-based assessment of the scale and typologies of non-compliance in relation to different labour standards, and the balance between inadvertent and intentional violations. It also set out a deeply theorised account of the institutional landscape of labour market enforcement, drawing a distinction between ‘compliance’ and ‘deterrence’ approaches. ‘Compliance’ approaches focus on supporting well-motivated employers to comply with their legal duties. This approach supported recommendations on improving transparency (such as information on payslips and the simplification of regulatory requirements). ‘Deterrence’ approaches focus on the deterrent effects of inspection and penalties. This supported recommendations on linking financial penalties to company turnover, and reputational penalties through naming and shaming offenders. The Strategy also set out proposals for joint responsibility for lead companies in supply chains, the extension of licensing requirements to certain problematic sectors, and promoting coordination and information-sharing between different enforcement agencies.

Yet courts are scarcely mentioned as relevant actors in the overall institutional landscape. Should we conclude that courts are peripheral to enforcement? In some respects, their marginal role in the public strategy should not surprise us. The statutory framework for the DLME is set out in the Immigration Act 2016. Section 2 directs the DLME in formulating the strategy to set out how ‘labour market enforcement functions’ should be exercised, which are further defined in section 3

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<sup>1</sup> David Metcalf, *UK Labour Market Enforcement Strategy 2018-2019: Full Report* (Home Office and Department for Business, Energy & Industrial Strategy 9 May 2018).

<sup>2</sup> *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51.

<sup>3</sup> See, e.g., *Impact v Minister for Agriculture and Food* (Case C-268/06) [2008] ECR I-2483, para 46.

as encompassing the various enforcement activities of the Gangmasters and Labour Abuse Authority, HMRC (the Inland Revenue enforcing the national minimum wage), and the Employment Agency Standards Inspectorate. The DLME cannot exercise strategic oversight of courts, not least given the constitutional importance of the independence of the judiciary. In political terms, the labour market enforcement strategy is a creature of the Ministry of Business, Energy and Industrial Strategy, not the Ministry of Justice. Yet as we shall see there are various recommendations for legislative change in the strategy which could be addressed by courts. Moreover, this could occur through incremental judicial development within formal doctrinal constraints. In this article, we consider four such examples: applying accessory liability doctrines in supply chains; developing stronger deterrent remedies using aggravated and exemplary/punitive damages; developing alternative remedies where the existing statutory remedies are ineffective; and restraining the illegality doctrine.

The landmark judgment of the UK Supreme Court in *UNISON* provides an overarching constitutional principle which places these seemingly disparate developments in a coherent and morally attractive light. Following the controversial introduction of fees for claimants to access employment tribunals to enforce their rights, the UKSC struck down the tribunal fees regime as unlawful. In a powerful judgment that attracted the concurrence of the seven Justices, Lord Reed set out the principal ground of unlawfulness, which was its infringement of the common law constitutional right of access to the courts.<sup>4</sup> This fundamental constitutional right was described as ‘inherent in the rule of law’, a constitutional principle of great significance in the English common law.<sup>5</sup> It necessitated an examination of the ‘real risk’ to enforcement in the real world of workers’ lives, assessing the aggregate empirical data on the effects of fees rather than an individualized focus on theoretical affordability for a hypothetical claimant.

In a narrow sense, of course, *UNISON* was a decision squarely about enforcement in the particular context of access to a court. The fees regime had led to a precipitous drop in tribunal claims following its introduction, and its removal after the *UNISON* judgment led to a predictable rise in employment claims. The constitutional significance of the judgment can be understood more broadly, however. Lord Reed observed that ‘at the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country... Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced.’<sup>6</sup> The second sentence is of fundamental importance to the topic of this symposium: courts *exist* to ensure that the enacted laws are applied and enforced. Sometimes enforcement can appear as an unglamorous technical adjunct to deeper normative questions about the nature of rights or the moral functions of labour law. *UNISON* clarifies the fundamental constitutional salience of enforcement. Enforcement is a basic responsibility inherent in the judicial role, at the intersection of the Rule of Law and the separation of powers. The judgment is also focused on the systemic effectiveness of labour regulation as an aspect of the Rule of Law. Again, as Lord Reed put the point, ‘People and businesses need to know, on the one hand, that they will be able to enforce their rights if they have

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<sup>4</sup> The UKSC also concluded that the Fees Order breached EU law’s principle of effective judicial protection.

<sup>5</sup> *UNISON* n 2 above, [66].

<sup>6</sup> *UNISON* n 2 above, [68].

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. It is that knowledge which underpins everyday economic and social relations.<sup>7</sup> Systemic effectiveness is necessary to ensure that citizens have a reliable expectation that the enacted laws will be enforced in practice.<sup>8</sup>

The wider significance of *UNISON* can be seen in the worker status case of *Uber*.<sup>9</sup> In finding that Uber drivers were workers, the UKSC applied a ‘purposive’ and ‘realistic’ approach to the determination of employment status. The relevant sense of ‘purposive’ was framed in constitutional terms redolent of *UNISON*, and it was based in the worker protective purpose of the statutory rights enacted by Parliament. According to Lord Toulson, ‘Laws such as the National Minimum Wage Act were manifestly enacted to protect those whom Parliament considers to be in need of protection and not just those who are designated by their employer as qualifying for it.’<sup>10</sup> It would be subversive of legislative intent to defer to the contractual arrangements effectively imposed by the stronger party in a work relationship. It was the court’s responsibility to determine whether the reality of the employment revealed features of vulnerability to exploitation, such as control and dependence, which justified the statutory protections in the first place. To recall the words of Lord Reed in *UNISON*, this exercise is infused with constitutional significance, in ensuring that ‘the laws made by Parliament...are applied and enforced’ with the scope that Parliament intended them to have.<sup>11</sup>

The UKSC in *UNISON* focused on the common law right over the arguments of EU and European human rights law. The UKSC also concluded that the Fees Order breached the EU principle of effective judicial protection and effective remedies, protected as a general principle and mirrored in Article 47 of the Charter of Fundamental Rights of the European Union. The fees regime imposed limitations on the exercise of EU rights that were disproportionate.<sup>12</sup> The boundaries of the common law constitution and EU and European human rights law were, in this respect, coterminous. This is important in the light of Brexit, because it suggests that the domestic common law right has dynamic normative potential, enabling it to keep pace with the normative content of Article 47 of the EU Charter. Domestic law will also continue to be shaped by any relevant principles on effective protection and remedies in the European Convention on Human Rights (ECHR) through the Human Rights Act 1998.

While explicit strategic coordination between the courts and other enforcement agencies faces constitutional obstacles, the fundamental right of access to a court means that enforcement is a relevant internal consideration for courts in applying and developing the law. This is rooted in the constitutional doctrines of the Rule of Law and the separation of powers. It is the constitutional

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<sup>7</sup> *UNISON* n 2 above, [71].

<sup>8</sup> For an academic piece emphasising the significance of systemic effectiveness in Lord Reed’s constitutional reasoning, see M. Ford, ‘Employment Tribunal Fees and the Rule of Law: *R (UNISON) v Lord Chancellor* in the Supreme Court’ (2018) 47 *Industrial Law Journal* 1.

<sup>9</sup> *Uber BV and others v Aslam and others* [2021] UKSC 5.

<sup>10</sup> *Uber*, n 9 above, [76].

<sup>11</sup> For a suggestion that *UNISON* might have constitutional relevance to horizontal disputes about employment status, see the remarkably prescient A. Bogg, ‘The Common Law Constitution at Work: *R (UNISON) v Lord Chancellor*’ (2018) 81 *Modern Law Review* 509.

<sup>12</sup> *UNISON* n 2 above, [117].

responsibility of the courts to ensure the systemic effectiveness of protective employment statutes. In *UNISON*, this was focused narrowly on the lawfulness of secondary legislation implementing a regime of tribunal fees. However, this principle has a wider significance as the purposive reasoning in *Uber* demonstrates. I propose that we should view this developing principle as an element in *labour constitutionalism*.<sup>13</sup> To emphasise its potential breadth and its normative proximity to Article 47 of the EU Charter, let us call it the common law principle of effective judicial protection, rather than the narrower idea of access to a court. This is because the constitutional reasoning in *UNISON*, ensuring the systemic integrity of statutory employment rights as a public good, supports a broader principle. Access to a court is a necessary but not a sufficient condition of systemic effectiveness. It also requires the court to attend to a broader range of matters, for example ensuring that effective remedies are sufficiently dissuasive. Indeed, there is some implicit recognition of this in Lord Reed's judgment in *UNISON*, where he discussed the specific difficulties where the cost of bringing a claim exceeded the likely tribunal award for certain employment rights. Its animating constitutional basis means that it is likely to be co-extensive with the normative reach of Article 47.

We should also recognise that the Rule of Law is an internally complex idea which engages a range of distinct elements. Sometimes those elements can pull in different directions and may need to be balanced against each other. The context of enforcement often reveals these internal conflicts and tensions acutely. This is exemplified by the divergence between the majority and minority in the recent UKSC case of *Kostal v Dunkley*.<sup>14</sup> The judgment concerned the interpretation of a complex statutory provision restricting individual contractual 'offers' to trade union members in certain circumstances where there was the potential for those terms to be subject to collective bargaining. The majority favoured an interpretation that maximised legal certainty for the parties. Where the individual offers were made during the operation of the parties' own agreed negotiation procedure, there could be statutory liability. Where the procedure had been exhausted, however, there could be no liability. While the majority recognised that this was a relatively arbitrary stipulation, it was the function of the law to provide clear guidance to the parties. Indeed, the law often makes its distinctive contribution through the authoritative specification of such (relatively arbitrary) distinctions.

By contrast, the minority favoured an approach that allowed the tribunal to scrutinise the employer's 'sole or main purpose' in making the offers and whether this was unlawful under the statute. This involved a greater degree of uncertainty in that it eliminated the temporal limitations on liability envisaged by the majority. Superficially, the majority's approach might appear to be a vindication of the Rule of Law in promoting legal certainty. A better understanding is that the divergence represents the priority accorded to different values *within* the Rule of Law. The maximisation of legal certainty may undermine systemic enforcement because it facilitates commercial planning by the purposive wrongdoer to avoid legal liability. In *Knüller v DPP*, the

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<sup>13</sup> There are parallels in constitutional theory with the important work of N.W.Barber, *The Principles of Constitutionalism* (Oxford, OUP, 2018). In the labour field, this approach also takes inspiration from the excellent R. Dukes, *The Labour Constitution* (Oxford, OUP, 2014).

<sup>14</sup> [2021] UKSC 47

court said that ‘those who skate on thin ice can hardly expect to find a sign which will denote the precise spot where they will fall in.’<sup>15</sup> It is the relative unpredictability of the minority’s ‘sole or main purpose’ test which enhances its potential to disrupt the planning of the purposive wrongdoer. It leaves the employer who strays close to the legal line unsure about when the ice will break, and this uncertainty may be a Rule of Law virtue rather than a vice.

The general principle of effective judicial protection can rationalise four seemingly disparate areas of judicial engagement with enforcement. It supports the following doctrinal developments: (i) extending the scope of liability to encompass secondary accessories to primary wrongs where they have knowingly encouraged or assisted the breach of labour standards; (ii) developing remedies so that aggravated damages and exemplary/punitive damages with deterrent effect are available in appropriate cases; (iii) creating additional remedies in either public or private law to support statutory schemes so that they are systemically effective; (iv) restraining the illegality doctrine as a bar to the enforcement of labour rights in some circumstances of workplace criminality. The article will conclude by reflecting on the potential (and limits) of judicial enforcement in a constitutional order that respects legislative supremacy. Throughout the paper, the analysis will consider Davidov and Eshet’s stimulating article on courts and enforcement in Israel.<sup>16</sup>

## II Third Party Liability

An important area of judicial development identified by Davidov and Eshet is the imposition of third party liability. This was also identified as a strategic priority by the DLME. This is focused on labour violations by powerful commercial parties where they have created the economic conditions for non-compliance by the direct employer.<sup>17</sup> For example, lead company X negotiates a commercial contract with Y in a subcontracting arrangement, and Y can only make a commercial profit by paying its own workers below the minimum wage. While the primary wrongdoer is Y, we might say that X is an accomplice to Y’s primary wrong. This can be important where the direct employer is impecunious as a result of a disadvantageous commercial contract effectively imposed by an economically powerful lead company. It commonly arises in fissuring situations involving subcontracting, franchising, and supply chains. It also tends to be more acute in certain sectors, for example garment manufacture, agricultural work, or subcontracted cleaning.

In Israel, this judicial development occurred in the context of minimum wage violations by a cleaning company providing cleaning services to a bank. Although the bank did not satisfy the legal indicators of an ‘employer’, the Tel-Aviv Regional Labour Court in *Shmuelov* nevertheless held the bank liable for the cleaning company’s violations.<sup>18</sup> This was because those violations were attributable to the commercial contract negotiated with the bank. Where the commercial contract

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<sup>15</sup> [1973] AC 435, per Lord Morris.

<sup>16</sup> G. Davidov and E. Eshet, ‘Improving Compliance with Labor Laws: The Role of Courts’ *Comparative Labor Law and Policy Journal*

<sup>17</sup> The leading work on this phenomenon is D. Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve it* (2014).

<sup>18</sup> *Ayelet Shmuelov v. Moshe Poonos Cleaning and Maintenance Services Ltd.*, judgment of Dec. 10, 2006.

is a ‘losing contract’, so that the contractor’s economic viability depends upon non-compliance with labour laws, there is a strong case for allocating responsibility to the stronger commercial party. On that basis, the bank was treated as a ‘joint employer’ and liable for the minimum wage and other labour standards.

Where powerful commercial actors use their bargaining power to negotiate contractual arrangements that lead directly to labour violations, strategic enforcement justifies targeting liability at these agents.<sup>19</sup> They are often well-placed to create the economic conditions for compliance with labour standards and to generate wider systemic improvements. In situations where third parties have knowingly induced the breach of legal rights by the employing companies in their supply chains and subcontracts, there is a strong case for labelling them as accessories to the direct employer’s primary wrong. Judicial developments on third party liability in Israel led to statutory interventions in the cleaning and security sectors, imposing third party liability in ‘losing contract’ situations. This represents a kind of ‘constitutional dialogue’ on enforcement between courts and legislators, with creative judicial solutions entrenched and extended through legislation.

Compared with Israel, the UK position on third party liability in employment law is still relatively underdeveloped. This has undoubtedly undermined the enforcement structure of UK labour law, and it has led to academic proposals for a new statutory underpinning for accessory liability in the context of national minimum wage violations.<sup>20</sup> Nevertheless, there are existing doctrinal tools that courts can use to promote compliance through mechanisms of third party liability. The recent decision in *Antuzis v Houghton* provides an important example of this.<sup>21</sup> *Antuzis* involved claims for multiple breaches under the Agricultural Wages Act 1948, unlawful deductions from wages, falsification of pay slips, and failure to provide paid annual leave. The claimants were all Lithuanian nationals working as chicken catchers in circumstances of grave labour exploitation, in a ‘gangmaster’ employment arrangement. There were three defendants in the action: D1 (the employing company), D2 (Jackie Judge, the company secretary), and D3 (Darryl Houghton, the sole company director). The critical liability question for the High Court was whether D2 and D3 were liable for the breaches of the employing company, D1. It was therefore focused on the economic tort of inducing breach of contract. In a carefully reasoned judgment, Lane J. concluded that D2 and D3 were liable for D1’s breaches of contract.

The issue of effective enforcement is central to the judgment in *Antuzis*. In paying tribute to the credible testimony of the claimants, Lane J remarked on ‘the gruelling and exploitative work regime that was being imposed upon them by the defendants.’<sup>22</sup> To adopt Feldman’s typology of compliance, the evidence in the case revealed the defendants in *Antuzis* as ‘calculative wrong

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<sup>19</sup> D. Weil, ‘A Strategic Approach to Labour Inspection’, 147 INTERNATIONAL LABOUR REVIEW 349 (2008).

<sup>20</sup> A. Bogg and P. L. Davies, ‘Accessory Liability for National Minimum Wage Violations in the Fissured Economy’ in A. Bogg, J. Collins, M.R. Freedland, and J. Herring (eds), *Criminality at Work* (Oxford, OUP, 2020) chapter 22. It is interesting to note that this chapter is placed in Part IV of the treatise, in the section titled ‘Criminalization and Enforcement’.

<sup>21</sup> *Antuzis v Houghton* [2019] EWHC 843 (QB), [2019] 4 WLUK 95 (*Antuzis*).

<sup>22</sup> *Antuzis*, above n 21, [58].

doers'.<sup>23</sup> According to Lane J., 'The evidence, is however, simply overwhelming that D2 and D3 were operating D1 at all material times in a deliberate and systematic manner, whereby chicken catchers were working massively more than the hours recorded on the payslips.'<sup>24</sup> On the face of it, given the tight nexus of control between D2/D3 and D1, tort liability for D2/D3's inducement of D1's breach of contract would seem to provide an obvious legal route for third party liability. However, the legal obstacle was the rule in *Said v Butt*,<sup>25</sup> which excluded liability for the tort of inducing the company's breach of contract where a director was acting bona fide and within the scope of his authority. This was because the director was treated as standing in the shoes of the contracting party, the company. In these circumstances, the imposition of tort liability would be tantamount to holding a contract-breaker liable for inducing its own breach.

In this case, it was possible to circumvent *Said v Butt* because D2 and D3 were not acting in the best interests of the company. This breach of their company law duties meant that they were not acting bona fides. The statutory dimension of the claimants' employment rights meant that 'breach of that duty is therefore indicative of societal disapproval of what the director has caused the company to do and the resulting reputational damage to the company.'<sup>26</sup> Indeed, their behaviour had been catastrophic for D1 and its ability to continue trading. Their accessory liability for the tort of inducing D1's breach of contract was easily established given D2/D3's knowledge of the contractual obligations owed by D1 to the workers.

In a subsequent hearing on remedies, the enforcement dimension was also emphasized by the court.<sup>27</sup> Thus, Griffiths J. made a significant award of aggravated damages for mental distress justified in the following terms: 'Recovery of the money due...will not compensate the Claimants for the whole effect upon them of their exploitation, manipulation and abuse by the Defendants at the time in question, and in the manner that I have outlined above. The means of inflicting this abuse was the...*systematic denial of the Claimants' statutory rights*.'<sup>28</sup> Note this terminology of systematic, echoing the constitutional concerns in *UNISON*. Griffiths J. did not award an additional measure of exemplary damages as a punitive response to the wrongdoing because he considered the level of the aggravated damages awarded to be sufficient to compensate the claimants for their losses. Interestingly, Griffiths J. would have considered awarding exemplary damages if there had been evidence that the defendants' profits had significantly exceeded the compensatory damages awarded against them.<sup>29</sup> This remedial dimension to accessory liability based on tort, and the potential for aggravated and, in a narrower range of circumstances exemplary/punitive damages, reinforces its potential as a doctrine to support enforcement and compliance.

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<sup>23</sup> YUVAL FELDMAN, *THE LAW OF GOOD PEOPLE: CHALLENGING STATES' ABILITY TO REGULATE HUMAN BEHAVIOR* 61 (2018), cited in Davidov and Eshet.

<sup>24</sup> *Antuzis*, above n 21, [86].

<sup>25</sup> *Said v Butt* [1920] 3 KB 497.

<sup>26</sup> *Antuzis*, above n 21, [121].

<sup>27</sup> *Antuzis v Houghton* [2021] EWHC 971 (QB). (*Antuzis II*)

<sup>28</sup> *Antuzis II*, above n 27, [155] (*emphasis added*).

<sup>29</sup> *Antuzis II*, above n 27, [158]. For further discussion of this category of punitive damages in tort, see A. Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (Oxford, OUP, 4<sup>th</sup> edition 2019) 364-367.

Although *Antuzis* represents a significant judicial development, the facts in the case were extreme. The commercial activities of D1 were directed solely by D2/D3, and the exploitation was of an egregious nature. How far it can be extended to other less extreme situations, such as that in *Shmuelov*, is a difficult question. The mental element for the tort of inducing breach of contract is still based on knowledge and intention, and this may be harder to establish in situations where the defendants are in an arms-length commercial arrangements such as supply chains or subcontracting.<sup>30</sup> A policy of effective enforcement could support a wider test of constructive knowledge, especially in contexts of civil rather than criminal accessory liability, though this is a significant change and ought to occur through statutory than judicial law reform.<sup>31</sup>

### III Remedies

Another area of judicial development examined by Davidov and Eshet is in the realm of remedies. The authors examine the important role that remedies can play in supporting enforcement and compliance, with particular reference to worker misclassification cases and the availability of punitive damages for certain serious labour violations. The use of punitive damages in the Israeli context has been particularly important in sex discrimination claims.<sup>32</sup> In the UK, there have been some important developments on remedies in worker misclassification cases, although this has been within the narrow context of the right to paid annual leave. This is a fundamental social right based in EU law. This judicial enforcement paradigm is now less robust after Brexit. This is because it is based in the EU Charter of Fundamental Rights which is no longer legally binding in domestic law as a result of section 5 of the European Union (Withdrawal) Act 2018. In relation to the role of damages in labour law,<sup>33</sup> the remedial baseline for statutory employment rights is provided by the general approach of the common law. As a result, while aggravated damages are sometimes awarded for many employment rights such as discrimination claims, punitive damages are only available in a narrow range of circumstances. This provides an interesting contrast with the Israeli position and it identifies an area of enforcement weakness in the UK context.

Effective enforcement in worker misclassification cases has been supported through the fundamental right specified in Article 47 of the EU Charter. This Charter provision is closely

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<sup>30</sup> According to Davies, the mental element of inducing breach of contract should focus on the defendant's knowledge of the breach of contract rather than his intention: see P.S. Davies, *Accessory Liability* (Hart, Oxford, 2015) 159-160. He also suggests that the existing case law would treat the knowledge requirement as satisfied where the defendant has deliberately closed his mind to the contractual breach: see *Emerald Construction Co Ltd v Lowthian* [1966] 1 WLR 691 (CA), 700-701.

<sup>31</sup> For a draft statutory provision, see Bogg and Davies, above n 20.

<sup>32</sup> The terminology of exemplary damages rather than punitive damages continues to be used in the UK context by courts. When discussing the UK position, I will use exemplary/punitive as the relevant descriptive term for the category described as punitive by Davidov and Eshet.

<sup>33</sup> Labour statutes usually describe these awards using the terminology of 'compensation' or 'loss' rather than 'damages'. See, for example, section 124 (2) (b) Equality Act 2010. Nevertheless, common law authorities have often been treated as relevant to the development of principles when interpreting remedial provisions under different labour statutes. The statutory language of 'compensation' raises tricky questions about the scope for recovering non-compensatory damages not related to loss, for example gains-based damages.



analogous to the general principle of effective judicial protection of rights conferred by EU law.<sup>34</sup> According to Lord Hodge, the principle of effective judicial protection should be understood as a high-level normative principle, of which the principle of effectiveness is a specific instantiation relevant to the procedural requirements for domestic actions to enforce rights conferred by EU law.<sup>35</sup> The principle of effectiveness requires that domestic legal procedures do not render it impossible or excessively difficult to exercise rights based in EU law.<sup>36</sup> Article 47 of the EU Charter guarantees a right to an effective remedy before an independent and impartial tribunal, and requires that the claimant is provided with a fair and public hearing within a reasonable time. This fundamental right includes, amongst other things, that individual remedies for breach of health and safety rights must be ‘effective, proportionate and dissuasive’,<sup>37</sup> with effective protection from victimisation for individual claimants.<sup>38</sup> This constitutionalisation of enforcement has been pivotal in supporting a strong approach to remedies where there has been a denial of important rights in EU law as a result of worker misclassification. It has been of significance in relation to the right to paid annual leave, which is regarded as a fundamental social right of particular importance in the EU legal order.

The leading case is the important decision of *Sash Window*.<sup>39</sup> Here the question arose whether on termination of the contract the claimant could recover a payment in lieu of leave that corresponded to the unpaid leave for the entire period of his engagement between 1999 and 2012. During this period, the claimant had been characterised under the contract as ‘self-employed’, whereas in the tribunal it had been accepted that he was a ‘worker’ for the purposes of EU law. The employer had conducted itself on the basis that the claimant was not entitled to paid annual leave. During the period of his employment, some periods of leave had been taken but unpaid, and a significant proportion of leave entitlement had been untaken. The employer argued that under the UK Regulations the claimant was not entitled to carry over leave entitlement into a new holiday year, in calculating the level of payment in lieu on termination of employment.

The CJEU based its reasoning principally on Article 47 and the right to an effective remedy. The odd regulatory structure in the UK system meant that a worker was forced to take leave before bringing an action to claim payment. Coupled with the strict limitations on carry over of leave entitlements into subsequent leave years, the overall effect was the negation of a fundamental right. In the words of the CJEU, such a result ‘would amount to validating conduct by which an

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<sup>34</sup> See J. Adams-Prassl, ‘Article 47 CFR and the effective enforcement of EU labour law: Teeth for paper tigers?’ (2020) 11 *European Labour Law Journal* 391,392-393. The Explanation to Article 47 makes clear that the Charter provision reflected an existing general principle of EU law recognised in Case 222/84 *Johnston* [1986] ECR 1651; see also judgment of 15 October 1987, Case 222/86 *Heylens* [1987] ECR 4097 and judgment of 3 December 1992, Case C-97/91 *Borelli* [1992] ECR I-6313. The analogous nature of the principles is referred to in *Anwar (Appellant) v The Advocate General for Scotland (representing the Secretary of State for Business, Energy and Industrial Strategy) (Respondent) (Scotland)* [2021] UKSC 44 [57].

<sup>35</sup> *Anwar*, above n 34, [63].

<sup>36</sup> Burrows, above n 29, 16. This is stated to be the correct legal test in *Anwar*, above n 34, [3]. The UKSC rejected the suggestion that there was a more stringent test for the effective judicial protection principle.

<sup>37</sup> C Barnard, *EU Employment Law* (Oxford, OUP, 4<sup>th</sup> ed 2012) 522.

<sup>38</sup> Case C-185/97 *Coote v Granada Hospitality Ltd* [1998] ECR I-5199.

<sup>39</sup> Case C-214/16 *King v Sash Window* EU:CL2017:914.

employer was unjustly enriched to the detriment of the very purpose of that Directive, which is that there should be due regard for workers' health.<sup>40</sup> This meant that the claimant could recover a payment in lieu of leave corresponding to the entire period of his engagement when it had been denied by the employer. This case establishes an important regulatory response to the problem of ambiguous employment status, which is a particular difficulty for precarious workers presented with comprehensive written contracts on a take-it-or-leave-it basis. In circumstances where an employer has taken advantage of these uncertainties in employment status, the *Sash Window* principle could provide a powerful financial deterrent against exploitative advantage-taking by employers.

This constitutionalisation of enforcement culminated in the recent troika of Grand Chamber judgments, delivered on the same day, on the meaning and effect of the fundamental social right to paid annual leave: *Max-Planck v Shimizu*,<sup>41</sup> *Kreuziger*,<sup>42</sup> and *Bauer*.<sup>43</sup> In *Shimizu* and *Kreuziger*, the Court focused upon the need for workers to enjoy an effective opportunity to take leave. The onus was on the employer to demonstrate that the worker had been encouraged to take leave and, further, that the decision not to do so had been taken in full knowledge of the legal consequences of not doing so in the leave year.<sup>44</sup> These can be understood as compliance-focused norms, in that they create the conditions for fundamental rights to be self-enforcing in the workplace, casting the employer in a facilitative role to encourage the right's exercise.

There is a thread running through all of these enforcement/compliance cases, which is the coupling of fundamental social rights with strong positive obligations on private actors to facilitate an effective opportunity for workers to take their leave entitlement. These positive facilitative obligations must be supported by remedies that are effective and dissuasive, as reflected in the *Sash Window* judgment. In this way, enforcement and compliance stand in a mutually supportive relationship.<sup>45</sup> Brexit has fundamentally altered the constitutional significance of the EU Charter in UK law, since the EU Charter no longer applies in the UK as a result of the European Union (Withdrawal) Act 2018. However, the principle of effective judicial protection upon which Article 47 is based is a general principle of EU law. As a general principle that already formed part of EU law on exit day, UK courts must continue to interpret EU-derived labour rights (such as those in the Working Time Regulations 1998) in every way possible so that they are in conformity with the Directive.<sup>46</sup> This strongly purposive interpretative obligation may have continuing relevance in respect of remedies for other employment rights that are derived from EU law. In addition, *UNISON* supports the view that there is a common law principle that has the same normative reach as Article 47.

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<sup>40</sup> *Sash Window*, [64].

<sup>41</sup> Case C-648/16 *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Tetsuji Shimizu* ECLI:EU:C:2018:874.

<sup>42</sup> Case C-619/16 *Kreuziger v Land Berlin* EU:C:2018:339. Note the reference to 'effectiveness' in guaranteeing the right to paid annual leave in *Kreuziger* at [52].

<sup>43</sup> Case C-569/16 *Stadt Wuppertal v Bauer* and Case C-570/16 *Willmeroth v Broßon* EU:C:2018:871

<sup>44</sup> *Kreuziger* [52]-[54]; *Shimizu* [41]-[42], [45], [48].

<sup>45</sup> On the differences between 'compliance' and 'enforcement', see Davidov and Eshet, XX

<sup>46</sup> This is known as the *Marleasing* duty. See *Marleasing SA v La Comercial Internacional De Alimentation SA* (C-106/89) [1990] ECR I-4135. See section 5 of the European Union (Withdrawal) Act 2018, and the accompanying Explanatory Notes to section 5.

With respect to the general position on remedies for breach of statutory employment rights, the position in labour law is influenced strongly by the common law baseline. As a result, the distinction between contract and tort is pivotal in determining the availability of aggravated and punitive damages. Generally speaking, there are much tighter restrictions on recoverable damages in contract than tort. So, damages for mental distress are only rarely recoverable and punitive damages are unavailable for breach of contract. By contrast, damages for mental distress are more readily available in tort and punitive damages are potentially recoverable if the case falls within the categories established in *Rookes v Barnard*.<sup>47</sup> For employment law purposes, the most important category of punitive damages in *Rookes* is that the defendant's conduct has been calculated to make a profit which exceeds the compensation likely to be recovered for the tort. There is a tendency for the courts to relate statutory claims to the contract/tort categories. Subject to the defining words in the statute, this characterisation as tort-like or contract-like will then determines the remedial framework. In remedial terms, both common law wrongful and statutory unfair dismissal claims are akin to contract, and neither aggravated nor punitive damages are available for either.<sup>48</sup> By contrast, discrimination claims and whistleblowing claims have been treated as tort-like claims.

Even where the primary wrong is treated as contractual, *Antuzis* indicates that there may still be secondary tort liability for the party that *induced* the breach of contract. In this way, there can be significant remedial advantages in pursuing the accessory party rather than the primary wrongdoer, such as the potential availability of punitive damages against the accessory in tort. It may even be possible to circumvent some of the statutory limitations on remedies against primary wrongdoers, such as 'caps' on compensation. These caps on compensation can be justified as striking a balance between the employees' interests in dignity and fairness and the employer's commercial interests. This will be particularly important where the employer's wrongdoing is negligent or inadvertent rather than calculated and cynical.<sup>49</sup> In situations where the breach has been deliberately procured by a third party, there is potentially a much more corrosive impact on systemic effectiveness of employment rights. There is something distinctive about the instigator and orchestrator of wrongdoing, which involves an insidious attack on the culture of enforcement and law-abidingness. This might justify displacing any statutory remedial limits for the primary wrongdoer, particularly in circumstances where the calculating behaviour of the accessory would warrant punitive damages under the *Rookes*' categories.

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<sup>47</sup> *Rookes v Barnard* [1964] AC 1129.

<sup>48</sup> In the wrongful dismissal context, the leading case of *Addis v Gramophone Co. Ltd* [1909] AC 488 established strict limiting rules on recoverable damages in a wrongful dismissal claim. In effect, damages are limited to wages for the notice period (subject to a duty to mitigate loss). For critical discussion of *Addis* and its remedial aftermath, see A. Bogg and M.R. Freedland, 'The Wrongful Termination of the Contract of Employment', in M Freedland and others (eds), *The Contract of Employment* (Oxford, OUP, 2016) chapter 25. Under the unfair dismissal legislation, the House of Lords has held that 'loss' is restricted to pecuniary loss, so that injury to feelings/mental distress is not recoverable: see *Dunnachie v Kingston-Upon-Hull City Council* [2004] UKHL 36.

<sup>49</sup> Section 12A Employment Tribunals Act 2016 makes provision for financial penalties where an employer's breach of employment rights has 'aggravating features'.

Before examining the employment case law, a brief note on terminology would be helpful. While the nomenclature of aggravated damages is controversial in English law, it is essentially concerned with non-pecuniary damages for mental distress (or ‘injured feelings’). These damages are compensatory rather than punitive in nature. The case law still distinguishes between basic damages for mental distress and aggravated damages. Assessments of quantum apportion damages between the basic and the aggravated. The ‘aggravated’ component concerns the egregious nature of the defendant’s motivation and conduct where this exacerbates the distress and injured feelings of the claimant. There is a degree of artificiality in separating out these elements, since the aggravation is simply an ingredient in the assessment of the mental distress experienced by the victim. In *Commissioner of Police of the Metropolis v Shaw*, Underhill J deprecated the judicial tendency to treat aggravation as a separate head of damage.<sup>50</sup> Instead, he emphasised the importance of ensuring that the overall award was proportionate compensation for the mental distress suffered. Punitive damages, which are usually described as ‘exemplary’ damages in English law, are aimed at punishing the defendant for his civil wrong. While these are sometimes available in tort claims, the circumstances in which a court will award exemplary/punitive damages have been construed narrowly by the courts.

As regards discrimination claims, there was a valuable distillation of legal principles in *Ministry of Defence v Fletcher*.<sup>51</sup> This involved sex discrimination claims brought against the Ministry of Defence by a soldier who had been subjected to an extensive campaign of harassment and victimisation by her superior officer. The tribunal had awarded £30,000 for injury to feelings,<sup>52</sup> aggravated damages of £20,000, and exemplary/punitive damages of £50,000. On appeal, the EAT confirmed that aggravated damages could be awarded in discrimination cases. It was important to be cautious about double recovery and overlap with the basic ‘injured feelings’ award. Nevertheless, the oppressive circumstances in which the discrimination occurred, including the subsequent conduct of litigation, could certainly be an aggravating factor warranting a compensatory response. Following a close examination of the factual circumstances, the EAT substituted a much lower sum of £8000 for aggravated damages. With regard to exemplary/punitive damages, the EAT recognised that these were recoverable in principle in discrimination cases. Furthermore, the facts in this case fell within the scope of a recognised legal category of ‘oppressive, arbitrary or unconstitutional action by the servants of the government.’ The exemplary/punitive damages were set aside on the facts in *Fletcher* because the wrongdoing was not sufficiently grave in amounting to ‘conscious and contumelious’ conduct. In practice, aggravated damages have generally been regarded as adequate to punish the defendant in discrimination cases.<sup>53</sup>

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<sup>50</sup> [2012] ICR 464.

<sup>51</sup> 2009 WL 3122429.

<sup>52</sup> There are three ‘bands’ of severity that quantify the financial parameters of compensation for injury to feelings in discrimination cases, first set down in *Vento v Chief Constable of West Yorkshire Police (No 2)* [2003] IRLR 102.

<sup>53</sup> See *Rookes v Barnard* [1964] AC 1129, at 1127-1128, where this is identified as a threshold condition before exemplary/punitive damages can be awarded (‘if, but only if, the sum which they have in mind as compensation...is inadequate to punish him for his outrageous conduct’, *ibid*, per Lord Devlin). See also Burrows, above n 29, 370. It is important to stress that the function of aggravated damages is compensatory, not punitive. In *Fletcher*, Slade J. suggested that aggravated damages contained a punitive as well as a compensatory element (above n 51, 52). This was rejected by Underhill J in *Shaw*, where he emphasised that

A similar approach to remedies has been adopted in whistleblowing cases, with the courts treating whistleblowing as sufficiently analogous to discrimination wrongs to attract a similar remedial response. This was established in *Virgo Fidelis Senior School v Boyle*.<sup>54</sup> In relation to a detriment claim for whistleblowing, Ansell J. applied the *Vento* guidelines to assessing the level of damages for injury to feelings in the whistleblowing context. The court rejected the argument that whistleblowing should attract stronger protection than discrimination wrongs given the dimension of public interest at stake in protecting the right. However, and by analogy with discrimination law, the court also recognised the scope for an aggravated element for mental distress in whistleblowing detriment. The court also reasoned that there was no principled basis for excluding the award of exemplary/punitive damages in an appropriate case within the scope of the *Rookes*' categories. The facts in this case did not reach the necessary threshold of severity, and 'in the majority of cases aggravated damages would be sufficient to mark the employer's conduct.'<sup>55</sup> Similarly, Underhill J. in *Shaw* emphasised that while 'deterrence and punishment' were not relevant factors in assessing compensation, the 'deterrent effect' of public recognition of wrongs were 'not to be under-estimated' either.<sup>56</sup> Compensation for injury to feelings is also recoverable in trade union 'detriment' cases, which is treated as sufficiently akin to discrimination wrongs, and which must also encompass scope for aggravated compensation.<sup>57</sup>

The limits of the more inclusive 'discrimination' approach to remedies were reached in *Santos Gomes v Higher Level Care Ltd*.<sup>58</sup> This involved a claim for compensation for injury to feelings for a denial of paid rest breaks under the Working Time Regulations (WTR) 1998. Singh LJ considered that these claims were 'akin to a breach of contract' rather than akin to tort-like discrimination wrongs.<sup>59</sup> Consequently, and in line with the unfair dismissal regime, loss was restricted to pecuniary loss. In this case, this corresponded to the wages for the periods where paid rest breaks had been denied by the employer. From an EU law perspective, the relevant question is whether the remedies are 'effective, proportionate and dissuasive'.<sup>60</sup> It may be doubted that the restriction of compensation to pecuniary loss is 'dissuasive', particularly for low paid workers who are more vulnerable to adverse health and safety outcomes. Indeed, this restriction is problematic because an hourly paid worker may have suffered no pecuniary loss at all by the failure to give a rest break.

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aggravated damages are purely compensatory (above n 50, 20). The correct legal position is as stated by Underhill J in *Shaw*.

<sup>54</sup> [2004] ICR 1210.

<sup>55</sup> *Boyle*, above n 54, 78.

<sup>56</sup> *Shaw*, above n 50, 38.

<sup>57</sup> See, e.g., *Hackney London Borough Council v Adams* [2003] IRLR 402. Given its characterisation as a discrimination-type wrong, there would seem to be no reason why punitive/exemplary damages should not also be available in trade union victimisation cases falling within the *Rookes*' categories. In *Santos Gomes* (n 58), Singh LJ appears to cast doubt on the principled basis to these trade union detriment cases. Under Article 11 of the European Convention on Human Rights, the European Court of Human Rights has emphasised the importance of 'deterrent' remedies in individual trade union victimisation cases: see Application no 35009/05 *Tek Gıda İş Sendikası v. Turkey* (4<sup>th</sup> April 2017) [55]-[56]. This supports an approach to remedies that is *at least* in line with the discrimination law approach.

<sup>58</sup> [2018] ICR 1571.

<sup>59</sup> [2018] 2 All ER 740, 67.

<sup>60</sup> *Barnard*, above n 37, 522.

It is also suggested that aggravated and punitive damages should be available under the WTR. Regulation 30 (4) of the WTR 1998 refers to ‘the employer’s default in refusing to permit the worker to exercise his right’. It is difficult to see how this reference to the nature of the ‘employer’s default’ could be relevant to anything other than aggravation relating to injury to feelings or the award of punitive damages. The *Marleasing* interpretative duty would support an interpretation that is, at the very least, inclusive of aggravated damages. It would also be desirable to develop a remedy that corresponds to the intrinsic value of the social right itself, rather than restricted to any consequential loss arising out of the right’s denial. This has been described as ‘substitutive’ damages.<sup>61</sup> It is probably somewhat strained to regard *Santos Gomes* as involving injury to feelings. This was more likely a way of augmenting the claimant’s award. It would be better to address this by focusing directly on the value of the right, which is likely to be significant for fundamental social rights.

The deployment of the tort/contract distinction to characterising statutory employment rights has a degree of artificiality.<sup>62</sup> Since the ‘cause of action’ restriction on exemplary/punitive damages was removed for tort claims in *Kuddus*,<sup>63</sup> a more principled approach would be to adopt a unified approach to remedies for all statutory employment rights. They ought to be characterised for remedial purposes as statutory torts. The statutory dimension is constitutionally important in light of *UNISON*. Where the systemic effectiveness of laws enacted by Parliament is being undermined by weak remedies, the courts have a constitutional responsibility to develop a principled remedial response to ensure that statutory rights are realised in practice. This would allow for recovery for injury to feelings, aggravated damages, substitutive damages, and (in appropriate cases) exemplary/punitive damages.

The courts have been particularly inclined to award exemplary/punitive damages in serious cases involving ‘modern slavery’. For example, in *Laslo Balogh and Others v Hick Lane Bedding Ltd* the claimants had been held in circumstances of ‘modern slavery’, and been subjected to very serious exploitation leading to psychiatric injury.<sup>64</sup> The court awarded exemplary/punitive damages to each of the claimants on the basis that ‘the defendant cynically exploited them in order to make a profit, thus falling into the second category of exemplary damages set out by Lord Devlin in *Rookes v Barnard* [1964] AC 1129.’<sup>65</sup> The amount was reduced to reflect the fact that there had been criminal punishment and the company had become insolvent.<sup>66</sup> This second *Rookes*’

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<sup>61</sup> R. Stevens, *Torts and Rights* (OUP, 2007) chapter 4.

<sup>62</sup> We see a similar approach in the doctrine of illegality, where the statutory right is characterised either as contract-like or tort-like which then has ramifications for how the illegality rules are applied. See further A. Bogg, ‘Illegality, Public Policy, and the Contract of Employment’ in M. Freedland and others (eds), *The Contract of Employment* (Oxford, OUP, 2016) chapter 19.

<sup>63</sup> See *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29. Prior to this, it had been thought that such damages could be awarded only for those specific torts for which punitive damages had been awarded prior to *Rookes*. This presented obvious difficulties for modern statutory torts in the employment field given the late emergence of the statutory ‘floor of rights’ in UK employment law in the mid-1970s.

<sup>64</sup> [2021] EWHC 1140 (QB), 2021 WL 01949274

<sup>65</sup> *Laslo Balogh*, above n 64, 17.

<sup>66</sup> *Laslo Balogh*, above n 64, 31.

category, of the defendant calculating that profit was likely to exceed the level of compensation, has been especially salient in landlord and tenant cases.<sup>67</sup> It provides a remedial response to situations of calculated breaches where the wrongdoer has engaged in a cynical calculation that it would be better off by wronging the victim. A punitive response can have an important deterrent effect, particularly because the overall level of punitive damages at large is more difficult to predict for the calculating defendant than ordinary compensatory damages.

Where violations of labour standards are orchestrated and calculated, and reflect a deliberate commercial judgement to disregard statutory rights based upon an economic calculation of profits against potential legal liabilities,<sup>68</sup> exemplary/punitive damages can perform a useful function. There is no reason why it should be restricted to cases involving serious labour exploitation, which in any event is not directly relevant to the underlying rationale of the *Rookes*' category. The recent scandal where P&O Ferries dismissed nearly 800 employees with immediate effect, in flagrant disregard of statutory redundancy consultation and unfair dismissal protections, exemplifies the kind of calculative breach warranting punitive damages.<sup>69</sup> It would be a strong candidate for treatment under a *Rookes*-type approach. At the current time, the best gateway into tort liability for the purpose of applying *Rookes* in the P&O scenario would be through *Antuzis*, focusing on the directors' role in inducing the breach of contract.

### III Augmenting existing statutory remedies through private and public law

Another important area where the courts have supported the enforcement of statutory labour standards is through the judicial augmentation of existing remedies where gaps and weaknesses have been identified in the statute. Sometimes this has involved developing a private law response to public wrongs. Other cases involve the provision of public law remedies where the existing private law remedies are inadequate. Starting with the development of private law remedies as an additive support to public enforcement through criminal law, there is a long history of this type of judicial activity in labour law. In his work on the role of criminalization as an enforcement tool in workplace health and safety, Michael Ford has traced the historical emergence of this 'private right' enforcement paradigm.<sup>70</sup> The key shift was in the important judgment in *Groves v Lord Wimborne*.<sup>71</sup> A boy had sustained injuries leading to the loss of his forearm because dangerous machinery had been unfenced. This breached the statutory duty in

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<sup>67</sup> Burrows, above n 29, 365-367.

<sup>68</sup> This is particularly relevant to large scale organized 'wage theft'. This faces the difficulty that 'wage theft' is likely to be treated as a contract claim. Exemplary/punitive damages are not currently available for contract claims in English law. In response, we might say that this add further support to the position that all statutory rights should be treated as a unified and autonomous field, and subject to common legal principles on remedies developed independently of the common law position. It is also interesting that in *Laslo Balogh*, one of the civil claims in that case was a failure to pay wages. There is also the possibility of tort liability for inducing breach of contract in situations like *Antuzis*.

<sup>69</sup> <https://www.theguardian.com/business/2022/mar/18/mass-sacking-by-p-and-o-ferries-a-new-low-for-shipping-says-union>

<sup>70</sup> Michael Ford, 'The Criminalization of Health and Safety at Work', in Alan Bogg, Jennifer Collins, Mark Freedland and Jonathan Herring (eds), *Criminality at Work* (Oxford, OUP, 2020) chapter 21.

<sup>71</sup> [1898] 2 QB 402.

section 5 of the Factory and Workshop Act 1878. The Court of Appeal recognised a civil claim for compensation for the injured worker based on breach of statutory duty.

The fundamental question was whether the legislature intended that a criminal fine (capped at £100) was to be the only available remedy for the breach of the statutory duty. The Court of Appeal took the view that an overall construction of the statutory scheme did not support this remedial exclusivity, particularly given the prospect that a worker could suffer very serious injuries without receiving adequate compensation. The Act was introduced to protect a particular class of persons from risks of death and serious injury in factories and workshops. The exclusive use of a penal sanction, focused predominantly on culpability and wrongdoing, was ill-suited as a mechanism for ensuring that the worker was compensated fully for his injuries. In retrospect, *Groves* can be understood as a protean instance of a legal principle of effective remedies. In this case, the entire process of statutory construction was shaped by consideration of just and effective enforcement, and the compensatory limitations of a penal sanction. In due course, the provision of parallel civil and criminal liability was adopted in later legislation.<sup>72</sup>

A similar problem of apparent remedial exclusivity in the statute arose more recently in *Barber v RJB Mining (U.K.) Ltd*,<sup>73</sup> in which the old case of *Groves* was cited and considered. This case was brought by Pit Deputies working in the coal mining industry and it concerned the enforcement of the working time limit of 48 hours per week over a reference period of 17 weeks. Regulation 4 (1) of the Working Time Regulations 1998 specified a mandatory limit that working time was not to exceed the statutory maximum. Regulation 4 (2) specified that the employer 'shall take all reasonable steps' to comply with the specified limit. It was possible to opt out of the limit through individual agreement, but the Pit Deputies had refused to do so which meant that that the limit applied to them. The enforcement scheme in the Regulations protected workers from detriment or dismissal if they refused to work more than the limit in Regulation 4 (1). Furthermore, the employer could be prosecuted in circumstances where it had not taken 'all reasonable steps' to ensure compliance.

Gage J. rejected the argument that Regulation 4 should be read as a composite whole, because this was contrary to Parliamentary intention. He construed the provisions such that the mandatory limit in Regulation 4 (1) was delinked from the qualified duty in Regulation 4 (2). It was 'clear' that Parliament intended Regulation 4 (1) to give rise to a statutorily implied term in all personal work contracts, whereas Regulation 4 (2) posited a distinct qualified duty enforceable through the criminal law. On that basis, the court granted a declaration of the workers' contractual rights, although it declined to grant injunctive relief. Interestingly, Gage J. did not regard the principle of effectiveness based in EU law as especially supportive of the claimant's case. Given more recent developments in cases like *Sash Window*, this principle has acquired greater normative strength since *Barber* was decided. Given the increasing prevalence of 'deregulatory criminalisation', where legislatures remove private rights of action in favour of exclusivity of criminal law sanctions, this could provide an important technique for ensuring that

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<sup>72</sup> Ford, above n 70, 419, discussing s 47 (2) of the Health and Safety at Work Act 1974. The right of civil action was removed subsequently in section 69 of the Enterprise and Regulatory Reform Act 2013.

<sup>73</sup> [1999] 2 C.M.L.R. 833.



effective remedies where labour standards are breached. Given the reliance on parliamentary intention in *Groves* and *Barber*, however, there are limits to what can be achieved by judges when the exclusivity of the statutory remedy is clear and unequivocal in the legislation.

The remedial flipside of this is where courts have developed public law remedies in response to inadequacies in the private law framework. The technique of declaratory relief in the working time context can be seen in *R (on the application of Fire Brigades Union) v South Yorkshire Fire and Rescue Authority*.<sup>74</sup> In this case, *public law* judicial review was used to challenge the implementation of a new shift pattern in the fire service. The claim (with which Kerr J. agreed) alleged that the new shift pattern was in breach of regulation 6 (limits on the length of night work) and regulation 10 (entitlement to daily rest). Interestingly, the techniques of public law were used here to augment the *systemic effectiveness* of private rights posited in the Regulations in regulation 10. This has striking echoes of the constitutional emphasis on systemic effectiveness of legislated rights in *UNISON*.

Kerr J. declined to grant relief in relation to the breach of regulation 6. The legislative scheme provided for criminal enforcement (and with the possibility of declaratory relief based upon the *Barber* statutory implication of the regulation 6 limit as an implied term of the contract). The Health and Safety Executive had decided not to bring a prosecution, and there was no possibility of a private prosecution under the statutory framework. The court did not consider it appropriate to make findings of criminal guilt without the operation of procedural and evidential protections in a criminal trial. In relation to regulation 10, it was possible for workers to bring individual claims directly in employment tribunals, with the possibility of a declaration and compensation. However, Kerr J. regarded this as insufficient to address the rule of law problem in this case, which involved an ongoing policy to continue in breach of the law as a result of budgetary pressures in the public sector. Reliance on the vagaries of individual litigation was unlikely to respond to the systemic problem revealed by the evidence before the court: 'The employment tribunal is not always the appropriate forum. The tribunal cannot vindicate the rule of law by granting declarations of unlawfulness. It can only secure observance of the law in individual cases.'<sup>75</sup> These systemic considerations could well have wider relevance given the systemic dimensions of non-compliance identified by the DLME.

A final example where the granting of public law remedies was justified by the inadequacy of the private law remedies in the statutory framework is *R (Shoesmith) v OFSTED*.<sup>76</sup> The occupant of the statutory post of Director of Children's Services at Haringey Council was removed from her post under instruction from the Secretary of State following the tragic killing of a baby in an abusive family situation. In granting her public law remedies as an office-holder, Maurice Kay LJ had regard to the remedial and procedural inadequacies of the statutory unfair dismissal remedy relative to judicial review as a justification for permitting her judicial review claim to proceed. In particular, the statutory cap on the compensatory award in the statutory unfair dismissal regime placed severe limits on her ability to secure adequate compensation for her

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<sup>74</sup> [2018] IRLR 717.

<sup>75</sup> *FBU*, above n 74, 128.

<sup>76</sup> [2011] EWCA Civ 642.

losses. The ignominious nature of her dismissal had a significant impact on her reputation and future employability, particularly given her very public humiliation as a scapegoat. The court issued a declaration that the original decision to dismiss her was unlawful, and the parties were encouraged to negotiate an agreement on appropriate compensation in light of that finding. The court in *Shoemith* was applying well-established common law rules and techniques in judicial review, rather than developing the common law in a novel and striking way. It was also tailored very narrowly to ‘office-holders’ in public law, thereby limiting the scope of potential beneficiaries. This is probably the best explanation as to why the cap in the statutory unfair dismissal regime has generally been used to justify restricting the development of general contractual damages for employees for wrongful dismissal.<sup>77</sup> Such a development has much greater potential for destabilizing the statutory regime. This is because the statute is based upon a democratic determination to cap compensatory remedies in general unfair dismissal claims. The courts have been understandably wary of taking such a step, to ensure a coherent relationship between wrongful and unfair dismissal.

#### **IV Taming the Illegality Doctrine**

The final context in which there have been important judicial developments supporting the enforcement of statutory employment rights is the illegality doctrine. This is concerned with the issue of when workers will be entitled to enforce their legal rights in a court of law where the legal claim is somehow tainted by criminal activity. It commonly arises in the context of migrant workers working without a right to work, so that the work and employment constitutes a criminal offence for both the employer and the worker. The illegality doctrine is not specific to labour law but operates as a general doctrine of law. It bars enforcement of legal rights in circumstances where judicial enforcement would undermine the integrity of the legal system. Historically, the illegality doctrine tended to operate harshly against workers who worked in circumstances of criminality. More recently, there have been important judicial developments that have restrained the illegality doctrine as a bar to the enforcement of statutory rights.

The watershed for the law on illegality in discrimination claims is *Hounga v Allen*.<sup>78</sup> This involved a tort claim for race discrimination brought by a migrant without a right to work who had been trafficked into the UK as a minor under an arrangement orchestrated by her employers. She was working illegally and had committed a criminal offence in undertaking work in breach of her visa restrictions. In the Court of Appeal, her claim was treated as barred by the illegality doctrine because there was an ‘inextricable link’ between it and her own criminal conduct under the immigration statutes. In a landmark judgment, she succeeded in her tort claim for race discrimination. On the majority approach formulated by Lord Wilson, the ‘inextricable link’ test

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<sup>77</sup> The leading case restricting damages for common law wrongful dismissal in light of parliamentary intention and the statutory cap on the compensatory award for unfair dismissal, is *Johnson v Unisys* [2001] UKHL 13 (*Johnson*). Lord Hoffmann declined to extend the implied term of mutual trust and confidence to the dismissal event because of ‘parliamentary intention’ as expressed in particular through the statutory cap.

<sup>78</sup> *Hounga v Allen* [2014] UKSC 47, [2014] 1 WLR 2889.

was replaced by a more transparent balancing of public policy factors. These public policy factors were oriented around issues of enforcement. For example, in assessing the public policy reasons favouring the denial of her discrimination claim, Lord Wilson asked, ‘would application of the defence of illegality so as to defeat the award compromise the integrity of the legal system by appearing to encourage those in the situation of Mrs Allen to enter into illegal contracts of employment? Yes, possibly: it might engender a belief that they could even discriminate against such employees with impunity.’<sup>79</sup> Since the countervailing tendency that permitting her claim would encourage trafficked migrants to break the law was dismissed as ‘fanciful’, the public policy reasons militating against her claim were held to ‘scarcely exist’.<sup>80</sup> Lord Wilson also identified countervailing public policy reasons that favoured upholding her discrimination claim in circumstances of illegality. He identified the public policy of protecting trafficked migrants. This required public policy to be fashioned in the light of the UK’s international treaty obligations, which included the right of victims to compensation from the perpetrators of trafficking.<sup>81</sup> This remedial consideration was treated as decisive. It may be understood as a specific instance of the general principle of effective judicial protection.

In *Okedina v Chikale* the Court of Appeal addressed the different issue of illegality and its impact on the contract claims of an irregular migrant.<sup>82</sup> This was an unusual situation where the worker had an honest belief that she had a right to work: the criminal culpability was that of her employer. The main technical issue in the case was whether the employer’s offence in employing the worker had the effect of impliedly prohibiting her employment contract. If so, this would bar the enforcement of her statutory claims based on that contract. In an important judgment, Underhill LJ provided a full review of the authorities on illegality and employment contract claims. Having noted the factual context to many claims by migrant workers, often working in circumstances of exploitation by stronger parties, Underhill LJ observed that ‘it does not seem to me that public policy requires a construction of these sections which would have the effect of depriving the innocent employee of all contractual remedies against the employer’.<sup>83</sup> Where Parliament had not stated clearly that the contract was to be prohibited in its formulation of the statutory offence, any implication of prohibition must be based upon a strict test of necessity. Viewed through the lens of the principle of effective judicial enforcement, it is the draconian impact of statutory illegality and the deprivation of remedies for exploited workers that justifies this strict approach.

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<sup>79</sup> *Hounga*, above n 78, [44].

<sup>80</sup> *Hounga*, above n 78, [45].

<sup>81</sup> *Hounga*, above n 78, [50].

<sup>82</sup> [2019] EWCA Civ 1393.

<sup>83</sup> *Okedina*, above n 82, [49].

## V Conclusion

This has been an exercise in constructive interpretation, in the spirit of Ronald Dworkin's account of interpretive legal theory.<sup>84</sup> The principle of effective judicial protection, formulated at a high level of abstraction, fits a seemingly disparate body of case law and reconstructs it in a coherent and morally attractive light. It ranges across the doctrines of accessory liability, rules on damages, the judicial supplementation of statutory remedies, and the doctrine of illegality. This account of a common law 'labour constitutionalism' also has affinities with the work of South American labour scholars articulating general principles of labour law.<sup>85</sup> As with Article 47 of the EU Charter, the common law right to effective judicial protection should be regarded as a general principle within which more specific principles, such as effective remedies, can be developed.

It appears that this principle is now being recognised in the English common law, under the influence of European law. In the recent case of *NTN Corporation and others v Stellantis N.V. and others* Green LJ said of the EU principle of effectiveness that 'procedural and evidential rules must not make it practically impossible or excessively difficult for a claimant to vindicate its justiciable rights...The common law is very much to the same effect; the rules should not be applied in such a way that the very right sought to be enforced is undermined.'<sup>86</sup> The fundamental nature of the statutory rights in labour law give this principle a particular constitutional significance, as recognised in *UNISON*. In their different ways, the judgments considered here identify the vital role of courts in ensuring the systemic effectiveness of statutes in a parliamentary democracy. Without systemic effectiveness, a range of important constitutional values, such as the Rule of Law and the separation of powers, are undermined. Ultimately, democracy itself is eroded where systemic effectiveness is in question: 'Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade.'<sup>87</sup> This constitutional context supports a dynamic approach to doctrinal development to support the enforcement of statutory rights. It goes beyond the rules of evidence and procedure and it may also encompass substantive rules and remedies.

Some important features of the argument should be emphasised. First, the courts have been particularly scrupulous in protecting the statutory rights of workers who are especially vulnerable to exploitation. We can see this in *Hounga, Okedina, and Laslo Balogh*. From a democratic perspective, such workers are also more likely to be vulnerable to majoritarian hostility or indifference in the democratic process. As an especially vulnerable sub-group within the subjects of labour law, the courts have performed an important role in securing their rights. The democratic argument in favour of judicial deference is attenuated for such workers, who will often lack the formal attributes of political citizenship. Secondly, there is an important fault line

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<sup>84</sup> R. Dworkin, *Law's Empire* (1986).

<sup>85</sup> Sergio Gamonal C and Cesar F Rosado Marzan, *Principled Labor Law: US Labor Law through a Latin American Method* (Oxford, OUP, 2019).

<sup>86</sup> [2022] EWCA Civ 16, 2022 WL 00114184 [29]

<sup>87</sup> *UNISON*, above n 2, [68].

between the general common law and statute. In assessing the scope for aggravated and exemplary/punitive damages, for example, the courts have often integrated the common law's remedial principles into the exercise of statutory construction. This could limit the development of remedies unduly. For example, where there are serious problems of systemic ineffectiveness of statutory rights, might this justify the broader availability of deterrent remedies based in exemplary/punitive damages? This does not appear to be permitted on the restrictive *Rookes* approach, yet there is a strong constitutional case for treating the statutory framework as autonomous from the common law principles. Where there are serious problems of enforcement leading to systemic ineffectiveness, deterrent remedies might be necessary to ensure the laws enacted by Parliament are not a 'dead letter'. This would probably require statutory intervention to provide a stronger and clearer legislative basis for judges to award uncapped punitive damages. This could be in the form of a general power set out in the relevant consolidation acts. The recent P&O scandal has intensified the calls for reform and exposed the weaknesses of capped financial remedies in cases of calculated breach. It might also be valuable to recognise 'substitutive' damages that correspond to the value of the right infringed, in addition to any consequential losses flowing from the interference. Thirdly, cases like *Barber* and *FBU* could be understood as akin to 'private rights of action' cases, where the legal framework makes provision for private actors to enforce legislation for the broader common good.<sup>88</sup> This is a necessary supplementation to public enforcement through agencies, and is rooted in a civic ideal of active citizenship. Finally, the principle of legislative supremacy sets important limits on what can be achieved through judicial enforcement. Many of the cases considered are rooted in a concern to respect parliamentary intention in applying the statutory provision. Where the statutory language is clear in stipulating limits on remedies and enforcement, the courts must be sensitive to that in interpreting the legislation. This provides the best explanation for the controversial ruling in *Johnson*, where the House of Lords treated the existence of a cap on the compensatory award in the statutory unfair dismissal as a reason for limiting recoverable damages at common law for wrongful dismissal. Otherwise, the courts would be facilitating the circumvention of a democratic compromise that had been crystallised in the statute. Respecting such statutory limits is an inevitable feature of judging in a democratic constitution.

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<sup>88</sup> On private rights of action and the common good, see the interesting discussion here: Pat Smith, 'The Private Right of Action' <https://iustitium.com/the-private-right-of-action/>