

Bridging the Spaces in-between? The IWGB and Strategic Litigation



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Bridging the Spaces in-between? The IWGB and Strategic Litigation

Manoj Dias-Abey*

Introduction

A number of new unions have appeared in the UK over the last decade. Small, agile and confrontational, these unions variously called “tiny unions”¹ and “indie unions”,² have used a variety of diverse and unorthodox tactics to make a number of meaningful gains for their members. Some of their victories, such as gaining parity of treatment for outsourced cleaners at the University of London (and more recently their insourcing), have garnered significant media attention;³ a sign perhaps that our desire to reimagine Goliath’s defeat at David’s hands never diminishes. The most prominent amongst the indie unions is the Independent Workers Union of Great Britain (IWGB), which formed in 2012 and boasts about 4,800 members today.⁴ Other examples include the United Voices of the World (UVW) formed in 2014 and the Cleaners and Allied Independent Workers Union (CAIWU) established in 2016. As is the case with many radical political formations, the indie unions have demonstrated a propensity to fracture and renew as ideological, tactical and personality differences arise—for example, CAIWU and UVW are offshoots of the IWGB, which itself formed as a result of a split from the Industrial Workers of the World UK.⁵ The membership of the three biggest unions in Britain dwarfs the size of these organisations by an order of magnitude many times greater—Unison and Unite have close to 1.2 million members each and GMB has just under 615,000 members.⁶ Current membership date

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¹ Daniel Randall & Zack Muddle, *Perspectives for the “Tiny Unions”*, WORKERS’ LIBERTY, <https://www.workersliberty.org/story/2019-10-09/perspectives-tiny-unions> (last visited Nov 23, 2020).

² Davide Però, *Indie Unions, Organizing and Labour Renewal: Learning from Precarious Migrant Workers*, 34 WORK, EMPLOYMENT AND SOCIETY 900-918 (2020). Però uses the descriptor “indie” to mean that these organisations are independent grassroots unions which are member driven. They are also independent in the sense that they do not belong to the Trade Union Congress, the federation of trade unions in the UK. For these reasons, I follow Però’s lead and will use ‘indie unions’ throughout this chapter.

³ Bethan Staton, *The Upstart Unions Taking on the Gig Economy and Outsourcing*, FINANCIAL TIMES, January 19, 2020, <https://www.ft.com/content/576c68ea-3784-11ea-a6d3-9a26f8c3cba4> (last visited Nov 23, 2020); Owen Jones, *The Courage of the LSE’s Striking Cleaners Can Give Us All Hope*, THE GUARDIAN, May 25, 2017, <https://www.theguardian.com/commentisfree/2017/may/25/lse-striking-cleaners-outsourced-university-injustice> (last visited Nov 23, 2020); Aditya Chakraborty, *The True Costs of Private Contracts in Universities*, THE GUARDIAN, March 24, 2014, <https://www.theguardian.com/education/2014/mar/24/cost-private-contracts-universities-documents-services-workers> (last visited Nov 23, 2020); Robert Booth, *University of London cleaners Win 10-year Outsourcing Battle*, THE GUARDIAN, November 3, 2020, <https://www.theguardian.com/education/2020/nov/03/university-of-london-cleaners-win-10-year-outsourcing-battle> (last visited Nov 23, 2020).

⁴ Staton, *supra* note 4. The number might be a lower due the private hire drivers autonomous branch’s recent split from the IWGB to form a separate organisation called the “United Private Hire Drivers”.

⁵ Randall and Muddle, *supra* note 2.

⁶ See www.tuc.org.uk/unions.

alone, however, tells us little about the potentially changing landscape of British industrial relations.

The age of austerity and the Conservative government's 'Hostile Environment' policies form the background to the birth to this new generation of trade unions. The crisis of 2008-9, which precipitated the near collapse of the global financial system, resulted in the imposition of austerity in the UK to deal with the burden to public financing caused by the socialisation of private debt.⁷ The cut in government spending caused a sharp spike in unemployment, and whilst unemployment began to steadily decrease in the slow recovery that followed (at least until the onset of the Covid pandemic), much of the growth was in part-time work and "self-employment".⁸ The second major development behind the growth of indie unions is the government's "Hostile Environment" policy, a raft of measures introduced by the then Home Secretary, Theresa May, to make life impossible for Britain's undocumented workforce.⁹ Several of these measures, particularly the privatisation of immigration enforcement to landlords and employers, have made life equally difficult for Black and Ethnic Minority workers who make up 14% of the working age population and the 8% of workers who were born in an EU country.¹⁰ Precariously engaged migrants, impressed by the indie unions' commitment to organising low-wage workers and taking a strong stand against racism, have rushed to swell their ranks; they currently make up about 90% of the membership of unions like the IWGB.¹¹

One of the most striking features about indie unions is the extent to which they utilise litigation as a tactic, particularly considering their more radical orientation. This is also remarkable given the historical hostility that the common law courts have shown 'combinations' of workers, whether that be in the form of their criminalisation until the 1800s, or the subsequent application of tortious liability until the passage of the *Trade Union Act* in 1906.¹² Over the course of the 20th century, unions have mostly sought to be free from state regulation so they could flex their industrial might to encourage employers to enter into collective agreements.¹³ However, employment relations have undergone a process of juridification since the 1960s, which accelerated under the auspices of the New

⁷ For an analysis of the financial crisis and UK government's response, see ADAM TOOZE, *CRASHED: HOW A DECADE OF FINANCIAL CRISES CHANGED THE WORLD* (2018), Ch 7.

⁸ Steve Coulter, *The UK Labour Market and the 'Great Recession'*, in UNEMPLOYMENT, INTERNAL DEVALUATION AND LABOUR MARKET DEREGULATION IN EUROPE 197-227 (Martin Myant, Sotiria Theodoropoulou, & Agnieszka Piasna eds., 2016).

⁹ For a critical look at the impact of these policies, see MAYA GOODFELLOW, *HOSTILE ENVIRONMENT: HOW IMMIGRANTS BECAME SCAPEGOATS* (2019).

¹⁰ RUBY MCGREGOR-SMITH, *Race in the Workplace: The McGregor-Smith review* 95 (2017), <https://www.gov.uk/government/publications/race-in-the-workplace-the-mcgregor-smith-review>; CARLOS VARGAS-SILVA, *EU Migration To and From Europe*, <https://migrationobservatory.ox.ac.uk/resources/briefings/eu-migration-to-and-from-the-uk/> (last visited Nov 23, 2020).

¹¹ Però, *supra* note 3.

¹² Roy Lewis, *The Historical Development of Labour Law*, XIV BRITISH JOURNAL OF INDUSTRIAL RELATIONS 1-17 (1976); Robert Knox, *Neoliberalism and the Constitution of Political Subjectivity*, in NEOLIBERAL LEGALITY: UNDERSTANDING THE ROLE OF LAW IN THE NEOLIBERAL PROJECT 92-118 (Honor Brabazon ed., 2017).

¹³ "Collective laissez-faire" as described by Kahn-Freund: see Otto Kahn-Freund, *Labour Law*, in SELECTED WRITINGS (1978). This position is somewhat exaggerated—see Ruth Dukes, *Otto Kahn-Freund and Collective Laissez-Faire: An Edifice Without a Keystone*, 72 MODERN LAW REVIEW 220-246 (2009); Keith Ewing, *The State and Industrial Relations: "Collective Laissez-Faire" Revisited*, 5 HISTORICAL STUDIES IN INDUSTRIAL RELATIONS 1-32 (1998).

Labour government (1997-2010) and developments in European Union law.¹⁴ As a result, unions have seen the provision of legal services to members as an increasingly important function.¹⁵ Running alongside these developments, some of the larger unions, such as Unison, Unite, and GMB, have developed sophisticated litigation strategies—in the past few years alone, Unison has successfully challenged the imposition of Tribunal fees by a Conservative government in a high profile case before the Supreme Court,¹⁶ and Unite has brought an action to retain collective forms of wage-setting in the agricultural sector in front of the European Court of Human rights.¹⁷ Indie unions, such as the IWGB, have embraced court action with gusto, participating in or initiating litigation challenging the exclusion of independent contractors from the statutory recognition process for collective bargaining,¹⁸ arguing that foster carers are employees of local councils,¹⁹ trying to achieve collective bargaining rights for Deliveroo riders,²⁰ challenging the lack of legal entitlements on the basis of mischaracterisation of private-hire drivers, medical couriers, and Uber drivers as independent contractors,²¹ and pointing out the racially discriminatory impacts of the London congestion tax.²² More recently, the IWGB has challenged an attempt to end lockdown prematurely²³ and successfully sought judicial review of the government’s failure to include all workers within the ambit of health and safety protections.²⁴

Unsurprisingly, industrial relations scholars have been at the forefront of analysing how the litigation strategies of unions relate to their other functions, such as organising and

¹⁴ Edmund James Heery, *Debating Employment Law: Responses to Juridification*, in REASSESSING THE EMPLOYMENT RELATIONSHIP 71-96 (Paul Robert Blyton, Edmund James Heery, & Peter John Turnbull eds., 2010), <http://orca.cf.ac.uk/23750/> (last visited Nov 24, 2020); LIZZIE BARMES, BULLYING AND BEHAVIOURAL CONFLICT AT WORK: THE DUALITY OF INDIVIDUAL RIGHTS (2015); NICOLA COUNTOURIS & KEITH EWING, *Brexit and Workers’ Rights* (2019), www.ier.org.uk (last visited Nov 24, 2020).

¹⁵ Tonia Novitz, *A Revised Role for Trade Unions as Designed by New Labour: The Representation Pyramid and “Partnership”*, 29 JOURNAL OF LAW AND SOCIETY 487-509; Ewing, *supra* note 14; Cécile Guillaume, *When Trade Unions Turn to Litigation: “Getting All Ducks in a Row”*, 49 INDUSTRIAL RELATIONS JOURNAL 227-241..

¹⁶ *R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent)* [2017] UKSC 51.

¹⁷ *Unite the Union v United Kingdom* App No 65397/13 (3 May 2016).

¹⁸ Author Unknown, *Union Takes Rights Claim to European Court*, MORNING STAR, December 3, 2015, <https://morningstaronline.co.uk/a-bb18-union-takes-rights-claim-to-european-court-1> (last visited Nov 24, 2020).

¹⁹ See, e.g., *Glasgow City Council v James Johnson & Christine Johnson* [2019] UKEAT 0011_18_2310. For analysis, see Eleanor Kirk, *Contesting “Bogus Self-Employment” Via Legal Mobilisation: The Case of Foster Care Workers*, Early Online CAPITAL & CLASS 9 (2020).

²⁰ *IWGB v RooFoods Limited T/A Deliveroo*, TUR1/985 (2016).

²¹ See, e.g., *Marshall & Ors v The Doctor’s Laboratory Ltd*, Case No: 2203491/20 and 7 Others and *Aslam, Farrar & Ors v Uber BV & Ors*, 2016 WL 06397421.

²² Zamira Rahim, *Uber Drivers Sue Sadiq Khan for Discrimination Against Ethnic Minority Drivers*, THE INDEPENDENT, March 1, 2019, <https://www.independent.co.uk/news/uk/home-news/uber-drivers-sue-sadiq-khan-race-minority-a8802461.html> (last visited Nov 24, 2020).

²³ Author Unknown, *Lockdown is Required to Protect BAME and Low Paid Workers’ Lives, IWGB to Argue in High Court Intervention* (2020), https://iwgb.org.uk/post/dolan_case_intervention (last visited Nov 24, 2020).

²⁴ *IWGB v Secretary of State for Work and Pensions & Ors* [2020] EWHC 2039 (QB) (Admin).

collective bargaining.²⁵ This small literature has produced a number of important insights, including that the “recombination” of legal and extra-legal tactics might have contingent, ambiguous and partial effects in terms of a union’s overall strategy. Some of these authors have explicitly borrowed analytical frames from the legal mobilisation literature to study the extra-legal impacts of litigation. Within the broader legal mobilisation literature, there has been a clear recognition that social movements and progressive organisations might gain more from bringing strategic litigation than simply winning in court.²⁶ That is, a movement may still win by losing in court. Douglas NeJaime has argued that the secondary effects of litigation can be categorised as either *internal* or *external* to the movement.²⁷ According to this categorisation, the secondary external effects of litigation might help movements achieve some of their objectives, for example, build alliances with allies and raise the public profile of the struggle. The secondary internal effects of litigation include those impacts on the participants of the movement—for example, litigation might help cohere a sense of shared identity amongst participants. So far, the industrial relations literature examining the secondary effects of union litigation strategies has focused on the external effects.

This chapter aims to build on this body of writing in several ways. First, thus far, there has been little written about the litigation strategies of indie unions in particular.²⁸ Given the outsize role that litigation plays in the strategic inventory of these organisations, analysis of the form and effect of the legal actions pursued by these unions is urgently needed. Second, this chapter sets out a rationale for why the legal mobilisation literature might provide important analytical tools for studying these developments. It is not immediately clear that the legal mobilisation literature, which has primarily been used to study the litigation strategies of social movements that arose in the twilight of the labour movement, can be usefully deployed to study the actions of trade unions. Third, whilst the existing literature has focused on the external secondary effects of litigation of British unions, this chapter seeks to explore how indie unions’ litigation strategy might also be having internal effects, such as cohering a sense of identity amongst movement participants.

This chapter sets out to answer the questions of how and why indie unions may be turning to the courts to build their movement by investigating the IWGB’s litigation strategy. As Tshepo Madlingozi has noted, “[a] *context-specific approach is...essential to resist the temptation of making sweeping claims about the efficacy of socio-economic rights strategies for social movements and other poor people’s movements.*”²⁹ In fact, a number of studies in the legal mobilisation literature proceed by way of analysis of a single social

²⁵ Trevor Colling, *Trade Union Roles in Making Employment Rights Effective*, in MAKING EMPLOYMENT RIGHTS EFFECTIVE: ISSUES OF ENFORCEMENT AND COMPLIANCE (Linda Dickens ed., 2012); TREVOR COLLING, *Court in a Trap? Legal Mobilisation by Trade Unions in the United Kingdom* 31 (2009); Guillaume, *supra* note 18; Heery, *supra* note 17; Kirk, *supra* note 22.

²⁶ See, e.g., STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS* (2nd ed. 2004), https://www.press.umich.edu/6766/politics_of_rights (last visited Nov 24, 2020); Marc Galanter, *The Radiating Effects of Courts*, in EMPIRICAL THEORIES ABOUT COURTS 117-142 (Keith Boyum & Lynn Mather eds.); MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* (1994); Catherine Albiston, *The Rule of Law and the Litigation Process: The Paradox of Losing by Winning*, 33 *LAW & SOCIETY REVIEW* 869-910 (1999).

²⁷ Douglas NeJaime, *Winning Through Losing*, 96 *IOWA LAW REVIEW* 941-1012. For a critique of this categorisation, see Catherin Albiston, *The Dark Side of Litigation as a Social Movement Strategy*, 96 *IOWA LAW REVIEW BULLETIN* 61-77 (2011).

²⁸ For an early attempt to study the work on indie unions using legal mobilisation analytic frames, see Kirk, *supra* note 20.

²⁹ Tshepo Madlingozi, *Post-Apartheid Social Movements and Legal Mobilisation*, in SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA: SYMBOLS OR SUBSTANCE 92-130 (Malcolm Langford et al. eds., 2013), 122.

movement or social movement organisation.³⁰ The IWGB formed in 2012 when a group of predominantly Latin American workers employed by a firm providing cleaning services to the University of London decided to leave Unison and form their own union.³¹ These cleaners went on to wage a two-year campaign with a network of students and community allies by its side, and ultimately succeeded in winning holiday and sick pay and pensions rights for workers in 2014. Since then, the IWGB has grown to incorporate workers from a range of other industries including bicycle couriers, private-hire drivers, and foster carers. Today, it is the biggest and most impactful of the indie unions. My aim is to mine the sociolegal literature to demonstrate the vistas opened up by the application of legal mobilisation analysis. Since I am primarily interested in the identity formation aspects of litigation, I draw on the legal mobilisation literature as well as adjacent theorisation on subjectivity to develop a set of postulates about why indie unions might be going to court in order to build a movement of empowered workers willing to challenge their exploitative working conditions. Hence, the primary intervention in this chapter is a conceptual one.

This chapter is structured as follows. In Part 2 of this chapter, I consider the appropriateness of legal mobilisation as a framework to study the actions of British trade unions. I argue that indie unions can be studied as social movement organisations since they are worker-led formations committed to organising and representing migrant workers and willing to draw on a broad repertoire of action to achieve their objectives. In Part 3, I examine the most relevant form of legal action brought by the IWGB—actions seeking ‘worker’ status for those engaged in the ‘gig economy’—and consider how the IWGB might see the stakes of its litigation strategy. Although there have been attempts by the IWGB to obtain employee or worker status for many categories of workers, I focus on workers in the gig economy since this is where the legal strategy has most clearly been integrated with a documented organising strategy. If the legal mobilisation literature is interested in unpacking the politics of rights, then, employee/worker status litigation (henceforth shortened to employment status litigation) becomes an exemplary case study to examine. In Part 4, I set out a series of postulates about how the IWGB’s legal strategy interacts with its political work. I argue that employment status litigation helps to create a more unified political subject in workplaces characterised by fractured subjectivities. I also contend that employment status litigation helps build class consciousness because domination inheres to the category of employment. Ultimately, a conceptual analysis such as this one remains a speculative exercise, and in the conclusion, I offer some preliminary thoughts about possible routes to empirically verifying the postulates floated in this chapter.

Can we use legal mobilisation analytic frames to study indie unions?

The precipitous decline of trade union power within workplaces, the economy and the political sphere has spurred a vigorous debate within the union movement since about various paths to renewal. Since the 1990s, unions in the UK have been debating whether to adopt an explicitly organising orientation to lift themselves out of their current doldrums. Those who have favoured an organising approach have argued that rather than simply representing existing members, unions should be actively recruiting workers from underrepresented groups, such as migrant workers, and promoting an attitude of self-help through collective action. Similarly, others have sought to get unions to adopt more confrontational social movement tactics, for example taking direct action, organising protest marches, and reaching out to allies in the community. These discussions have

³⁰ See, e.g., McCANN, *supra* note 27; HELENA SILVERSTEIN, UNLEASHING RIGHTS: LAW, MEANING, AND THE ANIMAL RIGHTS MOVEMENT (1996); ELLEN ANN ANDERSEN, OUT OF THE CLOSETS AND INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION (2009).

³¹ Jason Moyer-Lee & Henry Chango Lopez, *From Invisible to Invincible: The Story of the 3 Cosas Campaign*, in *WHERE ARE THE UNIONS?: WORKERS AND SOCIAL MOVEMENTS IN LATIN AMERICA, THE MIDDLE EAST AND EUROPE* 231-250 (Sian Lazar ed., 2017).

gradually led to important shifts within the trade union movement, and in my view, the transformation of British unions in the last few decades makes it possible to study them as social movement organisations. In the following paragraphs, I trace some of the debates around union renewal that have led to the gradual transformation of unions. As I will make clear, whilst traditional unions have only adopted these strategies partially and inconsistently, indie unions have taken these lessons to heart. That is, indie unions are the apotheosis of the British unions' social movement turn.

One reason that the IWGB, UVW and CAIWU have raised hopes and ignited imaginations is because they represent a category of workers that traditional unions have persistently struggled to organise: migrant workers.³² Whilst migrant workers have been a feature of the British labour market since at least the early 19th century (when Irish immigrants made up a portion of the labour force in the textile and building trades),³³ over this long duration, the British labour movement consistently failed to properly incorporate this segment of the working class, even during periods of heightened class struggle.³⁴ Occasionally, in British industrial relations history, there have been instances where the broader labour movement has expressed solidarity with fellow migrant workers, such as during the Grunwick strike in the late 1970s, but these have been the exception rather than the rule.³⁵ There are many reasons for this situation: racism in the trade union movement³⁶ and the prioritisation of economic class issues over an appreciation of the totality of workers' experience across dimensions such as race and gender³⁷ being two obvious reasons. As a consequence, non UK-born employees are much less likely to be members than UK-born employees (16.6% vs. 24.8%).³⁸ In sharp contrast, unions such as the IWGB have a membership that is almost 90 per cent from racialized backgrounds.³⁹ It has achieved this result through various practical means, for example, by providing English-language classes, running meetings inclusively with translators, promoting organisers that represent the diversity of the workplaces that they seek to organise, and drawing on international musical traditions in their protest actions.

Second, the indie unions display a commitment to organising. Whilst one of the core functions of trade unions has always been the recruitment of members, government attacks and employer hostility in the 1980s caused some of the larger unions to withdraw to their industrial citadels, offering members little more than the chance to mobilise occasionally for a collective agreement. Sometimes, they sought to entice members by offering a range

³² While the term "migrant" is a notoriously slippery term, in this chapter, it will be used to denote any worker who is non- autochthonous, either by fact of birth or social construction.

³³ STEPHEN CASTLES & GODULA KOSACK, *IMMIGRANT WORKERS AND CLASS STRUCTURE IN WESTERN EUROPE* (First Edition, First Impression edition ed. 1973).

³⁴ SATNAM VIRDEE, *RACISM, CLASS AND THE RACIALIZED OUTSIDER* (2014).

³⁵ For an account of this episode, see SUNDARI ANITHA & RUTH PEARSON, *STRIKING WOMEN: STRUGGLES & STRATEGIES OF SOUTH ASIAN WOMEN WORKERS FROM GRUNWICK TO GREEN GOURMET* (2018).

³⁶ E.J.B. ROSE, *Colour & Citizenship: A Report on British Race Relations* (1969), 299-300.

³⁷ Gabriella Alberti, Jane Holgate & Maite Tapia, *Organising Migrants as Workers or as Migrant Workers? Intersectionality, Trade Unions and Precarious Work*, 24 *THE INTERNATIONAL JOURNAL OF HUMAN RESOURCE MANAGEMENT* 4132-4148 (2013).

³⁸ See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/805268/trade-union-membership-2018-statistical-bulletin.pdf (although this data doesn't capture the membership rates of racialised workers who are UK-born).

³⁹ Però, *supra* note 3.

of useful services.⁴⁰ However, in the 1990s the discourse of ‘organising’ took hold in the British trade union movement, reflecting strategic trends gaining prominence in the United States and Australia.⁴¹ Organising represents a reinvigorated mandate for unions in at least two important respects: the recruitment of new members as well as their empowerment.⁴² Both are features of the indie unions. Rather than seeking to expand members in workplaces where members already exist, the indie unions have shown a willingness to organise in service sectors that have historically had very low rates of union penetration. The IWGB’s organising successes have been in the couriering industry (CitySprint, G Thompson), enterprises in the gig economy (Uber), and the cleaning sector (University of London, 5 Hertford Street Club). As a result, indie unions are characterised by a diverse membership, which they have self-consciously set out to recruit. Once members are recruited, indie unions encourage their members to participate in decision-making and campaigning to address their problems rather than waiting for a cadre of paid union officers to find solutions. In fact, there is some evidence that members join indie unions because they believe that more established unions, such as Unison and GMB, are undemocratic and encourage passive forms of membership.⁴³ There is a strong relationship between recruitment, worker self-organisation and union democracy since promoting worker involvement allows the gains of an expanded membership to become sustainable.

Third, indie union are also much more willing to employ confrontational tactics, such as engaging in wildcat strikes. For example, during the IWGB’s ‘3 Cosas’ campaign⁴⁴ at the University of London, cleaners walked off from their jobs to protest the company’s lack of action on unpaid wages.⁴⁵ Under UK labour law, such action constitutes “unlawful industrial action” since the legal technicalities of conducting a ballot and giving employers notice were not complied with, which opens up participating workers and any inducing union to a range of sanctions.⁴⁶ As well as those engaged on the basis of self-employment, this means that competition laws and EU rules on freedom of establishment and movement of services (at least for the moment) present additional legal obstacles.⁴⁷ Notwithstanding the legal situation, these unions often decide to take a calculated risk to engage in withdrawing their labour after assessing the broader political context. In the case of the 3 Cosas action on 1 September 2011, the strike ended when the University of London, which was wary of reputational damage, involved itself in negotiations to broker a deal in which workers were paid £6,000 in back wages.⁴⁸ These unions also often engage

⁴⁰ Steve Williams, *The Nature of Some Recent Trade Union Modernization Policies in the UK*, 35 BRITISH JOURNAL OF INDUSTRIAL RELATIONS 495-514 (1997).

⁴¹ MELANIE SIMMS, JANE HOLGATE & EDMUND HEERY, *UNION VOICES: TACTICS AND TENSIONS IN UK ORGANIZING* (2012).

⁴² *Ibid.* There are some variants of the ‘organising’ model that argue that the only purpose of organising workers must be to encourage them to exercise power by going on strike, but I think this is too narrow a conception: see JANE MCALEVEY, *NO SHORTCUTS: ORGANIZING FOR POWER IN THE NEW GILDED AGE* (2016).

⁴³ Moyer-Lee and Chango Lopez, *supra* note 32; Però, *supra* note 3.

⁴⁴ 3 Cosas means ‘3 issues’—these workers were fighting for three demands: annual leave, sick pay, and adequate pensions.

⁴⁵ Moyer-Lee and Chango Lopez, *supra* note 32.

⁴⁶ See ss 219-246 *Trade Union Labour Relations Consolidation Act 1992*.

⁴⁷ Ioannis Lianos, Nicola Countouris & Valerio De Stefano, *Re-thinking the Competition Law/Labour Law Interaction: Promoting a Fairer Labour Market*, 10 EUROPEAN LABOUR LAW JOURNAL 291-333 (2019).

⁴⁸ Moyer-Lee and Chango Lopez, *supra* note 32.

in protests to apply pressure on employers. Described variously in the mainstream press as “jubilant, noisy, confrontational and uncompromising,” protests also provide indie unions with an opportunity to gather with allies, gain the attention of those passing by, and raise the union’s media profile.⁴⁹ At times, the protests have been more disruptive than festive.⁵⁰

The fourth distinctive feature of the indie unions is their commitment to community organising. As organising within workplaces began to become more difficult due to employer hostility, unions started to realise that the dense network of relationships that workers enjoyed outside the workplaces could prove strategically useful. Since about 2001, unions in the UK have made a discernible effort to leverage these social and spatial networks.⁵¹ Some of the most high-profile efforts have been Unison’s involvement with Citizens UK to campaign for a living wage, the Trade Union Congress’ funding of various union-community projects, and the establishment of Unite’s community membership department.⁵² These three cases show that there are many dimensions to the notion of community organising. Community organising may mean working in the community to recruit more members, working with community groups to exert new forms of power against employers, or working in partnership with community organisations on broader social justice campaigns. The indie unions’ embrace of community unionism straddles all three dimensions. Activists from the IWGB, for instance, have participated in Latin American community groups such as Coalition of Latin Americans in the UK, fought alongside community allies to apply pressure on employers (e.g. during 3 Cosas campaign), and worked on broader issues such as the campaign for a living wage.⁵³ Community unionism has much in common with ‘social movement unionism’, which is a term that is more popular in the United States.⁵⁴

It is important to point out that these different strategic orientations are often intersecting. For example, a union dedicated to organising new members might consider reaching out to migrant communities. Similarly, democratic unions might be more likely to engage in confrontational tactics since the interests of a comfortable elite no longer dominate the agenda. The key question posed by the IWGB is why would a radical union dedicated to organising migrant workers in the workplace and the community be so committed to bringing strategic litigation? We can turn to the sociolegal study of law and social movements to gain some insight. But before we can begin to answer this question, we must first examine the forms of legal action brought by the IWGB.

The IWGB’s litigation strategy

The IWGB has brought a range of legal actions, but the most significant cases have sought to obtain ‘worker’ status for those engaged in the ‘gig economy’. ‘Digital work

⁴⁹ Staton, *supra* note 4.

⁵⁰ Author Unknown, *Nottingham Deliveroo Riders Protest PR Bus*, PUNCTURE, May 1, 2019, <https://notesfrombelow.org/article/puncture-2> (last visited Nov 24, 2020).

⁵¹ Jane Holgate, *Community Organising in the UK: A “New” Approach for Trade Unions?*, 36 ECONOMIC AND INDUSTRIAL DEMOCRACY 431-455 (2013).

⁵² *Ibid.*

⁵³ Moyer-Lee and Chango Lopez, *supra* note 32.

⁵⁴ KIM MOODY, *WORKERS IN A LEAN WORLD: UNIONS IN THE INTERNATIONAL ECONOMY* (1997); RICK FANTASIA, KIM VOSS & PROFESSOR OF SOCIOLOGY KIM VOSS, *HARD WORK: REMAKING THE AMERICAN LABOR MOVEMENT* (2004); Michael Schiavone, *Moody’s Account of Social Movement Unionism: An Analysis*, 33 CRITICAL SOCIOLOGY 279-3-309 (2007). Although the term ‘social movement unionism’ generally connotes both an orientation to organising and working outside the workplace.

intermediaries, such as Uber and Deliveroo, have exploited the austerity and hostile environment policies discussed previously to expand rapidly, alarming some observers.⁵⁵ Many of the legal rights and entitlements enjoyed by those who work in the UK are predicated upon them being classified as ‘employees’ for the purposes of a variety of statutes that bestow various legal entitlements, such as the *Employment Right Act 1996*, *National Minimum Wage Act 1998*, *Working Time Regulations 1998* and the *Equalities Act 2010*. Those classified as ‘self-employed’ (also known as ‘independent contractors’) are assumed to be engaged in running a business, and therefore, entitled to none of the statutory protections. A small subset of ‘self-employed’ workers are deemed ‘workers’ and provided with a more limited set of employment rights than those granted to employees. A complicated body of case law determines whether someone engaged in work falls within the employee, worker, or purely self-employed categories, with important consequences for their legal entitlements. For example, an ‘employee’ can contest the termination of their employment via the unfair dismissal regime (assuming that they have had 2 years of continuous service), whilst a ‘worker’ cannot. Workers nevertheless are entitled to a minimum wage, regulations prescribing maximum hours of work, and access to certain collective bargaining rights. Gig economy enterprises strenuously deny that their drivers and riders can be anything other than self-employed contractors.

The IWGB has been involved with two major cases relating to employment status.⁵⁶ The first case was brought by Uber drivers led by Yaseen Aslam and James Farrer who argued that they should be treated as ‘workers’ within the meaning of s 230(3)(b) of the *Employment Rights Act*, reg 36(1) of the *Working Time Regulations 1998*, and s 54(3) of the *National Minimum Wage Act*. Such a characterisation would have entitled Aslam and Farrer to minimum wage for all hours logged on to the app (not simply the time spent driving passengers). At first instance, the Employment Tribunal (ET) held that the reality of the relationship between the drivers and Uber, rather than the written contractual provisions, determined that the drivers were workers.⁵⁷ On the issue of working time, the ET endorsed a fact-specific approach to determining entitlement to pay on the basis of when the drivers might hold themselves out to be able and willing to accept driving assignments. This decision was upheld on appeal some 13 months later by the Employment Appeals Tribunal.⁵⁸ A further appeal to the Court of Appeal, which turned on a methodological point about whether the court should give primacy to the written contract in determining the terms of the actual contract or the practical realities of the working relationship, resulted in a split decision in favour of the drivers.⁵⁹ Uber appealed the matter to the Supreme Court and the appeal was dismissed on 19 February 2021. In doing so, the Supreme Court largely upheld the ET’s original decision—that is, the reality of the

⁵⁵ STATISTICAL SERVICES AND CONSULTANCY UNIT, *Platform Work in the UK 2016-2019* (2020). For critical commentary in the UK, see JEREMIAS PRASSL, *HUMANS AS A SERVICE: THE PROMISE AND PERILS OF WORK AND IN THE GIG ECONOMY* (2018).

⁵⁶ These cases have been appealed to higher appellate courts, and therefore, their law-making potential is significant. However, there have been other cases involving employment status as well, but these have not received the same degree of attention due to their application to workers not engaged in the gig economy. On the application of employment status to another category of marginalised worker—exotic dancers—see Katie Cruz, *Dancers are Workers: Nowak v Chandler Bars Group Ltd and the History of Dancer Organising in London*, UK LABOUR LAW BLOG (2020), <https://uklabourlawblog.com/2020/04/30/dancers-are-workers-nowak-v-chandler-bars-group-ltd-and-the-history-of-dancer-organising-in-london-by-katie-cruz/>.

⁵⁷ *Aslam v Uber BV* [2017] IRLR 4.

⁵⁸ *Uber BV v Aslam* [2018] IRLR 97.

⁵⁹ *Uber BV v Aslam* [2019] ICR 845. For an analysis of how the courts should resolve this methodological point in a manner that gives effect to the purpose of worker-protective legislation, see Michael Ford & Alan Bogg, *Between Statute and Contract: Who is a Worker?*, 135 LQR 347-353 (2019)..

relationship took precedence over contractual chicanery, and that the level of control exercised by Uber over the drivers pointed to their status as ‘workers.’⁶⁰ Whilst the matter before the ET was funded by the GMB, the remaining litigation was also supported by counsel engaged by the IWGB.⁶¹ Barristers, working on a pro bono basis, have been instrumental in advancing employment status litigation. As well as instructing barristers through solicitors, the former General Secretary of the IWGB, Jason Moyer-Lee, holds a licence from the Bar Standards Board, entitling him to directly instruct barristers acting in a pro bono capacity.⁶²

The second employment status matter related to a claim by the IWGB to be recognised as the bargaining agent for a group of Deliveroo riders in London. Deliveroo is a platform food delivery company founded in London in 2013. The request by the IWGB was rejected by the firm on the basis that the riders were not ‘workers’ for the purposes of the statutory recognition process contained in Schedule A1 of the *Trade Union and Labour Relations (Consolidation) Act 1992*. If Deliveroo’s contention that the riders were self-employed was upheld, Deliveroo would have no legal obligation to engage in bargaining with the IWGB, and in fact, to reach an agreement could result in the union falling foul of domestic restraint of trade rules and EU competition law.⁶³ The case ultimately turned upon whether the riders were required to provide personal service or whether they could substitute another. The Central Arbitration Committee held that riders could allow others to use their account, although this rarely occurs in practice, and therefore, the riders were not workers.⁶⁴ The decision has come in for criticism from those who claimed that the CAC did not adequately take account of the importance of European Convention of Human Rights obligations regarding the freedom of association of riders.⁶⁵ The IWGB sought judicial review of this decision on this basis, but this claim failed because the High court held that freedom of association rights in the ECHR only applied to employees.⁶⁶

Practically speaking, employment (and to a more limited extent, worker) status operates as a gateway and determines whether the person in question enjoys a set of important legal rights. Nevertheless, it is clear that some workers in the gig economy feel a deep sense of ambivalence towards employment status. Careful ethnographic work done with migrant workers engaged as taxi and Uber drivers in San Francisco has found that drivers derived social meaning from being described as independent contractors.⁶⁷ This research found that for the largely-immigrant Uber drivers, being classified as an independent contractor signified freedom and the ability to attain some measure of social mobility

⁶⁰ *Uber BV and Ors v Aslam and Ors* [2021] UKSC 5.

⁶¹ Yaseen Aslam & Jamie Woodcock, *A History of Uber Organizing in the UK*, 119 *THE SOUTH ATLANTIC QUARTERLY* 412-421 (2020).

⁶² Peter Oldham QC, *In the Eye of the Storm*, *COUNSEL MAGAZINE*, <https://www.counselmagazine.co.uk/articles/the-eye-of-the-storm> (last visited Nov 24, 2020).

⁶³ Mark Freedland & Hitesh Dhorajiwala, *UK Response to New Trade Union Strategies for New Forms of Employment*, 10 *EUROPEAN LABOUR LAW JOURNAL* 281-290 (2019).

⁶⁴ *IWGB and Roo Foods Ltd T/A Deliveroo*, TUR1/985 (2016). The motivations for why a rider might allow another to use their account varies between those who lease their account for a small fee when they are not working, and others who want to show solidarity with those without the proper authorisation to work in the UK.

⁶⁵ Joe Atkinson & Hitesh Dhorajiwala, *Note- IWGB v RooFoods: Status, Rights and Substitution*, 48 *INDUSTRIAL LAW JOURNAL* 278-295 (2019)..

⁶⁶ *R (The IWGB) v Central Arbitration Committee* [2018] EWHC 3342 (Admin).

⁶⁷ Veena Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities*, 105 *CALIFORNIA LAW REVIEW* 101-159 (2017).

through an entrepreneur identity; these drivers were not convinced of the benefits of an employee identity with its elegiac promise of a return to a past with better working conditions, given the racism that they had suffered even in this period. Holding out hope for the autonomy offered by self-employment is not the same thing as saying that Uber drivers are satisfied with their existing work arrangements. Whilst, similar ethnographic work has not been undertaken in the UK context to the best of my knowledge, there is some evidence that UK gig economy workers also report a preference for retaining the autonomy permitted by self-employment, such as choosing when they work.⁶⁸ The IWGB have sought to square this circle by pursuing worker status for its members rather than employee status, believing that this affords workers both freedom they desire and the protection they need.

To understand the IWGB's dogged pursuit of worker status in the face of members' ambivalence, we need to consider the ways in which the legal claims brought by the IWGB contribute to its political work. By political work, I mean tasks such as recruiting workers, attempting collective negotiations with employers, preparing workers to take strike action, seeking out allies, and launching campaigns outside the workplace. It seems to me that the IWGB's litigation strategy has operated alongside its political action, complementing rather than substituting this work. Whilst it may be possible that these twin strategies have been developed and operationalised in separate silos, this does not seem plausible given the organisation's small size and commitment to member empowerment. In addition to the legal work described above, the IWGB have made significant efforts to organise Deliveroo riders to take strike action in cities such as London, Brighton, Bristol, Birmingham and Sheffield, which had the effect of shutting down the functioning of the app for a number of hours in these localities.⁶⁹ These actions have also been supported by other indie unions, such as UUV. If it is the case that the IWGB's legal and political strategies operate in tandem and contribute to each other, the pressing question is in what way does the former promote the latter? The legal mobilisation literature may provide some answers.

Employment status litigation, collective identity, and class consciousness

Analytical frameworks contained in the legal mobilisation literature open up new vistas for thinking about the relationship between law and politics in contemporary British trade unions. My particular interest in this chapter is analysing how the legal mobilisation literature helps us uncover the precise mechanism through which litigation can help change constituents from passivity to bold action. Whilst being generally sceptical of rights as a tool for social transformation, Stuart Scheingold's 1974 analysis of the rights-based strategies of movements is one of the earliest articulations of how rights language can still serve as an important movement building resource.⁷⁰ Scheingold's contribution was to show that rights had a symbolic quality—as a set of signs, symbols, values, and discourses—that social movement actors could draw upon to increase their ranks and mobilise their members. Subsequent scholars have developed this insight in various ways. For example, Michael McCann demonstrated that the Supreme Court's decision in *Country of Washington v Gunther*⁷¹ had a catalysing effect on the movement by providing women who would go on to establish the pay equity movement with a frame for understanding

⁶⁸ See JASON MOYER-LEE & OTHERS, *Dead on Arrival: The IWGB's Reply to the Taylor Review on Modern Employment Practices*, www.iwgb.org.uk, para 9.

⁶⁹ CALLUM CANT, *RIDING FOR DELIVEROO: RESISTANCE IN THE NEW ECONOMY* (2019).

⁷⁰ STUART A. SCHEINGOLD, *supra* note 27.

⁷¹ 452 U.S. 161 (1981).

existing injustices, raising hopes, and illuminating a path forward.⁷² In a similar vein, Helena Silverstein showed that litigation provided animal rights activists with a resource to make meaning, and in the process, influenced their self-understanding and motivated action.⁷³ The late Sally Engle Merry argued that rights can allow social movements to “reframe” problems in such a way as to spur action.⁷⁴ Many of these theories are drawn from studies conducted in the United States, which provides plentiful examples of social movements enamoured with the potential of liberal legalism. But it would be a mistake to see social movements turning to the law as simply an American phenomenon, and a number of scholars have made a cautious case for the transplantation of these analytical frames to the UK context.⁷⁵

The key question for us becomes how litigation can change the self-understanding of migrant workers, who make up the bulk of the IWGB’s membership, to prompt them to engage in political activity. Here the legal mobilisation literature is only partially helpful because it fails to clearly disentangle and articulate the precise mechanisms by which workers’ subjectivity and collective identity can change as a result of legal action. Looking to combine poststructuralist and materialist theorisation of the self, Joanne Conaghan explains that subjectivity refers to the way in which social signification and materiality interact to produce individual consciousness as agents with free volition.⁷⁶ Thinking carefully about subjectivity formation is key to understanding the role that litigation can play in promoting action. Collective action does not simply arise out of the fact that workers are engaged in the production process in a similar way, and therefore, share a set of objective interests. For a start, the very notion of what is in one’s interests is refracted through an individual’s subjective experience. We see this quite clearly with Uber drivers who may see their interests as diverging from their fellow drivers on account of their entrepreneurial identity. Secondly, workers’ subjectivity is formed through experiences both inside and outside the workplace. It is simply not the case that people’s working lives represent the boundaries of meaning for them, and this might particularly be the case for migrant workers.⁷⁷ Struggles faced outside the workplace, and the practice of building bonds of solidarity with others to overcome these challenges, will often form crucial dimensions of an individual’s political subjectivity. Trade unions that seek to organise migrant workers in ways that fail to recognise the complexity of subjectivity formation runs the risk of failure.

Armed with this understanding of subjectivity, we can begin to discern how employment status litigation might work to create trade union members who are willing to organise in their communities, engage in strikes, and join protests. In workplaces marked by various divisions created by the interplay of legal and social forces, employment status litigation allows a unified employee subjectivity to emerge to the fore. It is worthwhile taking a moment to think about the many diverse subjectivities present in the modern workplace, which increasingly may even not be spatially bounded. Legal categories such as

⁷² MCCANN, *supra* note 29, Ch. 3.

⁷³ SILVERSTEIN, *supra* note 31..

⁷⁴ SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* (2006).

⁷⁵ See, e.g., Lisa Vanhala, *Is Legal Mobilization for the Birds? Legal Opportunity Structures and Environmental Nongovernmental Organizations in the United Kingdom, France, Finland, and Italy*, 51 *COMPARATIVE POLITICAL STUDIES* 380-412 (2018); COLLING, *supra* note 26. See also discussion in Part 1.

⁷⁶ Joanne Conaghan, *The Collusion of Law and Gender in the Construction of Working Subjects*, in *CAMBRIDGE COMPANION TO GENDER AND LAW* (Stéphanie Henneute-Vauchez & Ruth Rubio eds., 2021).

⁷⁷ Michael Piore has argued that one reason that migrant workers endure harsh working conditions is their greater temporal and spatial horizons: MICHAEL J. PIORE, *BIRDS OF PASSAGE: MIGRANT LABOR AND INDUSTRIAL SOCIETIES* (1979).

“employee”, “independent contractor”, “temporary”, and “illegal” operate to create a complex set of subjectivities in the workplace. The capacity for legal categories to constitute subjectivity and influence social relations has been articulated by those who have argued for the constitutive power of law.⁷⁸ These legally formed identities in the workplace exist alongside social identities, such as ethnicity, gender, and sexuality. The legal and social can interrelate in all sorts of complicated ways as we have seen with the immigrant Uber drivers who profess to prefer a contractor status given the racism that they had experienced in their working lives even whilst covered by the ostensible protection of employee status.⁷⁹ When unions, such as the IWGB, go to court to assert employee status for their members, these actions help these workers see themselves as rights-bearing persons deserving of dignity and fair treatment.⁸⁰ Moreover, the assertion of this common identity in fractured workplaces has the potential to partially overcome distinctions caused by the operation of legal and social differentiation. Just to be clear, I am not arguing that these other identities disappear, replaced by an employee subjectivity that eclipses all else. Subjectivity is a mutable and contingent process, and in moments of struggle, identities can be reformulated in novel and productive ways through a variety of strategies, including litigation.

Shifting the subjectivity of workers to form a common identity is essential for unions to function, particularly this new generation of unions committed to political action. In their seminal article on the logics of collective action, German sociologists Claus Offe and Helmut Wieselth identified that one of the main challenges facing unions is organising workers with a diverse set of interests: “*This multitude of needs of ‘living’ labor is not only comparatively more difficult to organise for quantitative reasons, but also for the reason that there is no common denominator to which all these heterogenous and often conflicting needs can be reduced so as to ‘optimize’ demands and tactics.*”⁸¹ Arguably, this situation is all the more acute in the case of the IWGB’s membership because these workers hail from all corners of the world and face a myriad of issues relating to housing, fair credit practices and access to public services. Offe and Wieselth argued that unions can overcome this barrier by articulating a collective identity. It is possible that employment status litigation contributes by providing impetus for workers to start to see themselves as being part of a common project. In the absence of this collective identity, the political work of the IWGB—organising, engaging in industrial action, and participating in protests—cannot take place, and in contrast to the more bureaucratic modes of operation of the more established unions, indie unions draw more frequently on these forms of collective activity. This makes cohering a collective identity all the more important. Of course, only forms of collective action are capable of creating real and ongoing “cultures of solidarity”, but employment status litigation may provide the initial momentum for this expression by bridging seemingly insuperable differences.⁸²

However, a successful strategy for organising migrant workers will combine this quest for unity within the workplace with a recognition of their difference without. The workplace in Offe and Wieselth conceptualisation is monotonously monocultural, and there is

⁷⁸ Karl Klare, *Law-Making as Praxis*, 40 *TELOS* 123-35 (1979); John Brigham, *The Constitution of Interests: Institutionalism, CLS, and New Approaches to Sociolegal Studies*, 10 *YALE JOURNAL OF LAW & THE HUMANITIES* 421-461 (1998).

⁷⁹ Dubal, *supra* note 67.

⁸⁰ Alan Bogg, *Employment Status in the Social Democratic Constitution: Law and Politics*, in *THE CONSTITUTION OF SOCIAL DEMOCRACY* (Alan Bogg, Jacob Rowbottom, & Alison L. Young eds., 2020)..

⁸¹ Claus Offe & Helmut Wieselth, *Two Logics of Collective Action: Theoretical Notes on Social Class and Organizational Form*, 1 *POLITICAL POWER AND SOCIAL THEORY* 67-115 (1980), 75.

⁸² RICK FANTASIA, *CULTURES OF SOLIDARITY: CONSCIOUSNESS, ACTION, AND CONTEMPORARY AMERICAN WORKERS* (1989).

evidence that organising migrant workers simply as workers might not work.⁸³ We cannot assume that domination in the workplace is the most important concern for most migrant workers. Paul Gilroy has made a strong case for the fact that the political struggles of racialized people regularly exceed the workplace.⁸⁴ For these workers, inequalities in health and housing, negative experiences with police and immigration officials, and overt and covert forms of racism from members of the community, may be equally, if not more, significant. We see the IWGB attempting to strike this balance in their litigation strategy. As well as bringing employment status litigation to reinforce the idea that all workers within a workplace share a common set of objectives, the IWGB has also initiated litigation that speaks to the specific experiences of an immigrant workforce. For example, the IWGB's recent decision to lodge a race discrimination claim against the London Mayor for his decision to impose a congestion charge on the mainly immigrant minicab drivers (while exempting the majority white black-taxi workforce) represents an attempt by the IWGB to negotiate the tension between sameness and difference. More recently, the IWGB has been at the forefront of challenging the disparate way that the Coronavirus pandemic has affected migrant workers. In an intervention in the High Court, the IWGB made the case against the millionaire Simon Dolan's attempt to prematurely end lockdown.⁸⁵ It argued that racialized workers are disproportionately represented in low-paid and precarious sectors, and ending lockdown early showed a callous disregard for their lives.

As well as helping cohere a collective identity, employment status litigation may help grow class consciousness. Employment status is Janus-faced, tantalisingly holding out the possibility of better treatment whilst at the same time reinforcing an employee's subordination at the hands of their employer. Being an employee means being subject to the unilateral decision-making of an employer who has the legal right to require an employee to deploy their labour power in a way of their choosing, provided that their request is not unlawful or unreasonable. This finds expression in the duty of obedience, cooperation and care, which is implied into every contract of employment.⁸⁶ In fact, the exercise of this control is an element of the common law test to determine whether a worker is an employee.⁸⁷ The philosopher Elizabeth Anderson has described the workplace as a form of private government, a particularly tyrannical one at that.⁸⁸ Recasting the working relationship in terms of employment provides workers with a compelling narrative that identifies a proximate source for their present misery. The workers of enterprises such as Uber and Deliveroo suffer an assortment of grievances in their daily working lives—unreasonable customer ratings, unilateral changes to the pay structure, and the imposition of new rules that curtail autonomy, all mediated by an impersonal app. In this environment, workers can find it difficult to discern from where their problems emerge. Claiming employment status works to identify the employer as the source of their grievances, clearing away the obfuscation created by an impersonal algorithm. An employee subjectivity permits union members to see their common interests pitted *against* those of their employer, which according to EP Thompson's classic formulation, is

⁸³ Alberti, Holgate, and Tapia, *supra* note 38.

⁸⁴ PAUL GILROY, "THERE AIN'T NO BLACK IN THE UNION JACK": THE CULTURAL POLITICS OF RACE AND NATION (1987).

⁸⁵ Unknown, *supra* note 24.

⁸⁶ See, e.g., *Morrish v Henlys (Folkestone) Ltd* [1973] ICR 482.

⁸⁷ See, e.g., *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497.

⁸⁸ ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) (2017).

what allows for the development of a collective identity infused with class consciousness.⁸⁹

Conclusion

Not all union legal strategies are driven by the same objectives, implemented with the same vigour, received by the courts in the same manner, and combined with more traditional forms of union activity with the same efficacy. Close and sustained study of the litigation strategies of unions is a worthwhile endeavour. In this chapter I have sought to analyse how one new union in the UK, the IWGB, has engaged with litigation. The IWGB is an interesting case study because of its activist orientation, commitment to organising low-waged migrant workers, and internal democracy, which makes it particularly apposite for studying using legal mobilisation frames. I have argued that the IWGB's litigation is closely linked to its political work because it allows political subjectivity to emerge, which contributes to overall movement building and action.

The conclusions drawn in this chapter are based on detailed examination of the IWGB's political work, analysis of the legal cases, and close reading of relevant literatures. There are few public accounts from the workers themselves. It is clear that the inquiry cannot end here. To properly appreciate the interaction of legal and political movement strategies, empirical work is necessary. In the case of the animating concern of this chapter—the evolution of worker subjectivity—qualitative study that tries to get at how workers see themselves and their path to activism will be necessary. There are a variety of types of methodologies that might be adopted, for example, the narrative biographical method which asks interview subjects to identify and discuss 'turning points' in their development that caused them to see the world in profoundly different ways.⁹⁰ The postulates raised in this chapter will help provide the framework for this empirical enquiry, but their confirmation or dismissal will ultimately depend on listening to the voices of affected workers.

⁸⁹ EP Thompson's formulation of class consciousness posits that workers, through struggle, develop a sense of themselves as having a set of interests in common *and against* the interests of other classes: E.P. THOMPSON, *THE MAKING OF THE ENGLISH WORKING CLASS* (1968), 887-8.

⁹⁰ See, e.g., NORMAN K DENZIN, *INTERPRETIVE BIOGRAPHY* (1989); JOHN W CRESWELL, *QUALITATIVE INQUIRY & RESEARCH DESIGN: CHOOSING AMONG FIVE APPROACHES* (2 ed. 2007).