IER
Institute of Employment Rights

HSE and Covid at work: a case of regulatory failure

edited by Phil James

This publication represents the collective work of a team of health and safety experts brought together by IER to review the UK's response to the Covid-19 pandemic, assess the lessons to be learnt and identify areas of weakness that need further attention. It is IER's intention to follow up this work with a more detailed analysis of the UK's health and safety framework, based on discussions with trade unions, health and safety reps, non-organised workers, enforcement bodies and safety specialists. On the fiftieth anniversary of the Robens Report of 1972, which, despite changes in workplace practices, remains the cornerstone of our health and safety laws, the IER will publish its findings and recommendations.

ISBN
978-1-906703-50-9
February 2021

published by the Institute of Employment Rights
4th Floor, Jack Jones House, 1 Islington, Liverpool, L3 8EG

e-mail
office@ier.org.uk
www.ier.org.uk

Design and layout by Upstream (TU)
www.upstream.coop

Printed by Rap Spiderweb (www.rapspiderweb.com)

£8 for trade unions and students
£30 others

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CHAPTER ONE

introduction

Covid-19 was declared a pandemic by the World Health Organisation (WHO) on 11 March 2020. Since then, the world has seen massive disruption to social and economic life as governments, with varying degrees of determination and success, have struggled to contain its cause – the SARS-CoV-2 virus – while supporting the functioning of their economies. In the UK, life continues to be disrupted by the devastating consequences of the pandemic and has far from returned to 'normal'. Indeed, it remains an open question how much of the old 'normality' will ever return.

From the outset of the pandemic, workplaces were recognised as significant locations for the transmission of the virus.[1] Yet, perversely, while such risks were acknowledged, they were also simultaneously downplayed, as the UK government sought to address the public health emergency while keeping the British economy functioning. The resulting failure to control the spread of infection through decisive actions have been widely and repeatedly reported. This failure begs serious questions about the wisdom and effectiveness of the policies adopted to control and prevent the spread of the virus, failures particularly apparent in relation to the regulation of workplace safety and health.

In the first UK lockdowns it was declared that only essential work was to be undertaken. And even this was required to be undertaken at home wherever possible. At the same time, what constituted essential work was widely disputed. For example, in England the UK government's decision to keep much of the construction industry open was subject to considerable criticism. Then from July 2020, the government called for people to return to their places of work, despite mounting evidence of the risks involved. All too predictably, the consequences of this action were confirmed when, further outbreaks of infection were reported across the country, leading, among other things, to a reinstatement of a work from home recommendation in September 2020.[2]

Meanwhile infection rates continued to rise. Throughout this period, the actions of the Health and Safety Executive (HSE), as the agency responsible for securing compliance with the regulatory control of

workplace exposures, could hardly be said to have assumed a high profile. Indeed, some of its actions could be interpreted as actually downplaying the role of work in facilitating the spread of Covid-19. For example, its guidance indicated that cases of Covid-19 among workers did not have to be reported under the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013 (RIDDOR) if their jobs did not entail dealing with infected people.[3] Similarly, the HSE's role in the reapproval of outdated supplies of personal protective equipment was criticised in press reports and the suggestion made that its position was subjected to political pressure. Indeed, its low profile as regulator during the onset of the pandemic led to suggestions that it had gone AWOL.

This picture has existed alongside evidence suggesting that occupational factors help explain the disproportionate vulnerability of BAME groups to Covid-related deaths, as well as the occurrence of outbreaks of infection in particular localities, such as Leicester. It also exists alongside a series of analyses by the Office of National Statistics (ONS) highlighting how some groups of occupations face statistically higher risks of death involving Covid-19 and Public Health England (PHE) data pointing to a strong association between prior 'workplace or education' activity and the onset of symptoms among people testing positive for Covid-19.[4]

This is not to say that the issue of workplace safety has not received official attention. Most notably, the UK government has since May 2020 produced a series of sector-based guides providing advice to employers on making workplaces 'Covid-secure'. Produced in consultation with the HSE, these are, however, far from perfect documents. They, for example, have no direct legal standing, in contrast to the various emergency laws introduced to restrict the movement and gathering of people. In addition, as will be explored in more detail later, they share two common and disturbing features: a systematic understating of the statutory obligations of employers to protect workers from contracting Covid-19, including legal consequences arising from failure to comply with them; and an almost complete absence of any mention of employee rights to representation and consultation on workplace Occupational Safety and Health (OSH) risks such as represented by Covid-19.

Such a downplaying of workplace risks and the duties of employers to manage them raises some profound concerns. These reach beyond the lamentable performance of the HSE in securing compliance with work safety and health standards in the face of the pandemic. Indeed,

they raise a host of questions about the governance, resourcing and leadership of the regulator and its role in regulating workplace risks at a time of national crisis. In fact, the HSE's performance raises the further question of whether it can any longer be viewed as a trusted regulator capable of protecting the interests of working people, independent of the shifting, politically driven agendas of government. Even more widely, the evidence of this failure in the face of the pandemic also casts doubt on the adequacy of the regulatory system in place in the UK to protect workers from harm.

This short report, therefore, aims to use lessons learned from Covid-19 to pose some important questions about the way in which work health and safety is currently regulated and the changes needed to update our laws and practices, notably with regard to the role of the HSE. The world of work is now very different to the one that informed the Report of the Committee of Inquiry into Safety and Health nearly 50 years ago. That Inquiry led to the introduction of the Health and Safety at Work Act 1974, which remains the bedrock of our health and safety laws and which is in dire need of updating.

The analysis that has led us to this position, as presented in this report, progresses through four stages. Initially, brief attention is given to the origins and transmission of Covid-19, international guidance on the protection of workers from infection and evidence shedding light on how far it has been effectively managed at work in the UK. Then, we outline the legal obligations imposed on employers to deliver and manage this protection. Following this important contextualisation, we examine three key aspects of HSE activity during the pandemic:

- the nature of HSE guidance on managing Covid-19 in the workplace
- the advice it has provided on the role of worker representation and consultation in developing protective measures in the workplace; and, finally,
- the actions it has taken to monitor and enforce employer compliance with their protective legal duties.

Finally, the report confirms that HSE's performance during the pandemic has hardly been that of a credible regulator. However, it further concludes that this poor performance during the time of a national health crisis has drawn attention to long-standing and deeply embedded problems surrounding the HSE's resourcing, the philosophy that informs its regulatory approach, the extent to which it both supports and is a focus of democratic accountability, and its

current constitutional standing. These conclusions therefore lead us to recommend the urgent establishment of a public inquiry charged with undertaking a robust examination of the nature and support for future regulation of work safety and health in the UK.

CHAPTER TWO

Covid and the workplace

To place the role and performance of HSE during the Covid-19 pandemic in context this chapter provides the reader with brief background information on (a) the origins of Covid-19 and its transmission associated risks, (b) the policies and practices that have been internationally advocated to control those risks and (c) how far employers in the UK appear to have adequately controlled them.

Covid-19: origins and transmission

Covid-19 is a disease caused by infection with the SARS-CoV-2 virus. This novel virus, a zoonotic pathogen hosted by bats, has, as readers will only be too aware, had devastating effects on the world's population. By 1 December 2020, 63 million had been infected with, and 1.5 million had died from, Covid-19, with 1.6 million and 59,000 being the respective figures for the UK.

The Covid-19 pandemic was not an inevitable development. Rather, its emergence is explicable by reference to capital-led deforestation and expanding markets for exotic foods, and by its dispersion through regional, then global, supply chains and production and travel networks.[5] Circuits of capital associated with agribusiness then have acted as the broadest nexus for diffusion. Meanwhile, capitalist work organisation, labour processes and employment structures, in tandem with the profound regulatory and public health deficits characteristic of neo-liberal governance, have rendered workers vulnerable to a deadly virus that is more highly infectious than SARS-CoV-1 or MERS.

Such vulnerability has been magnified by a misunderstanding of the relative significance of the modes of viral transmission. As exemplified by the World Health Organisation (WHO), whose guidance remained unchanged for six months after the pandemic was declared on 11 March 2020, the preoccupation was initially with direct contact through such means as shaking hands, indirect contact with contaminated objects (fomites) or infection directly from large droplets resulting from coughing and sneezing in close proximity. Accordingly, preventative measures fixated on handwashing or social distancing, notwithstanding that some recommendations (notably

the WHO's 1-metre rule) lacked scientific justification and were dangerously inadequate.[6] The transmission risk at 1-metre could be 2-10 times higher than at 2-metres.

Increasingly it has become clear that existing paradigms and control measures derive from outdated science that fails to acknowledge the salience of airborne transmission and how pathogen bearing particles should be located on a continuum of respiratory transmissibility infection, rather than classified on a rigid demarcation between infectious 'large' droplets and non-infectious 'small' ones. Accumulating laboratory and empirical evidence (e.g. Skagit choir, Guangzhou restaurant, Korean call centre) demonstrates that larger droplets linger longer and travel much further than previously thought and aerosol plume transmission, containing the highest particle concentrations, can travel 7-8 metres and remain suspended, like smoke, for many hours.[7] Closed and indoor environments have further been found to amplify secondary transmission by 18.7 times, according to a Japanese study.[8] This does not, however, mean that outdoor working environments are safe. One study shows that, in wind speeds of 4-15 km-an-hour, saliva droplets may travel six metres and leave construction workers, for example, vulnerable. In July, 240 leading scientists, consequently, urged the WHO to redress its neglect of airborne transmission.[9]

In short, it was clear from the outset of the pandemic that workplaces represented a very real location for the transmission of the SARS-CoV-2 virus. Furthermore, as evidence of the nature and scale of its airborne transmission has grown, so it has become increasingly clear that the risks of workplace infection are significantly greater than first thought.

protecting workers from Covid-19

Following the first workplace Covid cases reported in a Chinese market in Wuhan in 2019 and then the deaths of doctors treating Covid patients shortly afterwards, a number of effective key measures to prevent and control the virus were quickly identified and pursued around the globe in early 2020. In fact, the ILO and WHO had already prepared guidance on healthy and safe working during a pandemic.

These advocated policies and practices were as relevant to SARS-CoV-2 as they were to other coronaviruses and flu strains. They did not depend on new or sophisticated equipment or complex risk management systems. Rather, they incorporated basic and well

understood occupational health and safety measures that had been used for decades and were relevant to all groups of workers, not just healthcare ones. Measures included accurate risk assessments, the prevention of exposures at source or the removing of workers from likely sources of infection by such means as isolating and enclosing hazards, applying tried and tested ventilation solutions, using effective PPE, and employing hygiene and cleaning practices backed up by effective test, trace and isolate policies run by informed public health agencies.[10]

It was stressed that employers had to apply such measures under proper governmental oversight encompassing effective regulation, enforcement, inspection, and monitoring of workplaces by specialist occupational health and safety agencies. It was further stressed that these agencies needed to be properly resourced, funded and staffed and backed up by linked action by public health bodies to control community transmission. Finally, attention was drawn to the need for accurate recording and reporting of Covid cases.

Nevertheless, notwithstanding this guidance, the UK demonstrated early, extensive and continued failure to control the airborne and surface transmission of the virus: a failure that occurred at all levels – governments, private sector testing and tracing companies, regulators and some employers.

worker exposure to Covid-19

This failure has been graphically reflected in the very real risks of contracting Covid-19 faced by workers, both domestically and internationally. It has also, more specifically, been highlighted by evidence of employers all too often failing to adequately control the risks confronting their workers, not only in the UK but internationally.

Both white and blue-collar workers have been impacted by this failure of control. The findings of Taylor's survey of call centre workers, for example, point to potentially toxic effects from aerosol diffusion within sealed buildings, reliant on mechanical HVAC systems.[11] Meanwhile, meatpacking and processing plants have, in a number of countries, including the UK-experienced major Covid-19 infections. An estimated 30,000 workers having been affected across the US alone and in one outbreak in Gütersloh, Germany, 1,500 of 7,000 workers tested positive for Covid-19.[12] This last case also exemplified how workplaces can serve as epicentres of community outbreaks since it prompted the lockdown of 640,000 residents. Covid-19 has

therefore served to emphasise the crucial intersection of public and occupational health.

It has also become clear that certain groups of workers are particularly vulnerable to infection as a result of either working with infected people, such as in healthcare settings, or the public. The UK Office for National Statistics (ONS), for example, has analysed deaths from Covid-19 by occupation.[13] For males, increased mortality was found to be identifiable among 17 occupations, including taxi drives, security guards, bus/coach drivers, and so-called elementary workers.[14] For women, statistically higher rates were discerned amongst care or home care workers and sales and retail assistants. Of 17 occupations with increased death rates following lockdown, 11 had higher proportions of BAME workers, indicating how Covid-19 has reinforced social inequalities.

More widely, Covid clusters have emerged from one end of the country to the other in a range of industries and employment settings. Such clusters, for example, have occurred in the health sector, council departments, distribution centres, transport operations, colleges and universities, distribution centres, food processing plants, hospitality environments, call centres, and shops. Disturbingly, many of these clusters have not been documented by Public Health England (PHE) – a failure that has acted to compound official guidance which has severely limited the situations in which employers are required to report cases of Covid-19 infection to the HSE.[15]

These clusters point to widespread failures to control risks of airborne and surface transmission, as well as transmission across workplaces, notably for key and essential workers. Numerous examples have been identified of employers failing to produce 'suitable and sufficient' risk assessments or to share them with trade unions,while TUC survey findings have revealed widespread worker dissatisfaction with the arrangements put in place to protect them.[16]

Running parallel with these failures to control risk, NGOs, trade unions, researchers and professional bodies have therefore been constantly and carefully documenting Covid workplace risks and offering practical solutions to address them.[17] In doing so, they have emphasised Zero Covid strategies based on working at home,[18] with effective financial support if doing so, or if furloughed, to avoid virus transmission. Negotiated returns to work to ensure workplaces are Covid safe, not simply 'Covid secure', have also been stressed.[19] Where continued working on site was required, then the application

of tried, tested and effective controls such as distancing through the 2 metre 'rule', PPE, ventilation, cleaning, and reducing work numbers and track and line speeds have been promulgated to reduce contacts and aerosols.

conclusion

Work activities have been intimately connected to the spread of the SARS-CoV-2 virus and there was never any doubt that the Covid-19 pandemic constituted an occupational as well as public health emergency. Although knowledge of the mechanisms of its transmission has been developing, notably in terms of the role of airborne transmissions, well established policies and procedures relevant to the control of the virus already existed. Despite this, there have been major failures at all levels to control both its airborne and surface transmission.

These failures have led to the emergence of Covid-19 clusters across a host of different sectors and locations. It has also become clear that certain occupational groups have been particularly exposed to the risk of contracting and dying from the disease. There is consequently no doubt that failures of control have resulted in unnecessary fatalities.

These failures inevitably raise important questions about how they have been allowed to occur. In particular, they raise concerns about the adequacy of the legal framework for controlling such work-related risks and, more specifically, how it has been operationalised in relation to the Covid-19 pandemic by the HSE.

CHAPTER THREE

Covid-19 and health and safety laws

introduction

There is a substantial body of law governing health and safety at work that applies to the risks of contracting Covid-19 outlined in the previous chapter. This law consists of two strands; requirements imposed by the 'common law' (i.e. the law created by the judges, rather than by legislation) and requirements imposed by legislation (i.e. statutory law consisting of Acts of Parliament or regulations made under Acts of Parliament). It should also be noted that the government brought in additional legislation to require facemasks on public transport and, later, in shops (those permitted to open).

In summary, under the common law of negligence an employer owes a duty to take reasonable care of its workers and, to a degree, those who are not in its employment. In addition, under the Health and Safety at Work etc. Act 1974 (HSWA), an employer also owes general duties to ensure, so far as is reasonably practicable, the health, safety and welfare at work of its employees and of others who may be affected by the conduct of its undertaking, enforceable by criminal sanctions. More specific statutory duties relevant to Covid-19 are laid down in regulations made under the HSWA.

the common law

The common law has developed in tandem with health and safety legislation, establishing general principles which apply regardless of the legislation and filling gaps in the legislation.

The common law of negligence places an obligation on employers of workers to provide and maintain for the employee: a safe place of work, a safe system of work and safe and adequate equipment for the job. The employer is also 'vicariously liable' for negligent acts by its workers which cause injury to co-workers (and others). A failure to take all reasonable steps in these regards can entitle the worker to sue for damages if injured or, in the present context, contracting Covid-19, by reason of that failure. The common law also imposes some analogous duties on employers towards those, such as agency workers, who are subject to control by the employer or are practically

affected by the organisation of the workplace, even if they may not be strictly employees.

The common law of negligence has assumed a greater degree of importance since 2013 because, as from 1 October that year, the coalition government exempted businesses from civil liability for breach of the statutory duties in regulations made under the HSWA.[20] These duties are thus now only enforceable by means of the criminal law, since breach of them will be a criminal offence.

legislation

So far as statutory law is concerned, the most obvious requirements are those of the Health and Safety at Work etc Act 1974, the regulations made under it, and the Employment Rights Act 1996. Before moving on to review briefly these requirements, two problems surrounding them must be mentioned.

First, many of the Acts and Regulations cited below expressly confine the relevant employer's duties to 'employees' thereby excluding the self-employed and 'limb(b) workers' (i.e the intermediate category into which many gig workers fall) from protection. But in *R (IWGB) v Secretary of State for Work and Pensions*[21] it was established that for those health and safety statutory provisions which derive from EU law (as most are) the concept of 'employee' is broadened to include those in 'an employment relationship' i.e. one in which 'for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.' So now so-called 'limb (b) workers', some self-employed workers and those working through other arrangements, such as via personal service companies, are protected.

The other problem is that enforcement of the legislation is reliant on the criminal sanctions in HSWA and hence Improvement and Prohibition Notices served by the HSE and local authorities and prosecutions brought by them (because of the exemption from civil actions referred to above).

The HSWA 1974

This is the basis for UK health and safety law. The Act does not derive from EU law so that where it specifies a duty to 'employees' that duty is confined to employees. It imposes general duties in sections 2-7. The most significant provision is section 2 which states that 'It shall be the *duty of every employer to ensure, so far as is reasonably practicable,*

the health, safety and welfare *at work of all his employees*', a wide duty encompassing 'the *provision and maintenance of plant and systems of work that are, so far as is reasonably practicable, safe and without risks to health'*. The employer must also provide '*such information, instruction, training and supervision as is necessary to ensure, so far as is reasonably practicable, the health and safety at work*' of his employees and make and keep safe so far as is reasonably practicable '*any place of work under the employer's control*' including '*means of access to and egress from*' any place of work. The duty includes the '*provision and maintenance of a working environment for his employees that is, so far as is reasonably practicable, safe, without risks to health*, *and adequate as regards facilities and arrangements for their welfare at work'*.

The section also requires employers to consult safety representatives to promote and develop measures to ensure health and safety at work and to establish, in accordance with regulations made by the Secretary of State, a safety committee to keep health and safety measures under review.

Section 3 of the Act makes it the '*duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health* or safety.' Section 4 imposes duties in respect of non-employees who come into the place of work.

Section 33 makes it a criminal offence to breach any of the duties. Under sections 36 and 37 where a corporation is guilty, so may be directors and managers.

The Workplace (Health, Safety and Welfare) Regulations 1992

These regulations apply to places of work, which can include work as an employee or self-employed person (see section 52 HSWA). Moreover, because the regulations owe their origin to EU law, by reason of the *IWGB* case mentioned above, they should now apply to workers under the EU definition. The most Covid relevant regulations are: regulation 9 which requires that 'Every *workplace and the furniture, furnishings and fittings therein shall be kept sufficiently clean*'; regulation 10 which requires that '*Every room where persons work shall have sufficient floor area*, *height and unoccupied space*' from a health and safety perspective; regulation 17 which requires

safe circulation of pedestrians; and regulation 21 which requires readily accessible '*Suitable and sufficient washing facilities*'.

The Control of Substances Hazardous to Health (COSHH) Regulations 2002

Most of the duties in these regulations extend to those who are affected by an employer's work even if they are not employees (see regulation 3). In addition, they also derive from EU law and hence the *IWGB* case (above) extends their application beyond employees. The definition of 'substance hazardous to health' extends to biological agents, which includes replicating micro-organisms (regulation 2).

Regulation 6 prohibits an employer from carrying out work which is liable to expose any employees to any substance hazardous to health unless the employer has '*made a suitable and sufficient assessment of the risk created by that work to the health of those employees'*. Regulation 7 says that '*Every employer shall ensure that the exposure of his employees to substances hazardous to health is either prevented or, where this is not reasonably practicable, adequately controlled*.' The control measures involve design and use of work processes, ventilation systems and organisational measures, and suitable PPE '*where adequate control of exposure cannot be achieved by other means*'. Control measures also include reducing, to the minimum required for the work concerned, 'the *level and duration of exposure*, appropriate *general ventilation*, *appropriate hygiene measures including adequate washing facilities'*, and specifying appropriate decontamination and disinfection procedures.

Personal Protective Equipment Regulations 1992

The common law established that PPE is required to guard against reasonably foreseeable dangers in the workplace. The familiar measures against the foreseeable risk of Covid-19 fall into this category.

In addition, the PPE Regulations require that '*every employer shall ensure that suitable personal protective equipment is provided to his employees who may be exposed to a risk to their health* or safety *while at work except where and to the extent that such risk has been adequately controlled by other means which are equally or more effective*'. PPE is not suitable unless '*it is appropriate for the risk or risks involved, the conditions at the place where exposure to the risk may occur, and the period for which it is worn',* and it must fit

correctly and be '*effective to prevent or adequately control the risk or risks involved without increasing overall risk'*. It must be hygienic and only for use by one person. While the duties are stated only to apply to employees, because regulations were passed to implement EU law it appears they should be read as extending to 'limb (b)' workers following the *IWGB* case.

Management of Health and Safety at Work Regulations 1999

These regulations and the common law both require risk assessments to be made (in addition to the COSHH regulations above). The statutory requirements give effect to EU law and so should apply not just to employees by reason of the *IWGB* case.

Regulation 3 of the 1999 regulations specifies that '*Every employer shall make a suitable and sufficient assessment of (a) the risks to the health and safety of his employees to which they are exposed whilst they are at work; and (b) the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking*, *for the purpose of identifying the measures he needs to take …*'.

Those measures are to be applied in the following order: '(a) *avoiding risks*; (b) *evaluating the risks which cannot be avoided*; (c) *combating the risks at source*; (d) … (e) *adapting to technical progress; (f) replacing the dangerous by the non-dangerous or the less dangerous; (g) developing a coherent overall prevention policy which covers technology, organisation of work, working conditions, social relationships and the influence of factors relating to the working environment; (h) giving collective protective measures priority over individual protective measures; and* (i) giving *appropriate instructions to employees*.'

Regulation 5 requires the employer to undertake '*effective planning, organisation, control, monitoring and review of the preventive and protective measures*'. Regulation 6 requires the employer to appoint a competent person to assist. Thus, in relation to conducting a risk assessment, it must be conducted by someone competent to do it.

The Reporting of Injuries, Diseases and Dangerous Occurrences (RIDDOR) Regulations 2013

Regulation 9 of these regulations require that where, 'in relation to a person at work', the employer 'receives a diagnosis of … *any disease*

attributed to an occupational exposure to a biological agent,' the employer must report the incident in accordance with a procedure set out in the regulations. This includes Covid-19 and evidently is not confined to proof of contraction at work.

consultation with safety representatives

An employer is required to provide information to, and consult with, safety representatives appointed by a recognised trade union on questions of health and safety under the Safety Representative and Safety Committee Regulations 1977. The employer must also provide such facilities and assistance as safety representatives may reasonably require and allow them to inspect the workplace. Where no such representatives have been appointed, similar (but more limited) duties are owed to Representatives of Employee Safety elected under the Health and Safety (Consultation with Employees) Regulations 1996.

The Employment Rights Act 1996

Section 44 of the Employment Rights Act 1996 protects an 'employee' against being subject to a detriment for refusing to work in circumstances of danger which the employee '*reasonably believed to be serious and imminent and which he could not reasonably be expected to avert*'. There is a linked protection for employees who took 'appropriate steps' to protect themselves or others from persons in such circumstances. By section 100 of the Act, an employee who is dismissed under either of these provisions is deemed to be unfairly dismissed, and no qualifying period of continuous employment is necessary.[22]

These rights have their origin in EU law. The *IWGB* case was specifically concerned with these provisions and held that the right in section 44 (though not section 100) should extend to limb (b) workers, meaning that section 44 should be interpreted so far as is possible to protect such workers. But still there are significant limitations on the rights. It has been held, for example, that the rights do not extend to taking industrial action. This is a problem because the boundary between refusing to work in unsafe conditions and striking because of unsafe conditions is hazy.

conclusion

In the previous chapter it was observed that from the outset of the pandemic there was a recognition that workplaces represented a

potentially important forum through which the SARS-CoV-2 could be transmitted and Covid-19 contracted. It was further highlighted how reality in the UK has amply confirmed this in the form of outbreaks of the disease in workplaces across the country.

This chapter has in turn demonstrated that such outbreaks have occurred despite the existence of a very substantial body of law being in place to protect the health and safety of workers, including in relation to Covid-19. In doing so, it has served to bring to the fore questions regarding both the way in which this body of law has been applied and, more particular, what the HSE has been doing to ensure employer compliance with its statutory (and criminal) elements. The next three chapters now explore different aspects of this last question.

CHAPTER FOUR

HSE and managing Covid in the workplace

introduction

In this chapter attention is paid to the nature of the official advice that has been issued on managing Covid-19 at work and more particularly what it tells us about the approach that HSE has adopted towards detailing to employers what they need to do to protect workers from infection.

The HSE has contributed to the production of guidance on the management of Covid-19 in the workplace via two main avenues.[23] First, it has been consulted over the various guidance documents that have been published by the Department for Business, Energy & Industrial Strategy (BEIS). Secondly, it has produced two guidance documents of its own that in turn exist alongside other smaller pieces of Covid-related advice on its website, as well as, of course, a vast range of other more generic advisory material relating to the management of workplace risks.

In what follows, these two avenues of guidance are examined in turn. As will be seen, both are found to remarkably (and, arguably, misleadingly) downplay the legal obligations of employers to protect workers. In doing so they raise serious concerns regarding the willingness and capacity of the HSE to act as a credible regulator and one that is capable of adequately protecting the health and safety of those that it is intended to protect.

government guidance and the HSE

Since May 2020, BEIS has produced a series of guides providing advice to employers on making workplaces 'Covid-secure'. Currently there are 14 such guides covering different sectors and types of work, all of which have undergone numerous revisions since their original publication. Each contain a statement indicating that they have been produced by BEIS '*with input from firms, unions, industry bodies and the devolved administrations in Wales, Scotland and Northern Ireland, and in consultation with Public Health England (PHE) and the Health and Safety Executive (HSE)*'.

The HSE's involvement in the development of the guidance has also been confirmed by its Chief Executive in evidence to the Work and Pensions Select Committee.[24] Thus, in May 2020 she reported that '*We were very closely engaged, as were PHE, in helping BEIS write the guidance*', while earlier in March she commented that HSE was supporting '*the leadership that we see from Public Health England in tackling this particular and really serious issue*'. Furthermore, it would seem that senior management in HSE were relatively content with the guidance produced since at the same May hearing the HSE's chair felt able to say that '*if an employer is following the relevant Public Health England or Scotland or Wales guidance for their sector, in terms of controlling the public health risk, they will be taking reasonable practical precautions to control workplace risk'.* In other words, meeting the duty of care imposed on them under section 2 of the HSW Act.

This reassurance regarding legal compliance exists, however, alongside a striking lack of reference in the guides to what the legal duties of employers are, beyond the unattributed paraphrasing of the above duty, and similarly non-legally attributed guidance on matters like the need to conduct and record risk assessments and workforce consultation. Indeed, there are no explicit references to either the HSW Act or any of its supporting regulations. This is despite the fact that the guidance documents make clear that they do not '*supersede any legal obligations relating to health and safety, employment or equalities*'. Such an observation is more than merited.

Aside from the general duties imposed on them under sections 2 and 3 of the HSW Act, health and safety law lays down a range of more specific duties on employers (as set out in chapter 3) that are of clear relevance to the workplace management of Covid-19 (see Table 1).

Table 1: main health and safety laws relevant to Covid-19

- Health and Safety at Work Act, 1974
- Workplace (Health, Safety and Welfare) Regulations 1992
- Control of Substances Hazardous to Health Regulations, 2002
- Personal Protective Equipment Regulations 1992
- Management of Health and Safety at Work Regulations 1992
- Reporting of Injuries, Diseases and Dangerous Occurrences (RIDDOR) Regulations 2013
- Safety Representatives and Safety Committees Regulations 1977
- Employment Rights Act, 1996, sections 44 and 100

This lack of reference to clearly relevant health and safety law might be argued to reflect pressures from a UK government that is instinctively opposed to the imposition of regulatory burdens on business. Certainly, parallel Scottish government guidance has a noticeably more pro-worker flavour and a stronger emphasis on the legal obligations of employers and HSE's role in enforcing them. For example, Scottish guidance for the construction sector makes explicit reference to the 1974 Act and both the 1999 Management and 2002 COSHH Regulations, as well as the Construction (Design and Management) Regulations 2015, and adopts a more progressive approach to the use of PPE (see further below). In addition, all such guidance sits against the backdrop of a fair work statement concluded between the government and, among others, the STUC, which includes a supportive reference to unions making representatives available to support the development of risk assessments in workplaces where union representation is absent.

HSE's guidance

It is striking and remarkable that the same failure to reference relevant legal requirements can be noted in the two Covid related guidance booklets that the HSE itself has produced.

The more generally focussed of these, entitled *Working safely during the coronavirus pandemic,* is aimed at employers and the self-employed and is woefully thin, comprising just six generously spaced pages of substantive comment, that are largely focussed on telling the reader what they should think about while again failing to make any specific references to a piece of law. The second document is the *Talking with your workers about preventing coronavirus*. This is a lengthier publication that runs to 22 pages. But, as explored in more detail in chapter 5, similarly says virtually nothing about the legal duties of employers to consult workers and their representatives or the functions and rights of the latter. In fact, most of the document is concerned with providing guidance on reducing the risks from coronavirus – guidance that once again fails to mention a single legal provision directly.

Such a failure by a regulator to make reference to the laws it is responsible for enforcing is, to say the least, surprising. It becomes profoundly disturbing when the silence exists alongside the promulgation of guidance that is legally questionable with regard to the issue of social distancing and the related provision of PPE.

The HSE website has a link to relatively detailed guidance on the management of social distancing at the workplace which, yes you guessed it, fails to specify, or even mention, any relevant legal provisions. This guidance states that where two metre social distancing is not possible, then consideration should be given to a number of additional control measures that are listed in no apparent order of priority. One of those mentioned is '*Decide if an activity can be stopped*'; although this recommendation is rendered slightly meaningless given the absence of any reference to the legal duties that should inform such a decision, such as the duty under the COSHH regulations to, as far as reasonably practicable, prevent exposure to hazardous substances. Another option mentioned is the organising of a space '*so that people are side-by-side or facing away from each other rather than face-to-face*'. Once again, however, no reference is made to the duty under COSHH to ensure that such an action will result in the risk being 'adequately controlled'. Nor does the guidance go on to state that where adequate control is not achieved by other means, then legally suitable PPE must be considered. Instead, no reference is made to the use of PPE in the form, for example, of face masks. As a result, the HSE appears to suggest that staff '*facing away from each other*', even for lengthy periods of time, is an option that is invariably compatible with COSHH and PPE requirements, as well as the general duties of the HSWA. This is despite the fact that the UK government has deemed it mandatory to wearing facemasks on public transport and in shops, even for very short journeys and visits.

In taking this stance, the HSE has echoed the position adopted in nearly all the government guides on managing Covid in the workplace. For example, the guide on 'Construction and other outdoor work' states that '*When managing the risk of Covid-19 additional PPE beyond what you usually wear is not beneficial. This is because Covid-19 is a different type of risk to the risks you usually face in a workplace, and needs to be managed through social distancing, hygiene and fixed teams or partnering, not through the use of PPE*'. While the guidance does admittedly go on to highlight the potential value of using face covering, the approach adopted towards the use of PPE can be seen to compare unfavourably with the more nuanced (and legally correct) position taken in the Scottish government's construction industry guidance: which notes that the use of PPE should be driven by risk assessment along with a risk-based approach focused on a hierarchy of control, as recommended not only by the government, but by the HSE!

Such differences of tone and prescription suggest that HSE's guidance around social distancing and PPE has been overly influenced by wider UK government concerns around the failure to procure sufficient PPE of an appropriate standard for use by key health care workers. In doing so, they in turn raise important and worrying questions regarding the extent of HSE's vulnerability to political pressures and its subservience more specifically to government.

conclusion

In the face of clear evidence that work constitutes an important route through which the virus can be transmitted the UK government, the devolved administrations and the HSE have all produced guidance on how to protect workers from the risks of infection. Both the UK government and HSE have chosen to issue guidance that is largely devoid of references to the extensive legal duties that are imposed on employers in respect of the protection of workers, as well as the penalties associated with a failure to comply with them. Furthermore, the HSE appears officially happy to accept that much of the prevailing guidance on face masks is 'legally compliant', notwithstanding that there are good grounds for questioning this. More particularly, both HSE and UK government appear content with guidance which states that PPE is unnecessary to protect workers from infection even though face masks have been mandated for use on public transport and in shops.

In short, HSE, in the guidance on Covid-19 management that it has issued has downplayed relevant legal provisions for which it is responsible as a regulator and adopted an overly business-friendly approach to its framing. How far this situation has reflected the preferences of senior HSE staff as opposed to those of government ministers must remain a matter of some speculation. There are grounds for suspecting, however, that the guidance produced has directly or indirectly reflected political influences that the HSE has felt unable to resist.

CHAPTER FIVE

worker voice and representation during Covid-19: missed opportunities and political manipulation

introduction

Workers have a right to have their voice heard on all safety and health issues that arise at the workplace, including those brought about by the Covid-19 pandemic. Moreover, the presence of an estimated 100,000 trade union health and safety representatives in the UK[25] is a substantial resource that could have been used by the HSE to support securing compliance and better practice on safety and health at work during the health crisis created by the current pandemic. Unfortunately, this resource has been ignored by the HSE. Instead, it has chosen to marginalise worker voice and representation in relation to the prevention of workplace exposures to Covid-19. Such marginalisation is not merely incompetence or oversight on the part of the regulator, but a deliberate political act, in keeping with the control of the HSE by the neo-liberal orthodoxies of the present government.

worker representation: rights and effects

The Safety Representative and Safety Committees (SRSC) Regulations 1977, introduced under the Health and Safety at Work Act 1974, provide that workplace representatives appointed by recognised trade unions are entitled to inspect workplaces regularly, investigate workplace accidents and dangerous occurrences, receive certain types of information held by their employers, investigate the complaints of their workforce constituents, and make representations to the employer on their behalf. They also require employers to consult with representatives in good time over a range of issues, including the possible safety and health consequences of changes at the workplace and new risks, and allow them time off to conduct their safety and health activities and to be trained to do so. They further enable representatives to require employers to establish joint safety committees.

Lesser rights to consultation also apply to employees not covered by union appointed safety representatives under the Health and Safety (Consultation with Employees) Regulations 1996. Here, though, employers have the option of consulting either directly or via elected representatives.

A large body of research in the UK has found that where trade union health and safety representatives are supported by preconditions that enable them to undertake the functions granted to them by the law, they are very effective.[26] Workplaces in which they are present and active have far better safety and health outcomes than workplaces where, in their absence, safety and health is managed solely by employers. Moreover, such findings are consistent with those seen in many other countries where similar arrangements exist.[27] It is therefore clear that where worker representatives are properly trained, have appropriate facilities and time to conduct their functions and support from wider structures for collective representation at their workplaces, then they make a significant contribution to improving health and safety arrangements and outcomes.[28] Indeed, their obvious success has led to requirements for worker consultation being central to ILO Convention 155 on safety and health at work and the EU Framework Directive 89/391.

In some countries the statutory requirements on workers' voice on OSH go further, for example giving workers in micro and small enterprises access to representation on safety and health through regional or territorial representatives, or requiring employers to allow employees of contractors on multi-employer worksites, such as in construction, access to representation.[29] Other provisions give unions the right of entry to workplaces to support workers on OSH matters.[30] Yet others support forms of enforcement action, such as rights to issue provisional improvement notices and order the cessation of work regarded as involving serious risks to the safety and health of workers.

Covid and worker representation

Clearly health and safety representatives had every potential to play a major role in developing arrangements to protect workers in the face of the pandemic. There is also much anecdotal evidence of representatives supporting workers across a whole range of workplaces and sectors in the UK, along with outstanding examples of their dedication and commitment. Yet their absence from the HSE's pronouncements on workplace safety during the pandemic has

been far more conspicuous than any serious effort to acknowledge their potential role and the support it might offer, let alone any sign of a willingness to use workplace reps as a significant resource for co-enforcement. Nowhere in the guidance so far issued has there been any detailed mention of the rights and functions of health and safety representatives or how these legal entitlements could be used positively and effectively to aid the workplace control of the risks arising from Covid-19. This begs some serious questions concerning the reasons behind such a missed opportunity.

The fact is that British regulatory requirements have always been rather coy about relations between worker health and safety representatives and regulatory inspectors. Section 28(8) of the HSW Act requires inspectors to provide information to representatives while regulation 4 (1)(g) of the SRSC Regulations indicates they have rights to receive such information. But the regulations are generally silent on how this should occur, and more generally on the role of inspectors in supporting representatives in undertaking their functions, notably by intervening with employers to ensure representatives are appointed and appropriately supported. Internal guidance from HSE to its inspectors during the first 20 years of the SRSC Regulations, essentially adopted a hands-off approach to these matters, advising inspectors to leave them to the relations between employers and unions at the workplaces concerned and to only intervene as a last resort and where normal industrial relations procedures were exhausted.[31] This led to wide variations in the practices of individual inspectors and hardly any examples of enforcement action when representative rights were infringed. In the face of criticism concerning this passivity, in the late 1990s HSE updated its internal advice to its inspectors, advocating a somewhat more proactive approach, subsequently further updated. Its current guidance to inspectors indicates that, '…general policy is that field staff will contact relevant '*Appropriate Representatives' during all visits, unless alternative contact agreements exist*' and goes on to suggest ways in which this might occur. However, even now, considerable discretion is given to inspectors to decide how this is to take place. Perhaps tellingly, the guidance prominently reminds inspectors that representatives have no legal right to demand that they accompany inspectors during their visits.[32]

In its Guidance to Employers on Covid-19,[33] HSE provides no suggestions concerning how employers might engage with representatives. Indeed, it fails to mention them at all, other than saying in passing in the Introduction to the document that 'The guidance may also

be useful to workers and their representatives…..'. Admittedly, in the Introduction to its publication 'Talking with your workers about preventing coronavirus',[34] the HSE does remind employers that they have a duty to consult all their workers on health and safety issues and suggest that in larger businesses they may do this through a safety representative. But it then fails to mention these representatives, let alone their detailed rights and functions, including the protections provided under sections 44 and 100 of the Employment Rights Act, throughout the remainder of its guidance on steps employers might take to consult with their workers during the pandemic.

These lacklustre efforts to encourage the role of worker representatives are modified somewhat in the Scottish and Welsh national guidelines, which promote the role of representation more prominently, while ironically and misleadingly referring interested readers to the HSE Guidelines for more details. For example, the Scottish guidance state that '*Risk Assessments and the introduction of mitigation measures should be part of regular, ongoing dialogue between organisations and trade union or workforce representatives.*' They also stand in stark contrast to the line taken by the TUC, which has recommended that since Covid-19 represents a change in workplace risk profiles, there should be a regulatory requirement that employers undertake proper risk assessments in consultation with union representatives, where present and further recommended that government introduce a tripartite network, involving employers, unions and the HSE, with power to instruct employers that refuse to take reasonably practicable safety measures to cease work.[35]

In turning its face against such an 'enforcement network' the HSE has chosen not to embrace an approach akin to those advocated by American researchers who have pointed to the success of co-enforcement strategies in both North and South America.[36] It has similarly rejected analyses pointing to the value of a 'strategic enforcement' approach incorporating inputs from trade unions and community interest groups.[37]

Another missed opportunity on the part of the HSE concerns the role that trained and experienced union representatives in large organisations could play in providing workers in small and micro firms with access to representation during the Covid crisis. Such an approach, akin to that found in legislation in Nordic countries and in Italy, and practiced through sector or regional level agreements between employers and unions in other countries, has been canvassed many

times in the UK, but has seldom been practiced.[38] Yet, here again, the evidence is overwhelmingly positive concerning the beneficial effects achieved by such representatives.[39] Indeed, as Swedish researchers pointed out many years ago, regional representatives in Sweden made significantly more visits to such enterprises in the course of a year than the combined number of visits made by occupational health services and work environment inspectors.[40] Yet while Scottish guidance refers to union health and safety representatives being available on request to help non-union workplaces, with a relevant email address being given, HSE guidance remains silent about such a possibility

conclusion

Substantial evidence points to the valuable role that workforce, particularly union, representatives can play in improving health and safety arrangements and outcomes. Bewilderingly, however, HSE has chosen during an occupational and public health emergency to downgrade, and virtually ignore that role. Notwithstanding that workforce consultation and involvement represents a central element in the self-regulatory framework of law for which HSE has operational responsibility.

The missed opportunities detailed above have undoubtedly resulted from the political influence to which the HSE is currently subjected; an influence highlighted by the comparisons noted with the guidance of the Scottish and Welsh governments. What is especially disappointing about this is that for decades HSE has been arguing for the adoption of 'innovative approaches' to inspection and achieving compliance. Yet when a real need is apparent, a form of short-sighted political expediency and a lamentable display of weakness on the part of the regulator has caused it to deliberately avoid engaging with a form of preventive support that is already in place and demonstrably effective in unionised workplaces to protect workers from the work-related transmission of Covid-19.

CHAPTER SIX

workplace oversight and enforcement during Covid

introduction

In May 2020, Prime Minister Johnson announced, with typical bluster, that Health and Safety Executive (HSE) spot-checks were making workplaces 'Covid-19 secure', ensuring that 'businesses are keeping employees safe'.[41] The HSE - a body disparaged and attacked by a long line of Conservative Prime Ministers - has suddenly found itself to be a valuable asset to the Johnson Government. The HSE is now being used by government to cover its back: to underwrite its own promise to keep workers and the public safe from Covid infection.

Yet, in the early period of the pandemic, it seemed clear that HSE had virtually abrogated its regulatory responsibility for Covid-19 safety. On the 27th March, it announced it was suspending all inspections of building sites because it could not guarantee the safety of its inspectors.[42] *Hazards Magazine* meanwhile noted that between March and mid-June, HSE had not conducted one single visit of a care home, despite its responsibility for regulating safety in those sites,[43] by the end of September, it had conducted eight such visits.[44]

The HSE's journey of transformation from Tory punchbag to Tory excuse for inaction is in many ways a tragic one. But it is a story that reminds us how important it is to have a properly funded and accountable health and safety regulator – while highlighting what happens when we don't have one.

a perfect excuse for inaction

The political usefulness of the HSE lies in the gap between what the government tell us about it and the reality. The government tells us that the regulator is still capable of doing its job. Yet year-upon-year of ceaseless political attacks, incremental budget cuts, and government red tape imposed on inspectors, have rendered it - and its local authority counterparts[45] – toothless.

HSE funding had been reduced significantly: falling from £239m in 2009-10 to £121m in 2019-20 (see Table 2). When inflation-adjusted,

this amounts to a real terms reduction of 58% in central government funding. These funding cuts inevitably affected staffing numbers. If we compare the numbers of HSE full time equivalent (FTE) posts, including 'frontline staff' (which includes all inspectors), between 2009/10 and 2019/20, total HSE staff fell by 36% (from 3,702 to 2,371) and frontline staff, including all inspectors, declined by 35% (1,617 to 1,059).

Table 2[46]

Funding and staffing of the Health and Safety Executive

	Funding, £ millions		Staff numbers	
	Cash terms	2020/21 prices	Total staff	Inspectors
2008-09	207.9	270.5	3,591	1,561
2009-10	239.4	306.6	3,702	1,617
2010-11	213.5	268.5	3,400	1,556
2011-12	170.0	210.6	3,288	1,511
2012-13	161.2	195.8	3,183	1,448
2013-14	154.3	184.0	3,081	1,396
2014-15	141.1	165.9	2,575	1,113
2015-16	142.6	166.4	2,576	1,106
2016-17	131.0	149.2	2,524	1,061
2017-18	135.5	151.6	2,478	1,058
2018-19	129.0	141.1	2,426	1,066
2019-20	121.3	129.6	2,371	1,059

Source: Cabinet Office, Public bodies reports; HSE, Annual report and accounts, multiple editions; real terms figures calculated using OBR, Public finances databank, December 2020

Given this decline in funding and personnel, then it is hardly surprising that, during this period, every form of enforcement activity declined, so that:

- Between 2010 and 2019, total HSE Field Operations Directorate Inspections fell by 38% (18,052 in 2018/19)
- Between 2010 and 2020, total Enforcement notices issued by HSE fell by 36%, with the most serious, Prohibition notices, falling by 50% (7,075 notices in 2019/20)
- Between 2010 and 2020, convictions of offences fell by 39% (467 in 2019/20).

We find very similar trends in the diminution of enforcement

capacities and activity in local authorities:[47]

- Between 2010 and 2019, the total number of health and safety visits by Local Authorities fell by 78%, with a 93% decline in preventative visits (42,800 in 2018/19)
- Between 2010 and 2019, total Enforcement notices issued by Local Authorities fell by 69% (there were 2,263 in 2018/19) with the most serious, Prohibition notices, falling by 41% (with 968 in 2018/19)
- Between 2010 and 2019, total offences prosecuted by Local Authorities fell by 73%, with convictions falling by 70% (there were 80 of each in 2018/19)

In some areas, there is no regulatory coverage at all. Thus, seven Local Authorities (North Kesteven, North Lincolnshire, Oadby & Wigston, Ribble Valley, Richmondshire, Selby, York) reported having no FTE health and safety Environmental Health Officer (EHO) in place during 2018/19. Moreover, 135 Local Authorities recorded having less than one such FTE. At the same time, tens of thousands of companies are virtually exempt from local authority law enforcement as a result of the government's Primary Authority (PA) scheme. Under PA, a company operating across more than one local authority area enters an agreement with one specific local authority to regulate all of its sites, nationally. This contract buys for the company the absence of effective oversight in the vast majority of its sites. This is because while sites can be visited by inspectors from the authority in which they are located, enforcement action can only be pursued through the local authority which is the PA.

token gestures

This is the context for understanding Prime Minister Johnson's assertion that HSE is well-placed to ensure that workplaces are 'Covid-19 secure.' In responding in this way to questions about how workplace safety could be guaranteed for those having to work on-site, he knew of course that HSE has no real capacity to ensure workers are adequately protected. Successive Conservative governments have very deliberately paralysed its capacity to inspect and investigate and its capacity to enforce the law.

When Johnson pledged £14m of additional funding to support the HSE for this task, he also knew very well this was a token gesture. The additional £14m amounts to a fraction of the almost £1000m loss to its budget in the past decade. Little wonder, then that the regulator

virtually went AWOL in the first two months of the pandemic.

The same goes for the token funding set aside to address the shortfall in local authority capacity through the emergency Local Authority Compliance and Enforcement Grant.[48] It represented a tiny fraction of the resources needed to bring local authority capacity back. For example, additional funding to the seven local authorities, highlighted above, that have zero EHO capacity amounts to an average of £44,000 per authority. Put another way, when you add in office costs, Johnson's emergency funding for inspection and enforcement was barely enough to pay for a fully trained inspector for a year in each of these areas. In any case, those authorities were, like all other local authorities in the UK, expressly prohibited from employing new inspectors under the terms of the funding.

the failure of spot checks

The 'extra' funding provided to HSE was allocated for activity over and above its normal regulatory duties. It was allocated ostensibly to cover the much vaunted 'spot inspections' promised by government to detect breaches of law relating to Covid exposure and transmission.

Effective checks were certainly needed. Evidence from a TUC survey undertaken between 31st July and 5th August 2020 indicated that very clear breaches of the law were present in over a third of workplaces.[49] This survey found that 62% of workers were not aware if their employers had carried out Covid-secure risk assessments. Only 42% reported being given adequate PPE, 34% said they were concerned about not being able to socially distance from colleagues and 30% said they were worried their workplace would not be cleaned properly.

Given that HSE is responsible for regulating approximately 5.5 million duty-holders,[50] this was a huge task. And as the data below shows, the £14 million enabled a volume of spot checks that would reach less than 0.5% of these duty-holders. But this feeble response to the pandemic by the UK's leading safety regulator is revealed as even more problematic when one examines what constitutes a 'spot check'.

As HSE notes, what it refers to as 'Spot Check Calls' follow a 3 stage process, based initially on a telephone conversation '*whereby Stage 1 is a scripted question set that follows the Covid guidance, Stage 2 is a more detailed conversation delving into any areas of potential concern from Stage 1*'.[51] These calls are largely carried out by '*approved partners to deliver the spot check calls and visits*'. In other

words, Covid 'spot checks' are conducted by telephone calls, largely made by outsourced, private providers.

The use of private outsourcing companies is partly an effect of the rules governing the additional government funding noted above: it cannot be used to train new inspectors.[52] Indeed, more than half of the additional £14 million granted to HSE, £7.2 million, was spent on 'third party compliance spot checks'.[53] The Stage One scripted calls take outsourced companies 15 minutes.[54] In May, a YouGov survey of the public reported findings that indicate widespread suspicion of the effectiveness of spot check phone calls. The survey found that 67% of the public supported random in-person HSE checks compared with 9% who thought phone checks would be sufficient.[55]

A very small proportion of Covid spot checks led to further action. Some 'stage 2 calls are referred on to Stage 3 (on-site inspection) if there are any outstanding concerns from the calls process and it is only at this stage that enforcement action would be taken'.[56] In the six months from 1st April-30th September, a total of 15,622 'spot check calls' were made, supplemented with 4,938 'spot check visits'. In total, this Covid enforcement activity generated 78 notices and no prosecutions.[57]

In addition to Covid checks, in this period, HSE inspectors conducted 406 non-Covid inspections. Taken together, that means that in a six-month period, during a major public health pandemic, HSE made 5,344 inspections or visits to British workplaces – a decline of over 40% on the six months in the previous year.[58]

As Britain's workplaces were the site of unprecedented danger, HSE virtually disappeared as an enforcement presence.

conclusion

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

As Andrew Watterson has noted, investigations of Covid-19 workplace clusters in Britain are led by public health staff not by the HSE.[59] This creates another layer of paradox: the HSE and local authority regulators have powers to close a workplace hazardous to health.

Directors of Public Health do not. Tragically, our experience of the pandemic is that the HSE has failed to adequately monitor the spread of Covid in the workplace and has failed to take action to protect workers and communities when they have found anything dangerous.

The pandemic has revealed HSE to be far less the safety regulator it was formally established to be, and much more a smokescreen for government inaction.

CHAPTER SEVEN

lessons of the pandemic and their implications for the future

key findings

Our analysis has focussed on the origins and transmission of Covid-19 in the UK, the role that workplace transmissions played in the spread of the virus and policies and practices needed to avoid or at least minimise such transmission. Three sets of findings emerged clearly:

- from the outset of the pandemic, work activities have been important in the transmission of the virus;
- although knowledge of how it spreads has evolved over time, well established and long-standing means of controlling transmission already existed; and
- despite this, workers were inadequately protected and therefore infected unnecessarily.

This outcome resulted despite the existence of a comprehensive body of health and safety laws covering the management of work-related risks, which in theory at least, should have provided workers substantial protection from contracting Covid-19. These laws are framed by general duties laid down under sections 2 and 3 of the HSW Act and supporting sets of regulations, including those imposing requirements on the control of biological agents that are hazardous to health, personal protective equipment, and workplace hygiene.

Yet extraordinarily, UK government and HSE advice on managing Covid-19, while voluminous, barely mentions the duties laid down under this body of law or the consequences if duty-holders fail to comply with them. The advice also misrepresents and understates the legal obligations of employers to protect workers from the risk of infection via the provision of masks and face protection. Furthermore, these failures are much less apparent in the advice promulgated by the Scottish and Welsh governments – a disparity which is seen to point to the way in which UK advice has been shaped by a particular set of political considerations.

Similarly, HSE guidance on workforce involvement says virtually

nothing concerning the legal rights and protections that workers possess or on actions that employers could and should take to enhance and support collective processes of workforce consultation and representation. A health emergency in which workers are facing the possibility of contracting a fatal disease while doing their bit to support the economy, surely constitutes a situation in which the protective value of drawing on their insights and expertise as well as that of their representatives should be emphasised? Yet, one searches in vain for an explicit reference to the Safety Representatives and Safety Committees Regulations 1977 among the employer-orientated guidance to 'safe behaviour' offered by the government and the regulator.

Meanwhile, the HSE (and for that matter, local authority) inspection and enforcement activity during the pandemic indicates a woeful and supine performance from a regulatory authority charged with seeking compliance from duty-holders with what are after all, no more than their legal obligations. At one level, this performance is unsurprising – it represents a continuation of longer-term trends in enforcement capacities and outputs that were already apparent as a result of cuts to HSE funding and staffing and the effects of 'business-friendly' government policies. Nevertheless, the sheer inadequacy of HSE's inspection and enforcement activity in relation to Covid-19 remains shocking. It is therefore no exaggeration to view HSE's failure to take a more robust approach to securing compliance from duty-holders during the pandemic as one that has had fatal consequences for workers and their families.

implications for future reforms

The way in which the HSE has been systematically denied the resources necessary to deliver its regulatory functions through the massive reduction in its funding that has occurred in recent decades has undoubtedly made an important contribution to the sorry and depressing tale that has been reported. But this should not detract attention from further important contributory factors. Indeed, more generally, the Covid-19 pandemic has highlighted fundamental and long-standing problems associated with the UK regulatory approach to work safety and health that cannot be ignored. These beg a host of questions concerning the ethical, political and economic validity of a regulatory system that is massively under-resourced and which overtly favours the interests of business over the protection of workers. The following paragraphs list the key issues on which such questions focus.

regulatory resources and strategy

The limited nature of HSE (and local authority) resources is difficult to exaggerate. It was starkly captured in the following evidence given to the Work and Pensions Committee by its former Chair Martin Temple on 4 March 2020: '*One of the interesting things, just to give you a sense of things, is that the number of inspections we do is relatively small. We do 20,000 odd or something of that order and we have 5.5 million duty holders*' It is similarly highlighted by the fact that in 2020 HSE had just 1,059 frontline staff (including inspectors), while its responsibilities extend to encompass around 900,000 workplaces!

The notion that there could be an inspectorate of sufficient strength to have any chance of inspecting more than a fraction of the workplaces that fall within its aegis has always been dismissed as impracticable in the UK, although it has been achieved as a part of enforcement strategies in countries such as Denmark in the recent past. Instead, the HSE has promoted alternative regulatory strategies with which so-called hard to reach firms and their workers receive guidance and support through a variety of 'arms-length' approaches on the part of the regulator. Such approaches may, when used appropriately, be useful. However, when used, as in the case of the HSE, to project an appearance of a regulator 'doing more with less' and as part of a politically determined strategy to appear more 'business-friendly', they are not helpful. Such a projection, moreover, is arguably little short of criminal if used to defend the failure to combat the spread of a fatal disease.

While there may be scope for debate about the scale of the increases in funding required to reverse this decline, there is little doubt that significant investment is required if the HSE is to regain a credible image as an effective regulator. Previous inquiries and reviews have generally indicated the need for substantial increases in HSE resources, whatever innovative strategies it adopts towards securing regulatory compliance.[60] Moreover it is also important to bear in mind that such reviews were undertaken when HSE's resourcing was more substantial than today.

Experiences with the pandemic also serve to raise serious strategic questions about how any increased resourcing could be most efficiently and effectively used for regulatory purposes.

Nearly 50 years ago, the Report of the Inquiry into Safety and Health at Work called for a new regulatory approach to safety and health

at work. This was framed, a couple of years later, by the Health and Safety at Work Act 1974 in which principle and process-based regulation replaced the more prescriptive standards of the Factories Acts and similar legislation, which had been the basis of UK regulation of workplace safety and health for more than 100 years. A unified regulator, the HSE, was created by this Act, along with a tripartite peak commission, the HSC, the latter to oversee, and ensure the engagement of workers and employers with its work. While there have been changes to this structure in the ensuing years, its general features and purpose have remained essentially unchanged. However, the problems with HSE performance reported here suggest strong grounds for reviewing the effectiveness of this system.

Equally there is a strong case for critically evaluating how HSE approaches monitoring and enforcing compliance with the law, and in particular, the extent to which non-compliance is met by the use of legal sanctions. HSE's low usage of such sanctions has long been criticised. For example, attention has been drawn to the way in which it contrasts with how periodic bursts of enforcement activity on construction sites, via a concentrated 'blitz' of inspections, have consistently revealed widespread violations of the law as almost routine across this hazardous sector.[61] These concerns have increased against the background of an endless series of government sponsored reviews driven by a desire to minimise burdens on business. Our data on the limited enforcement action taken during the pandemic only add to these concerns. Consequently, the time is surely ripe for a comprehensive review of how compliance with the law on the part of businesses can be achieved most effectively and efficiently.

control and accountability

As well as the effects of tripartitism on its origins and the structures surrounding it, the HSE largely incorporated the traditions of the separate and much older inspectorates which it subsumed on formation. To varying degrees, these traditions claimed independence of action and professional autonomy in relation to workplace inspection. Nevertheless, the HSE, and its field inspectorate, are parts of the structure of the state. As such HSE has always been obliged to conform to the bidding of state governance, whatever its political orientation. But as this report and many others show, such politically driven bidding has become increasingly strident in recent decades. In particular, the deregulatory drive, characteristic of the neo-liberal economic and political orthodoxies adopted by successive governments over several decades, now profoundly and ruthlessly

override legacies of autonomy formerly tolerated in bodies like the HSE. Consequently, the policies and practices of HSE have increasingly reflected such orthodoxies. Experiences of the pandemic have therefore simply highlighted the extent of the regulatory capture of the HSE during the decades in which governance of the UK has been dominated by policies favouring interests of business and the market.[62] This conclusion is borne out by the way in which, despite its role as a regulator charged with monitoring and securing compliance with laws to protect the safety and health of workers, the HSE has been virtually silent concerning such laws in its guidance on the workplace management of Covid-19.

This question of the autonomy and political independence that can be allowed to an organ of the state, to act in the best interests of those it is supposed to protect, is both difficult and complex. Indeed, it would be both over-simple and naïve to regard the outcomes we have described as *solely and directly* the result of the dominance of a particular political orientation of government. They are also the product, for example, of new public sector management strategies, as well as the changing structure and organisation of work. However, their consequences, as highlighted by the Covid 19 pandemic, still raise questions about whether bodies like the HSE could be placed on a constitutional footing that better protects both their resources and their autonomy of action.

One possible option that could be explored here is the reconstitution of bodies like the HSE in line with the United Nations' Paris Principles relating to the status and functions of National Human Rights Institutes. These principles require such bodies to embody 'the pluralist representation of the social forces (of civilian society)', and make clear that, where government departments are represented, this should only be in an advisory capacity and require that 'adequate funding' is provided to enable them to be 'independent of government and not be subject to financial control which might affect its independence'.[63] The potential value of such constitutional reform is clearly another issue that merits serious investigation through the holding of an independent inquiry.

enhancing regulatory oversight

The HSE's incapacity to provide effective oversight of employers' compliance with their legal duties raises a set of further questions concerning how other existing structures might be enhanced to supplement its role. For example, evidence from other countries

highlight ways in which structures of worker representation act to supplement public regulation and inspections, prompting consideration of three possible reforms for the UK. First, expansion of union rights of access to workplaces to undertake preventive work, along with an increase in the rights of workplace safety representatives to the provision of information, consultation, and training (including paid time off to undertake it). Secondly, the provision to unions of enforcement rights where employers are failing to comply with their legal duties, for example in terms of issuing improvement notices and bringing private prosecutions. Thirdly, through the introduction of a degree of co-enforced oversight, as reported in other countries.[64]

Moreover, it is not only trade union representation that might play such roles. It is widely recognised for example that successful efforts to address poor working conditions in the lower tiers of global supply chains have resulted from alliances between consumer groups, unions, regulators and other institutional actors in civil society. Further examples are seen in the Danish regulatory approach of 'orchestration' of private and public regulatory action.[65] In all of this, notions of regulation take on new meanings, and the lines between public, private and mixed forms of regulatory surveillance are increasingly blurred and combined.

This begs further important questions concerning co-ordination and control as well as regarding whose interests are being served. Such questioning contrasts sharply with the seeming lack of interest in making more use of current arrangements for worker consultation and representation, shown by HSE during the pandemic.

More fundamentally, questions might be asked about the extent to which the present regulatory system can be regarded as fit for purpose in an economy in which the structure, organisation and control of work are now profoundly different from those for which it was originally designed. These questions encompass, for example, the extent to which regulation based on direct employment relationships (and contracts) can be regarded as effective in contexts where working conditions are fully or partly determined by the needs of third party businesses. Equally, questions can be asked about the appropriateness of legal requirements focussing on the management of workplace risks to many current work situations, such as those applying to self-employed workers engaged in platform work and the 'gig' economy.

conclusions

This report has outlined the appalling performance of the UK's regulator for safety and health at work, the HSE, during the Covid-19 pandemic. This performance has undoubtedly cost many lives and has been shown to be the consequence of the politically motivated efforts of British Governments to both reduce the resources available for regulatory actions on safety and health at work, and to support the capture of the regulator by the needs of business. The blame for it therefore rests at the door of government and in no way reflects on the professionalism and commitment of HSE staff, including frontline inspectors.

The report has argued that these developments mean, that, as currently constituted, led and resourced, it is simply not possible to view the HSE as a credible regulator. It has been further argued that this current position is framed by a regulatory approach developed nearly 50 years ago which is no longer fit for purpose. As a result, the report concludes a major independent inquiry into the future of regulation of safety and health at work in the UK is needed urgently. The aim of such an inquiry must focus on ways to create a regulatory system, including an effective regulator, that will better protect the health and safety of *all* workers in the UK, now and in the future.

recommendations for reform

The urgent launch of a major independent public inquiry into the future of the regulation of safety and health at work in the UK, with a focus on creating a regulatory system, including an effective regulator, that will better protect the health and safety of *all* workers in the UK, now and in the future.

A significant increase in investment in the HSE to promote stronger enforcement of legal protections, thereby improving their effectiveness.

A comprehensive review of enforcement strategies employed by the HSE and local authorities, including a critical examination of the currently rare use of legal sanctions.

Ensure the political independence of the HSE, by considering its reconstitution in line with the United Nations' Paris Principles, which require the involvement of representatives from civil society and the ringfencing of adequate funds to prevent government from imposing its political beliefs through financial control.

Stronger trade union rights to access workplaces, undertake preventative work and enforce the law, such as through the issuing of improvement notices and the bringing of private prosecutions.

Enhancement of existing safety representative rights relating to the provision of information, consultation, and training (including paid time off to undertake it).

Reform of the current statutory framework for health and safety at work to better protect workers in modern, more casualised, forms of employment, including those found in the gig economy.

Reform and enhance current protections provided under Sections 44 and 100 of the Employment Rights Act.

Consider adopting international models of co-enforced oversight, that involve State regulators working alongside trade unions and other civil society organisations to monitor and enforce compliance with legal standards.

Explore the value and application of forms of supply chain regulation under which powerful supply chain actors have duties to ensure that they support effective health and safety management and compliance in supplier organisations.

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On 11 March 2020, the World Health Organisation declared a global Coronavirus pandemic. From the outset, workplaces were recognised as a major source for the spread of the disease. Yet the UK government downplayed the dangers, with Prime Minister Johnson announcing that workplaces were 'Covid-secure' thanks in part to HSE 'spot-checks'. Yet, throughout this period, the Health and Safety Executive, the agency responsible for securing compliance with health and safety regulations at work, has been notable by its absence.

The analysis contained in this report, partly based on data gathered via Freedom of Information requests, reveals the extent to which the HSE failed in its duties to protect workers, promote relevant health and safety laws and prosecute rule-breaking employers. It also failed to highlight the rights and functions of the 100,000 trade union health and safety representatives and the role they could play in securing compliance with the law and appropriate health and safety practices at work. Instead, tax-payers money was used by the HSE to outsource inspection to private companies to undertake phone call checks to employers.

This is a timely and informed report highlighting the failings of the HSE and the UK's framework of laws. It concludes with a list of recommendations – the first of which is the need for a major independent inquiry into the future of health and safety in the UK.

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