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Institute of Employment Rights

International health and safety standards after Brexit

by Andrew Moretta and David Whyte

HAZARDS CAMPAIGN

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contents

PREFACE

ILO rules

All is not well in Britain's workplaces. The classic occupational diseases caused by chemicals and dust refuse to die and are now being complemented by the maladies of the 21st Century workplace – heart disease, suicide and work-related depression and despair.

This is neither speculation nor scaremongering. Asbestos deaths are at an all-time high,[1] silicosis ruins or ends thousands of lives each year[2] and occupational asthma afflicts unchecked new generations of wheezy workers. At the same time work-related stress, anxiety and depression are at a record high.[3] This old and new health-robbing double dose is no accident. UK workers are vulnerable by design, increasingly overloaded and under-protected at work.

The lines between work and home life have blurred too, as technology gives employers a wireless route directly into our homes, day and night. Shiftwork, linked to cancer, heart disease, diabetes and all round poorer health, is now the 'daily' routine for many. The result is that UK working hours are among the highest in Europe. Burnout is now a World Health Organisation (WHO) recognised and classified 'occupational phenomenon'.[4] We are a generation of working wounded, frequently too poor or too worried to go sick.

At a time when the UK has a record numbers of workers and workplaces to police, the Health and Safety Executive – the UK's safety regulator – is running on empty, barely visible at work and increasingly absent from the courts.

Andrew Moretta and David Whyte show that far from being protected, an erosion of employment rights combined with a retreat from official oversight of workplace health and safety conditions, have left more UK workers vulnerable to abuse at work and lacking both support and an effective safety net. It is, they observe, a time when the future of all labour rights in the UK is "uncertain."

In a global economy, UK safety outcomes can be determined in the boardrooms of multinational companies or fashioned to suit global trade lobby groups. This means national standards must be only one part of a responsible government's essential regulatory armoury.

Consider this. The chemical industry is set to double in size by 2030, according to the UN.[5] It is an upward trend expected to continue for decades. Companies and their uber-rich owners frequently have more economic power than the majority of countries where they do business. The online retailer Amazon, valued at about US$1 trillion, is worth more than the GDP of 90 per cent of the world's nations. The personal wealth of Amazon CEO Jeff Bezos, at about US$100 billion, would put him at number 65 in the list of richest countries if he was a nation and not the world's richest shopkeeper.

It is a system that can elevate money over morality. The organisation governing world trade, the World Trade Organisation (WTO), does not have protection of workers' rights, welfare or the environment as part of its core operational priorities. In fact, WTO has been used to challenge protective legislation as a barrier to free trade.

There is, however, a well-established global body capable of checking labour rights and safety abuses, and which is cited in international trade negotiations. The International Labour Organisation (ILO), a UN agency, celebrated its centenary in 2019.

As Moretta and Whyte note, the UK was a driving force in the creation of the ILO. However, this heralded and influential role has long since waned. As this report reveals, the UK has ratified fewer than 1-in-5 of ILO's up-to-date health and safety instruments, putting it below almost all European Union and OECD nations and on a par with Libya, Mozambique and Saudi Arabia.

The absentees from the list of UK ratifications are not irrelevant instruments on esoteric or archaic issues. They include *almost all* of the safety key Conventions, including the main occupational health and safety instrument, Convention 155, and the Occupational Health Services Convention, Convention 161. Other absentees, known by heart and by number by international trade union reps because they are cited so frequently, include Conventions 162 (asbestos), 139 (occupational cancer), 170 (chemicals) and 174 (major industrial accidents).

The need for global baseline safety standards has never been more acute. Cost-cutting decisions made in the London boardroom of BP were major contributory factors in the deaths of 15 contract workers in the Texas City refinery fire in 2005 and 11 in the 2011 Deepwater Horizon oil rig tragedy in the Gulf of Mexico. As the gold price soars, companies including London-based Anglo American are cashing in as

some of their workforce in Southern Africa die in poverty from dust-caused silicosis and tuberculosis.

When the UK fails to ratify ILO safety Conventions, it sends a signal worldwide that safety beyond its immediate doorstep doesn't matter, even though the UK coffers and the country's most prestigious companies benefit hugely from income earned in other nations and produced by the labour of their nationals. In many countries, ILO Conventions are the *de facto* safety laws, agreed globally and guaranteeing core rights and are, as Moretta and Whyte observe, 'the thread which links all of the regional international rights regimes'.

If the UK thinks these ILO safety instruments are not worth ratifying, why should a developing nation step up? Eschewing globally accepted controls sends that clear and clearly dangerous message. It is a point not lost on the European Commission which, as Moretta and Whyte point out, indicated in a February 2020 draft negotiating mandate that any post-Brexit trade deal with the UK should include adherence to 'Conventions of the ILO'.

It is significant that unions and safety advocates are finding creative ways to ensure decent and safe standards are observed internationally. Unions have for example negotiated binding labour safeguards in the procurement contracts of multilateral development banks and World Bank projects, including stringent occupational health and safety stipulations, sometimes including explicit references to ILO Conventions.

The ILO model is also embraced in 'Global Framework Agreements' struck between multinational companies and global unions. The agreement signed in 2017 between the UK-based global online fashion retailer ASOS and the global union federation IndustriALL, for example, requires both sides 'to collaborate to ensure the application of International Labour Organisation standards' [6] throughout the ASOS supply chain. It makes explicit reference to several ILO health and safety Conventions and recommendations.

If the UK wants to emulate the economic success of countries like Sweden, Norway, Finland, Germany and the Netherlands it would do well to note the observation in this publication that these countries are far more enthusiastic ratifiers of ILO safety Conventions. You can't have a first class economy if you choose to play by third rate rules.

But we shouldn't have to argue a business case. We shouldn't have to

put a case against a system where the law allows workers to be used, abused then thrown away. We must and can reject completely a UK government approach that, by design, requires some among us to die making a living.

Rory O'Neill, Editor, *Hazards Magazine* and occupational health and workplace safety adviser, *International Trade Union Confederation*.

Notes

1 Asbestos exposure: the dust cloud lingers: Editorial, *The Lancet Oncology*, vol. 20, no. 8: 1035
2 *Hazards* issue 148, October-December 2019.
3 Health and Safety Executive (2019) *Work-related stress, anxiety or depression statistics in Great Britain 2019*, London: HSE.
4 See World Health Organisation sources: QD85: Burn out, WHO International Classification of Diseases (available: https://icd.who.int/browse11/l-m/en#/http://id.who.int/icd/entity/129180281, accessed online 6th March 2020) and related World Health Assembly update (available: https://www.who.int/news-room/detail/25-05-2019-world-health-assembly-update, accessed online 6th March 2020)
5 UN EnvironMEntal Programme (2019) Global Chemicals Outlook II – From Legacies to Innovative Solutions: Implementing the 2030 Agenda for Sustainable Development,Global Chemicals Outlook, Geneva: UNEP.
6 *Global Framework Agreements briefing and listing, IndustriALL. GFA between ASOS and IndustriALL*. Available: http://www.industriall-union.org/industriall-signs-global-framework-agreement-with-asos (accessed online 6th March 2020).

executive summary

Brexit is seen by many in the UK government and the Conservative Party as an opportunity to further undermine workers' rights and intensify the 'race to the bottom' under the guise of improving the UK's global competitiveness. It looks very likely that workplace health and safety standards in particular will come under renewed attack.

At the same time, the advent of new trade agreements with other states and trading blocs will mean that UK compliance with benchmark international standards on regulation generally, and worker health and safety in particular, will come under more intense scrutiny.

The ILO is the single most important organisation charged with developing global legal standards for workplace rights.

Historically, the UK government has deliberately avoided formal agreement with ILO health and safety standards. It has only ratified 6 of the 36 'up-to-date' and interim health and safety Conventions and Protocols. This puts it on par with the following countries that have also ratified 6: Cameroon, Comoros Islands, El Salvador, Guyana, Libya, Lithuania, Mauritius, Mozambique, North Macedonia and Saudi Arabia. In a league table of EU states' ratification of ILO health and safety Conventions and Protocols, the UK is 26th out of 28. Only Romania and Estonia have signed up to less.

Despite this appalling record of nonratification, the UK remains bound by both the European Social Charter and the United Nations International Covenant on Economic, Social and Cultural Rights. Those treaties use ILO health and safety Conventions as the primary source of their evolving standards. This means that ILO standards apply to the UK, albeit indirectly, even if it has not yet ratified the relevant ILO instruments.

This will remain the case whether or not the UK continues to be bound by the EU treaties and regardless of the type of trade agreement agreed between the UK and the EU, or any another trading bloc or state.

This booklet argues that the UK trade union movement must take the initiative in demanding that the UK complies with ILO standards. This means ratifying those Conventions and Protocols it is yet to sign up to and ensuring effective implementation of those that it has.

UK government compliance with international law will not be achieved easily. Ultimately this is a goal that must be fought for through renewed trade union campaigns at a political level as well as at a workplace level.

CHAPTER ONE

introduction

It is often claimed by government ministers and regulators that the UK has one of the most advanced systems of health and safety regulation in Europe.[1] However, such claims are notoriously difficult to substantiate and are often based on a selective use of evidence, or on comparisons using data that is gathered using different criteria.[2] Moreover, there is compelling evidence indicating the contrary position – that the UK's record on worker health and safety does not compare well with those of other states with 'advanced' economies. According to the Organisation for Economic Cooperation and Development (OECD),[3] UK employment protections are amongst the weakest in the developed world; only the US and Canada rank lower than the UK.[4]

It is significant in this respect that the UK has a rapidly rising number of workers in precarious employment,[5] working under conditions that heighten the risk of industrial injury and disease. Casual, 'zero hours' and agency employment arrangements are closely associated with unsatisfactory and unsafe working practices.[6] One comprehensive review has concluded that 'the evidence on several key categories of precarious employment indicates that these arrangements are associated with a clear and measurable decline in OSH indices.'[7] These so called 'atypical' forms of employment often involve workers hired by unscrupulous employers as if they were self-employed sub-contractors, under 'disguised employment' arrangements. In certain circumstances courts, tribunals and HMRC may even regard these *de facto* employees as legitimately self-employed.[8]

Legitimate or not, self-employed status has become a significant indicator of poor working conditions. The self-employed are much more likely to be killed at work.[9] Although accounting for only around 15% of the working population, UK Health and Safety Executive data indicates that workers who are defined as 'self-employed' account for 30% of workplace fatalities.[10] They are *twice as likely* to be killed at work.[11]

This is a particular problem in the UK which has a labour market with relatively low standards of temporary employment regulation.[12] Over the past 40 years the UK has seen a growth in 'outsourcing,' in both the public and private sectors, with larger enterprises tending to push dependent smaller firms into a reliance on an increasingly 'flexible' workforces.[13] As a consequence, these smaller firms, often with less awareness of what is expected of them in terms of health and safety compliance, and less capacity to comply,[14] have become much more numerous. Precarious employment has become more common, and management control of both commercial risk and management of workplace health and safety are passed down the supply chain with the latter said to be 'diffused.'[15]

In recent years these problems have been compounded by a documented crisis in UK health and safety enforcement.[16]The annual total of proactive health and safety inspection in workplaces is a fraction of the annual total 20 years ago[17] The number of prosecutions for health and safety offences has more than halved in 20 years.[18]

At the same time, the rate of work-related death and injury *appears* to have radically declined since the Health and Safety at Work Act was introduced in 1974. According to the statistics compiled by the Health and Safety Commission and Executive, occupational safety and health has been completely transformed for the better, with the HSE claiming an 84% reduction in the number of fatal injuries to employees since 1974.[19] The reality is, however, more complicated and gives us little reason for complacency. The official trend is impossible to substantiate, since at the same time a failure to adequately monitor incidents and exposures in UK workplaces means that it is very difficult to track trends accurately.[20] The HSE claims that since '2000/01, the estimated rate of non-fatal injury to workers has fallen by around a half,' and that the number of annual workplace fatalities fell from a figure usually well in excess of 200 prior to 2008 to around 140, the average for 2014-19 being 142. Yet this 'headline figure' of deaths and injuries,[21] counts only those workers killed in very limited circumstances. HSE headline statistics only count a proportion of those whose deaths are caused by working. HSE methodology tends to include only deaths that occur from sudden injury in the workplace (and it falls short of including *all* of those deaths). Most importantly, this methodology omits almost all deaths caused by occupational illness and ill health. Academics and campaigners have used a revised methodology to include *all* deaths caused by working. A more comprehensive estimate of the

total deaths caused by sudden injury and by illnesses and ill health that applies this revised methodology, concludes that at least 140 people die *every day* as a result of workplace incidents, injuries and exposures; or 50,000 per year.[22]

As the nature of work has changed, so has the nature of the threat to the health and safety of workers, with occupational illnesses now as likely to arise in administrative and service industry workplaces as elsewhere. Three examples serve to illustrate this: First, while the first wave of asbestos-related fatalities fell disproportionately upon manufacturing and construction workers, asbestosis and mesothelioma are now increasingly linked to those who work in the buildings built before the 1980s that contain asbestos. Consequently, in more recent years office workers and teachers as well as blue collar workers, been living with and ultimately dying of these diseases.[23] Second, as the damage caused by excessive workloads and long hours has begun to be properly acknowledged, it has become understood that the impact of stress-related diseases upon workers in office-based or service industry jobs can be as devastating as overwork in more physically taxing occupations.[24] Third, although employment in the heavy industries associated with the pre-1980s manufacturing sector has significantly declined, there is evidence that those employed in what remains of manufacturing and heavy industry still face a relatively high risk of sudden injury and exposure to toxic substances. Witness for example the emergent high rates of cancer and occupational health problems in the electronics industries,[25] and in the various 'high risk' waste disposal and recycling industries.[26] These are sectors which – in contrast to the heavy industries of the post war period – are also distinguished by very low levels of trade union recognition, and by the consequent absence of the effective worker participation in monitoring health and safety envisaged by the 1974 Act, which became a central pillar of the subsequent UK health and safety regime.[27]

It is therefore not necessarily the case that occupational illness and deaths are in long-term decline. Indeed, there is evidence that the new economy is creating major problems that are masked by the way that labour is organised and regulated. Moreover, there is clear evidence that the protections against dangers at work have been adversely affected by more than a decade of austerity-driven cuts,[28] compounding the withdrawal of state funding of health and safety supervision that was set in train in the early 1980s. This failure in

regulatory protection has been further compounded by 40 years of legislative attacks on trade union freedoms that have adversely affected worker safety. Far fewer employers now recognise trade unions, and consequently far fewer are obliged under the terms of the regulatory regime which was set in place following the 1974 Health and Safety at Work Act to permit recognised unions to appoint safety representatives empowered to monitor health and safety compliance and establish joint health and safety committees.[29]

CHAPTER TWO

health and safety gone Brexit mad

None of this provides evidence to support the over-simplified idea that 'health and safety has gone mad', still periodically wheeled out to support the idea that the UK is overregulated. Indeed, the characterisation of a UK regulatory system that ties business up in unnecessary health and safety regulation remains remarkably enduring in government, particularly the Conservative Party. Former Prime Minister David Cameron was especially keen on such rhetoric, referring regularly to the 'madness' of health and safety regulations as a 'burden' imposed on business. Cameron famously blamed health and safety law for a regulatory climate in which '… children are made to wear goggles by their head teacher to play conkers… trainee hairdressers are not allowed scissors in the classroom… office workers are banned from moving a chair…'[30] These simple, mendacious, but memorably absurd stories disguised a concerted ideologically and politically motivated bid to permit employers and shareholders to make short term profits at the expense of the lives of working people as proposals for 'common sense' reform.

Cameron's old friend from Eton and Oxford, Boris Johnson, is also keen on this type of hyperbole. In November 2019, just a few days after the first report of the Grenfell Tower Inquiry had presented a damning assessment of the supervisory and regulatory failures which had led to the catastrophic fire,[31]Boris Johnson promised a post Brexit 'bonfire' of red tape for contractors bidding for government contracts.[32]Given that the Grenfell Tower disaster had represented a significant moment of exposure for a system of subcontracting in which regulatory controls were minimised for profit, this was especially ill-judged political grandstanding, even for Johnson.[33] Even the intense public questioning of government red tape policies in the aftermath of the Grenfell fire was not getting in the way of the opportunities for business offered by Brexit .

The prospect of UK business escaping the regulations imposed by Brussels to enter a new age of prosperity has long been a preoccupation – even an obsession – of right wing politicians and media commentators.[34]

The neoliberal Thatcher government had initially been able to curb the attempts of the other EEC social and liberal democrat led member states to balance the economic freedoms demanded by the Treaty of Rome with its *Social Action Programme* and the introduction of rights to protect the interests of workers. The early results of that programme had obliged the UK government in the late 1970s and very early 1980s to implement two overt occupational safety and health Directives and introduce collective redundancy and 'TUPE' Regulations. The Community legislative programme, however, required unanimity and subsequently the UK exercised its veto widely on health and safety matters.[35]

In 1986 circumstances changed as the Thatcher government was forced to agree to European convergence in the sphere of occupational health and safety as part of the price of access to the single market. With only a 'qualified majority' now necessary to secure the adoption of Health and Safety Directives it was no longer able to exercise a veto, and the 1989 Framework Health and Safety Directive was the first of a new succession of Directives and regulations specifically intended to protect the safety and health of workers.[36]

However, convergence on health and safety regulation has had limited impact. EU member states are afforded a wide 'margin of appreciation' in the implementation of occupational safety and health protections. Moreover, despite the need for such regulation to be effective, the European Commission, most obviously since the exponential expansion of the EU in the early 2000s, has appeared satisfied merely to see that member states have the required legislation in place. It prefers not to invoke the very formidable and effective infringement procedures that have made member state governments so generally respectful of the demands of the treaties, and failures to enforce health and safety provisions tend to be overlooked.

As regards the European Social Charter, apparently happy with the *status quo*, the UK has consistently avoided keeping pace with the evolution of the Charter, an unstated policy most notably manifested in British failures to ratify the 1988 Protocol to the 1961 Charter, the Revised Charter of 1996, and – in particular – the Additional Protocol of 1995. The latter instrument implements the Charter's Collective Complaints Procedure, and permits organisations like trade unions to present cases directly to the Charter's monitoring body, the European Committee of Social Rights (ECSR)[37] for adjudication. The result has

been that the monitoring of the implementation of the Charter obligations by the government is hampered by UK adherence to an outdated reporting regime which limits the ECSR's power to identify instances of non-compliance.[38]

For example, in January 2017, in its annual report to the ECSR, the government explained away the effective withdrawal of occupational safety and health enforcement in the UK. It claimed that the HSE's current approach 'accommodates the need for inspectors to target key risks and take proportionate action... inspection is concentrated on the higher risk industrial sectors... However, employers in any sector who under perform in any health and safety may still be visited.'[39]

This is the context for the government's response to the ECSR; it passed off a policy that has had devastating consequences for UK health and safety protections, arguably an unequivocal breach of Article 3 of the Charter, as if it were a matter of administrative streamlining. The ECSR, seemingly satisfied with the government's reassurances, still holds the UK to be compliant with Article 3(2) 'to provide for the enforcement' of health and safety regulations 'by measures of supervision.' Working under the 1961 procedures, and thus largely reliant on the government's version of events, the more recent manifestations of a 40 year de-regulatory campaign in the UK have yet to be revealed to the ECSR – at least not on the record.

There is no doubt that re-adjustment of our relationship with the EU will offer right wing opportunists a new rationale to cut the 'red tape' that supposedly hampers the UK economy, in spite of all evidence to the contrary. Yet Brexit now raises an imminent threat of the UK entering a highly risky 'race to the bottom.' If the modest European minimum health and safety requirements cease to apply after we have left the EU, then the Government is likely to permit workplace safety protections to slip even further behind the standards set by other developed economies. There can be little doubt that Conservative Party politicians and their allies in the media hope to reprise their previous propaganda successes and manage to persuade the public that rolling back health and safety protection is *a good thing.* One consequence of leaving the EU will be a shift away, to some degree at least, from convergence with EU regulatory standards. This means that UK compliance with other benchmark international standards will come under more intense scrutiny following any re-negotiation of

trade agreements with the EU. Indeed, this much is recognised in the UK government's own Brexit pre-negotiation statement of February 2020, which claims that both sides should make a commitment 'not to weaken or reduce the level of protection afforded by labour laws and standards'.[40] The British government appears to be happy to make such commitments. However, a crucial nuance, articulated in the same document is that it does not want such commitments to be *obligations*. The UK government 'will not agree to any obligations for our laws to be aligned with the EU's.'[41] This objection to obligation, to being bound to any labour standards, is crucial.

Whether our European health and safety obligations are to be diluted or not, the UK government will be forced to think much more carefully about where the UK regulatory system sits in international law. Indeed, the UK's current regional and international OSH obligations cannot be dispensed with by any Brexit deal, even a 'no deal'. Those imposed by the Council of Europe's European Social Charter[42] and the United Nations International Covenant on Economic Social and Cultural Rights (UNICESCR) will remain whatever the UK's future relationship with the EU.[43]

As the next section of this booklet argues, it is the Conventions of the International Labour Organisation (ILO)) and the Protocols to those Conventions that give effect to the UK's current treaty obligations, and they will continue to do so in international law.

CHAPTER THREE

Europe and the UK's health and safety obligations

In 1919, at the end of the 'Great War,' the Treaty of Versailles established the ILO, and in the 20 years prior to WWII, the UK government ratified 26 of the non-maritime Conventions adopted by the Organisation's International Labour Conference (ILC) – more than any other state. After WWII the UK government took the leading role in the revision of the ILO constitution, the drafting of the fundamental Conventions Nos. 87 and 98 on freedom of association, the right to organise and the right to bargain collectively.

In the aftermath of World War II, the UK government played a very important and prominent role in negotiating protections for trade union freedom in the Council of Europe's European Convention on Human Rights (ECHR), and those which were eventually to be incorporated into the United Nations International Covenants on Civil, and Political Rights and Economic Social and Cultural Rights.[44] The UK government also played a key role in the long negotiations with fellow Council of Europe member states over the ECHR's sister instrument, the 1961 European Social Charter, much of which is concerned with labour protection. In 1951 the UK had been the first state to ratify the ECHR and in 1962 it was the first to ratify the Charter.

In 1967, long before the EU Single European Act of 1986 obliged the UK to implement the first of a fresh series of health and safety Directives, the first interpretative statement was issued on Article 3 of the European Social Charter. Article 3 requires states to guarantee safe working conditions, and in that statement, the Charter's supervisory committee, the ECSR held that in order to fulfill the 'core' requirements of Article 3(1) states must 'prove that safety and health regulations have been issued for all economic sectors.'[45] A recent Statement of Interpretation on Article 3(1) incorporates a very comprehensive list broadly covering all the areas of EU regulation, a list subject to regular updating. The ECSR 'has at its disposal a very complete set of international technical reference standards which can be of use for defining and listing the main risks and occupations,'

which require protective measures sufficient to comply with 3(1).

Perhaps the most important of those are the instruments of the ILO. As Kari Tapiola, former Special Adviser to the Director-General of the ILO has noted, the rights of workers guaranteed by the 1961 Charter and the revised 1996 Charter are reflected and 'fleshed out' by the ILO regime.[46]

> 'As to the coverage of the International labour standards and the European Social Charter, some areas are similar, very often down to the letter… The rights that pertain to work are in general covered by one or another of the over 190 Conventions and 200 Recommendations of the ILO.'[47]

The ILO jurisprudence is the thread which links all of the regional and international rights regimes which currently bind the UK with respect to labour protection. The European Court of Human Rights accords great respect to the ILO Conventions and Protocol, as well as to the European Social Charter and to the interpretations of those instruments by their respective supervisory bodies.[48] The ECtHR's 'integrated' approach to the interpretation of the Article 11 European Convention protection for freedom of association is grounded in the ILO and Charter jurisprudences – particular importance is attached to the former. The European Social Charter's ECSR routinely cites ILO Conventions and the findings of the ILO Committee of Experts – and the ILO's Committee of Experts refers to the work of the ECSR. The UN Committee on Economic Social and Cultural Rights ['UNCttESCR', the UN equivalent of the ECSR] draws particularly heavily on the ILO instruments and jurisprudence to inform its interpretation of the labour rights protected by the Covenant. In its General Comment (No.23) on Article 7 – which requires states to guarantee 'just and favourable conditions of work,' and, in particular, safe and healthy working conditions – the Committee holds that the provision of a 'comprehensive national policy on occupational safety and health' is a core requirement, and it is the ILO instruments that provide the required template.

Due to the failure of successive UK governments to ratify ILO health and safety instruments, it is however, the European Social Charter and the UN Covenant – by which the UK has been bound since 1965 and 1976 respectively – which can be said to require the UK to adhere to a health and safety regime broadly equivalent to the

EU health and safety regime. It is, for example, the view of the Council of Europe, and of the European Social Charter's ECSR, that there is close correspondence between the Social Charter and the standards required by EU law; the 'rights established by the Charter are guaranteed in a more or less explicit and detailed manner by EU law.'[49]

Nevertheless, because EU, European Social Charter and the UN Covenant are so intertwined with the standards required by the ILO, they can be said to indirectly influence what is required of the UK government, as many EU Directives explicitly refer to ILO instruments.[50] Adding to this web of mutual reinforcement and interdependence, such is the relationship of EU law and ILO jurisprudence that the European Commission 'calls upon all Member States to set an example by ratifying and implementing the ILO Conventions classified by ILO as up to date.'[51]

So, even if in the future the UK government is no longer bound by either the EU treaties or a free trade treaty with the EU requiring it to retain health and safety law equivalent to that required of EU members, other treaty commitments will nevertheless require it to maintain an equivalent regime providing the same protection. Nevertheless, such has been the cavalier approach of the UK to these other labour treaty obligations that the European Commission, in its February 2020 Brexit negotiating mandate, states that any trade agreement with the UK 'should include provisions of *adherence to effective implementation* of relevant internationally agreed principles and rules. This should include Conventions of the International Labour Organisation (ILO) and the Council of Europe European Social Charter.'[52]

For despite this apparent multi-layered level of obligation, successive UK governments have been permitted to get away with a steady degradation of its health and safety system of regulation – most notably and paradoxically by the European Commission. Matters could perhaps be helped if the trade unions showed more of an inclination to submit comments on UK state reports made by the government under the terms of the 1961 European Social Charter. However, even when breaches are drawn to the attention of the ECSR, and adverse conclusions reached, they are routinely ignored by the UK government. Member states are treaty bound to act to rectify the failures of compliance the committee identifies yet when this does not happen, then in practice the ultimate sanction - if there is

the political will for it – is for a 'Recommendation' to be issued by the Committee of Ministers. A small number of Recommendations have been issued to the UK. They have, however, largely gone unheeded.[53] As for the UN Covenant, in 38 years of Concluding Observations, UK occupational health and safety has been mentioned in only two, most notably in 1985 in relation to the then disproportionately large numbers of fatal accidents in UK industry.

We do not argue that ratification of ILO treaties is the holy grail, or that it will guarantee improvements in working conditions. After all, while the UK government from the 1980s onwards attacked the freedom of workers to negotiate collectively, this right was two of the core 'fundamental' Conventions to which the UK is a signatory: ILO Convention 87 on 'Freedom of Association and Protection of the Right to Organise' and ILO Convention 98 on the 'Right to Organise and Collective Bargaining'.

This is why the main focus of this booklet will be on the UK's record on the ratification *and* implementation of ILO occupational safety and health instruments. While the health and safety standards set by the Council of Europe, United Nations and ILO instruments are subject to varying intensities of scrutiny and differing expectations of implementation,[54] considered as a whole – and the ILO jurisprudence can be said to bind these treaty obligations into a coherent whole – they impose what is arguably an ultimately inescapable legal duty upon the UK government.

In what follows, we will describe the health and safety treaty obligations incumbent upon the government and how compliance with international legal standards on health and safety can be strengthened and entrenched for British workers even without the 'safety net' of the minima demanded by the EU. The UK embarks upon this new chapter in its relationship with international legal standards from a very low level of engagement.

CHAPTER FOUR

the ILO and the UK – the politics and practice of non-ratification

ILO working time standards and the UK

The first Convention adopted by the ILC in 1919 was the Hours of Work (Industry) Convention No.1. The UK declined to ratify it. Reviewed in 1959 and 1965 the government took the view that 'hours of work have generally been regarded a best settled by voluntary collective bargaining…without intervention by the state.' By the early 1990s, after more than a decade of legislative attacks on the freedom for workers to negotiate collectively, the government argument was that the 'regulation of working hours, other than for health and safety reasons, would be a major barrier to employment,' that to ratify the Convention would 'impose unrealistic restriction on businesses, reduce productive capacity and erode competitiveness....' A similarly evolving view was taken of the Weekly Rest (Industry) Convention (No.14) of 1921 – in 1962 UK 'voluntarism' had been cited as the principal barrier to ratification, and even in 1983 the government argument was that these were 'matters for collective bargaining… although they may sometimes be determined by Wages Councils.' By 1992 the argument was that ratification would be a 'burden on business.' Dropping any reference to collective bargaining, the government stated that it thought weekly rest 'best left for negotiation between the parties directly.' Exactly the same arguments to justify the non-ratification of Convention No.1 were trotted out by the Major government when obliged to review the Hours of Work (Commerce and Offices) Convention (No. 30), the 40 Hour Week Convention (No.47), the Reduction of Hours of Work (Public Works) Convention (No.51) and the Reduction of Hours of Work (Textiles) Convention (No.61).

It therefore came as no surprise when the John Major government sought to resist the obligation to implement the EU Working Time Directive into UK law. It argued at the Court of Justice of the EU that it was a 'social' measure rather than the primarily occupational safety and health Directive that the European Commission held it to be, and that it was an element of the Maastricht Treaty 'social chapter' which

the Major government had so famously declined to accept.

Therefore, it argued, the UK was not bound to implement it. However, that argument was rejected and the government lost its case – rightly so.

The EU Working Time Directive was, of course, implemented by the subsequent Blair government which made full use of the derogations secured by the Conservatives to undermine its impact. Employers were given very considerable scope to avoid having to concede a 48 hour maximum average working week, principally by means of the 'individual opt out,' and by allowing employers to recruit on the proviso that the new employee agrees to sign away their right to a 48 hour cap. Permitting the use of Workforce Agreements which essentially permit employers who do not recognise a trade union to 'rubber stamp' collective opt outs by the entire work force also proved popular with employers – until it became understood that the domestic regulations were rarely enforced. The New Labour government had taken care to ensure that the scope for individual enforcement of the working time regulations was heavily compromised, and that state supervision and enforcement was almost non-existent.

Subsequent governments have taken more or less the same position and have similarly resisted risking extending trade union influence over the implementation of working time standards, of making working time protections effective,[55] or of inviting a barrage of very politically damaging advice criticism and condemnation by underpinning the provisions of the EU Working Time Directives through ratification of the relevant ILO Conventions.[56] It will come as no surprise if working time protections are to be a priority for attack by the current government.

ILO occupational health and safety Conventions

The ILO health and safety Conventions are the missing layer of obligation. States choosing to ratify the ILO instruments lay themselves open to a robust supervisory regime. The ILO Committee of Experts has, in contrast to the Charter's ECSR and the UN Committee on Economic, Social and Cultural Rights, continually questioned and drawn attention to the UK's unstated policy of health and safety 'regulatory surrender,'[57] despite the UK's poor record of ratification of health and safety Conventions. This is the result of the Attlee government briefly bucking the general policy of UK governments

with regard to health and safety related Conventions and ratifying the Labour Inspection Convention (No. 81) of 1947.[58]

Excluding maritime instruments,[59] between 1945 and 1980 the UK government ratified 32 ILO Conventions. However, just five of these were specifically health and safety Conventions.[60] During 1980 – 1997, the years of the Thatcher and Major governments, other than two maritime Conventions and two Conventions initiated by the Callaghan government, only the uncontroversial Labour Statistics Convention was ratified.[61]

The first Thatcher administration had declined to ratify the Occupational Safety and Health Convention No. 155 of 1981, despite the fact that this instrument, which remains the cornerstone of the Organisation's health and safety regime, has much in common with the Health and Safety at Work Act 1974. This reflects UK influence at the ILO during the drafting process, the wider influence of the UK Robens Report of 1972, and the increasing belief that states should follow the British example and establish preventative 'goal-setting' regimes – as opposed to technical or prescriptive regimes.

No new legislation would have been required to secure compliance,[62] yet Convention 155 was successfully 'knocked into the long grass'. Although the HSE subsequently (without publicity) recommended the ratification of Convention 155 on at least two occasions, it remains unratified.[63]

This continuing unstated policy of non-ratification is arguably both practical and ideological. The government has no wish to create a rod for its own back, in the form of monitoring, questioning and condemnation by and from the Committee of Experts, and criticism at the ILC and from the Conference Committee on the Application of Standards. Moreover, the ILO health and safety instruments consistently emphasise the need for employers to consult and collaborate with the most representative of the relevant workers' organisations – the trade unions - and almost invariably incorporate a right for workers to 'down tools' and vacate themselves from situations where they are exposed to serious danger. Those instruments essentially require states to oblige employers to recognise trade unions for health and safety purposes and give workers a right to strike until health and safety grievances have been rectified – anathema to neoliberal governments.[64]

The view of the HSE on the very important unratified 'priority' or 'governance' Labour Inspection (Agriculture) Convention (No.129) of 1969, when the position was reviewed early in the first Major government is instructive. It saw 'no reason not to ratify.' However, the HSE noted that Ministers were to again review the position in 1993, but stated that 'given the deregulatory stance of the present administration, ratification of Convention 129 remains unlikely…' Convention 129 remains unratified, the comment of the Major government being that 'It would be inconsistent with this approach to ratify C [Convention] 129.'[65] Very obviously ideological concerns were paramount.

After 1997, however, the newly elected Blair government, having adopted a positive stance towards ratification of ILO Conventions set about ratifying the three remaining 'fundamental' instruments in accord with the ILO Declaration on Fundamental Principles and Rights at Work.[66] At the same time it looked into the possibility of ratifying more 'non-core' Conventions, and the health and safety Conventions were considered first.[67] Ultimately, however, during its 13 years in office, the New Labour governments of Blair and Brown, two maritime instruments aside, only ratified four ILO Conventions, the three fundamental instruments and just one health and safety Convention, the Promotional Framework for Occupational Safety and Health Convention, 2006 (No.187), principally concerned with publicising and promoting health and safety. That was ratified almost as soon as was possible – in 2008. Convention 187's closely related 'sister' instruments, Convention 155 (considered above) and the 2002 Protocol to Convention 155 (concerned principally with health and safety recording and reporting) have, however, yet to be ratified.[68] The ILO's Governing Body regards Convention 155, Convention 187 and the 2002 Protocol to be the key ILO health and safety instruments.[69]

The Blair government had in 1998, asked the Health and Safety Commission's Policy Unit to review the ILO health and safety Conventions.[70] The budgetary attacks on the Commission and Executive undertaken during the Thatcher and Major years had then – temporarily as it would turn out – been suspended, and with supposedly conflicting EU standards particularly in mind, the HSE had made enquiries as to whether the ILO would amend Conventions where there were 'insurmountable obstacles to ratification.'[71]

That was an unnecessarily guarded approach. Not only was there no chance whatsoever of the ILO amending any Conventions to suit the UK government, there should have been few difficulties with the ratification of health and safety Conventions. The ILO had been inserting 'flexibility clauses' in occupational safety and health Conventions since the 1977 Working Environment (Air Pollution, Noise and Vibration) Convention, (Convention 148), which had permitted the UK to ratify only the provisions on air pollution. Subject to consultation with the most representative workers' and employers' organisations, provisions which posed substantial difficulties could be 'excluded,' albeit with a view to the eventual acceptance of the excluded provisions, or the inclusion of those sections of workforce temporarily denied the protections of the Convention. Moreover, by 1998 it was becoming apparent that in practice states were often able to treat the temporary derogations as permanent; indeed Convention 148, ratified by the UK in 1980,[72] is still only ratified in respect of air pollution.

As for clashes with European standards, of the ILO Conventions, those covering areas of 'shared competence' with the EU are ratifiable by member states autonomously subject only to 'the duty of sincere cooperation.'[73] Where Conventions relate to areas where the EU has exclusive competence it is necessary for the member state to obtain authorisation from the European Council before ratification – no more than a formality – and more recent Conventions have 'REIO' clauses which allow derogation from provisions which contradict the *acquis*.[74]

So, arguably, while there was some confusion in the early 1990s over the freedom of EU states to ratify new ILO Conventions, the Blair government's 'insurmountable barriers' to ratification were more likely to do with the very prominent role that ratification would imply for trade unions. The central role of unions is woven into the fabric of each occupational safety and health Convention. The ILO's Committee of Experts was to draw attention to the successive budgetary attacks on the HSE/C that were such a feature of UK governments from Thatcher and Major to Blair and Brown.

After New Labour lost office in 2010, the Maritime Labour Convention (No.186) of 2006, which consolidated and revised numerous maritime Conventions, was ratified by the Coalition in 2013. The subsequent Cameron-led Conservative government ratified the 2014

Protocol to the Forced Labour Convention (No.29) of 1930 in 2016,[75] and the Work in Fishing Convention of 2007 (No.188) was ratified by Theresa May's government in 2017. The EU and the ILO collaborated over the maritime instruments, both of which principally concern health and safety and working time protection for seafarers, and EU Directives implement the agreement of the representatives of workers and employees on Convention 186 and Convention 188 into EU law. The *acquis* now incorporates the demands of the Conventions – the relevant Directives came into force at the same time as the ILO instruments.

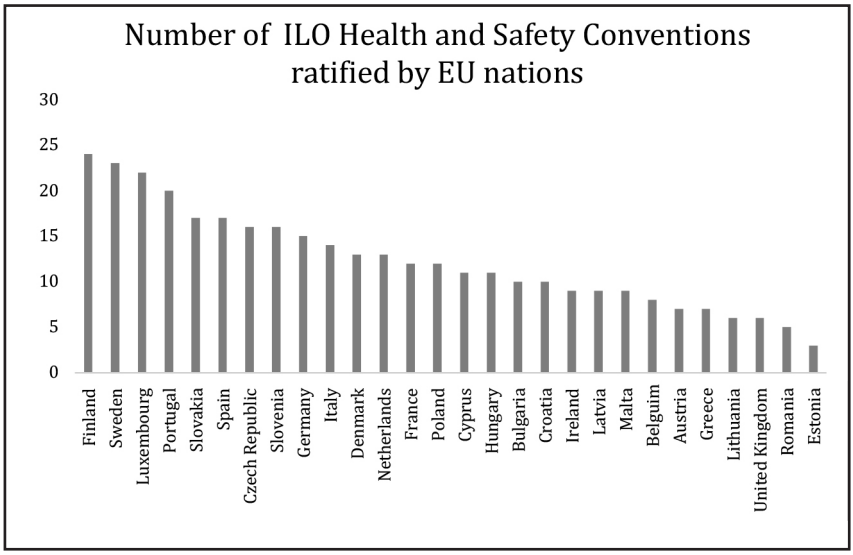
UK ratifications of ILO occupational health and safety standards in comparative context

In terms of health and safety instruments, the UK government has ratified only 6 of the ILO's 36 'up-to-date' and 'interim' health and safety Conventions and Protocols (including the key health and safety-relevant working time instruments).[76] This puts it on par with the following countries that have also ratified 6: Cameroon, Comoros Islands, El Salvador, Guyana, Libya, Lithuania, Mauritius, Mozambique, North Macedonia and Saudi Arabia. There are 74 countries in the world that have signed up to more ILO health and safety Conventions than the UK. In a league table of countries that have ratified at least one ILO health and safety Conventions, the UK would be in the bottom half. As table 1 shows in stark detail, the UK's record looks exceptionally poor when set out in those terms.

Table 1: Non-EC and Non-OECD nations that have ratified more ILO Health and Safety Conventions than the UK[77]

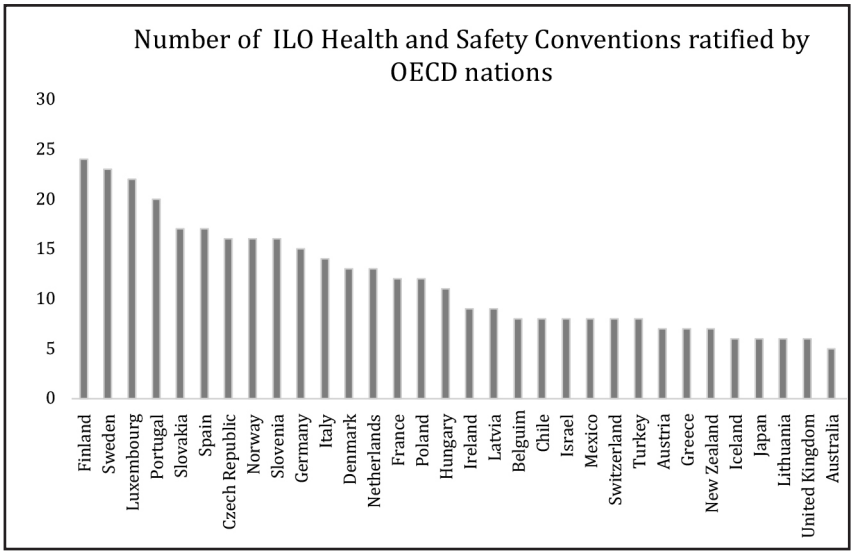
Uruguay	22	Tajikistan	10
Russian Federation	18	Costa Rica	9
Brazil	16	Dominican Republic	9
Bolivia	15	Burkina Faso	8
Guatemala	15	Côte d'Ivoire	8
Argentina	14	Djibouti	8
Bosnia and Herzegovina	14	Ghana	8
Montenegro	14	Panama	8
Ukraine	14	Peru	8
Ecuador	13	Switzerland	8
Lebanon	13	Venezuela	8
Serbia	13	Algeria	7
Syria	13	Egypt	7
Colombia	12	Gabon	7
Albania	11	Haiti	7
Azerbaijan	11	Kazakhstan	7
Belarus	11	Madagascar	7
Cuba	11	Moldova	7
Iraq	11	Morocco	7
Guinea	10	Nicaragua	7
Kyrgyzstan	10	Niger	7
Paraguay	10	Tunisia	7

The record looks equally bad when compared with other economically developed states. Figure 1 sets out the total number of ratifications of 'up to date' ILO Conventions and Protocols across other members of the EU.



78

As Figure 2 below shows, the UK's record looks even worse when set against the record of OECD states.



79

It must nevertheless be borne in mind that the mere fact of 'ratification' tells us little about the implementation of a Convention

or Protocol: depending on the date of ratification, for some states certain instruments may not yet have become binding, provisions may have been (supposedly temporarily) 'excluded,' and certain sections of the workforce may have been similarly excluded from the protection required. It is also the case that ratification tells us little about the extent to which the terms of an instrument are enforced.[78] We will come back to the question of enforcement, particularly in our discussion of Convention No.81, and in our discussion of the role of trade unions and collective struggles in the conclusion.

In the meantime, although we acknowledge the limits in what 'ratifications' tell us, we must emphasise that they are a strong measure of *political will*. That is, the data set out in table 1 and in figures 1 and 2 tell us something about the extent to which a given state is prepared to show a commitment to ILO standards, by laying itself open to the scrutiny of the ILO's Committee of Experts, and working towards establishing a baseline of working conditions and labour rights.

enforcement and Convention 81

So far, this booklet has focused on the ILO ratification record of the UK, and some of the context that explains this record. As we noted above, there are major limits to what this record can tell us about the implementation of those standards. However, the UK can be challenged on its compliance with the health and safety Conventions it has ratified.

This is why ILO Convention No. 81 on Labour Inspection, ratified by the Attlee government is particularly important.[79] This Convention is discussed in detail in this section since it is, in many ways, the instrument upon which the implementation of other Conventions rest. Indeed, we would argue that compliance with the other occupational safety and health Conventions that the UK has ratified (certainly Conventions 115, 120, 148) is virtually impossible to ensure without adequate labour inspection protection.

Convention 81 is one of 4 'governance Conventions' that are regarded as 'priority' instruments. The other 3 governance Conventions are the Employment Policy Convention, (No. 122); the Labour Inspection (Agriculture) Convention, (No. 129) and the Tripartite Consultation (International Labour Standards) Convention (No. 144). Other than Convention 129, the UK has ratified all of those Conventions.

Article 17(1) of Convention 81 provides that '[p]ersons who violate or neglect to observe legal provisions enforceable by labour inspectors shall be liable to prompt legal proceedings without previous warning…' Indeed, Article 16 provides that a key element of any effective system of regulating health and safety law is the knowledge that regular inspections will be made in workplaces to monitor compliance by employers, and that there is a credible threat of punishment when legal violations are found. Yet the credible threat of prosecution and enforcement action in the UK, has been dramatically eroded over the past 2 decades. As we noted above, the annual total of proactive health and safety inspection in workplaces is around a quarter of the total it was 20 years ago. The number of local authority inspections in the UK has been cut by 50% in roughly the same period.[80] If we take the number of inspections by HSE (less than 18,000 each year) in the context of the numbers of premises for which its inspectors have enforcement responsibility (around 900,000), we can surmise that the average workplace can now expect an inspection much less than once every 50 years.

Moreover, Article 2 (1) provides that: 'The system of labour inspection in industrial workplaces shall apply to all workplaces in respect of which legal provisions relating to conditions of work and the protection of workers while engaged in their work are enforceable by labour inspectors.' As we note above, from 2011, onwards, the Coalition government in the UK took a series of Ministerial-level decisions that created a new category of 'low risk' workplace which effectively removed the majority of UK workplaces – including some of the most deadly classifications of work - from routine, unannounced, inspections. Indeed, when *Hazards Magazine* investigated where deaths caused by sudden injury in the workplace actually occurred, it found that 53% of such deaths were in government defined 'low risk' working activities.[81]

At the same time, successive governments have cut the resources that HSE and local authorities have to monitor and enforce compliance with statutory health and safety requirements. The effects of these cuts are clear. The 2020 Committee of Experts report on Convention 81, notes with *concern* 'that the number of labour inspectors decreased from 1,432 to 990 between 2011–12 and 2018–19.'[82]

This constitutes a decrease of 31% in 7 years. Moreover, in the decade between 2005 and 2015, there were, respectively 1140 and 736 full-time equivalent local authority Environmental Health Officers (EHOs)–

a fall of 35%.[83] It is this crisis in funding, combined with policies that actively discourage proactive inspection, which has sharply reduced health and safety inspections and prosecutions.

Article 10 of Convention 81 provides that: 'The number of labour inspectors shall be sufficient to secure the effective discharge of the duties of the inspectorate.' According to how the ILO applies those standards in practice, the UK, as an industrial market economy, should have a ratio of inspectors to workers of at least 1: 10,000.[84] The figures cited about indicate that the current ration in the UK is roughly 1:15,000. In order to comply with ILO baseline minimum standards set out in ILO Convention 81, HSE and local authorities would need to increase the number of inspectors they currently employ by at least 50%.

The systematic under-funding of regulators and the subsequent reduction in planned inspections and other regulatory activities, combined with an undermining of enforcement strategies in government policy, has clearly had a deleterious effect on rates of prosecution and other enforcement actions. Indeed, the ILO Committee of Experts in 2020 urged the government 'to take the necessary measures to ensure that sufficient budgetary resources are allocated for labour inspection…',[85] noting in the same report that there had been a 'significant fall' in number of HSE convictions in the three years between 2015-16 (672) and 2018–19 (361). This amounts to a fall of 46%. In this context, it is difficult to sustain the argument that there exists a credible enforcement capacity in the UK, let alone one that would make it compliant with this general standard of inspection enshrined in international law.

While the ILO's Committee of Experts has for years been assiduous in pressing the UK government on its Convention 81 supervisory failures, much more enforcement of treaty obligation is required. Ratification of the full hand of health and safety and working time instruments will generate much more of the required impetus for change, and invigorating the supervision of UK compliance with the European Social Charter through the ratification of the Additional Protocol – and the Revised Charter – could do much to augment that political traction. Fresh Convention ratifications will also serve to entrench existing protections and make them far less vulnerable to future attacks.

CHAPTER FIVE

conclusion

The future for all labour rights in the UK is now an uncertain one.

The requirement that employment rights of EU origin be retained by the UK at the end of the Brexit 'transition period' was removed from the Johnson government's October 2019 revision of the Withdrawal Agreement negotiated by the May government. A pledge of at least static alignment was, instead, inserted in the accompanying 'political declaration.' However, following the Conservative victory in the December 2019 election the flimsy domestic procedural 'protections' proposed for the content of 59 EU Directives the majority of which concerned health and safety at work, were dropped from the Withdrawal Agreement Bill 2019. The Bill passed into law as the EU (Withdrawal Agreement) Act 2020, with these unsatisfactory assurances about workers' rights having been replaced by the still less satisfactory promise of an Employment Bill of unspecified content to be introduced to Parliament later in the year.

The government most emphatically does not wish to see the UK bound in the future to EU employment protection standards. Indeed, the opportunity for the government to bind the UK to fresh trade treaties without being bound to protect the interests of working people is at the heart of the promised 'freedom' which Brexit is supposed to deliver, and which those on the right wing of the Conservative Party have sought for a long time. And the Johnson administration may well deliver on this promise.

The EU however appears determined to require at least 'static alignment' with respect to labour rights, demanding that 'laws, regulations and requirements existing in the Union regarding working conditions and workers' rights should continue to apply' under future trading arrangements.[86] The 'envisaged partnership' should ensure that protections cannot be:

> 'reduced below the level provided by the common standards applicable within the Union and the United Kingdom at the end of the transition period in relation to at least the following areas:

> fundamental rights at work; occupational health and safety, including the precautionary principle ; fair working conditions and employment standards…'[87]

Effective enforcement, notably 'an effective system of labour inspections,'[88] is to be required by the EU 27, and arguably an element of 'dynamic alignment' is implicit in the EU's demand that the future trading partnership 'should uphold common high standards and corresponding high standards over time,' with a labour rights 'ratchet' mechanism envisaged.[89] However, more remarkably, in addition to broad references to the partnership respecting both ILO and European Social Charter obligations, the EU expects the UK to remain bound by the ECHR and to effectively retain the Human Rights Act:[90]

> '…the envisaged partnership should provide for automatic termination of the law enforcement cooperation and judicial cooperation in criminal matters if the United Kingdom were to denounce the European Convention of Human Rights (ECHR). It should also provide for automatic suspension if the United Kingdom were to abrogate domestic law giving effect to the ECHR, thus making it impossible for individuals to invoke the rights under the ECHR before the United Kingdom's courts.'[91]

Of course, anything can happen during the next year or so. Very obviously there is an urgent need to reinforce and entrench what rights we have. While there is little that can be done in this regard in the short term there are some basic health and safety demands that the trade union movement can organise around and agitate for. In domestic terms, grassroots and trade union rank and file organisations such as the Hazards movement will have an even more crucial role to play in the coming years. The trade unions will certainly be required to step up and organise campaigns that are capable of mobilising against both the government and against business. One such campaign must be a programme of ratification of regional and international instruments (the Revised European Social Charter and the optional Protocols to the Charter and the UNICESCR), and especially the ratification of the full hand of ILO health and safety Conventions.

As an example of the value of the latter: We saw that the Coalition government ratified the Maritime Labour Convention in 2013 and that the May government ratified the Work in Fishing Convention

in 2017. We saw too that the ILO and the EU collaborated over the drafting of the Conventions. Member states are merely encouraged by the Commission to ratify the two Conventions, while they are, of course, obliged to implement the provisions of the relevant Directives. The Directives were among the 59 Directives mentioned above, protections for which were dropped when the government obtained a Commons majority of 80 seats in the December 2019 election.

Yet these rights are protected by virtue of the fact that the UK government has ratified the Conventions. Whatever its future arrangements with the EU, the UK is bound to guarantee them – just as it is bound to retain the substance of the other health and safety rights of EU origin by virtue of its European Social Charter and UNICESCR treaty obligations. However, while the weaknesses of the UN and Council of Europe reporting regimes – as they are currently accepted by the UK – will very likely permit the government to shrug off adverse conclusions when or if it elects to infringe or discard those rights, the UK government will not be able to treat the consequences of breaching Convention obligations as lightly. The great irony of Brexit is that should the UK 'crash out' of the EU without a deal the UK is still bound by treaty, by international law, to retain those protections for workers. Should the government wish to denounce the Maritime Labour Convention its first window of opportunity will be in 2024-5. A second opportunity will arise in 2034-5, while the relevant dates for Convention 188 are 2030-1 and 2040-41.

Given that, in practice, EU states are given very wide leeway to dilute or emasculate those rights, the ILO Conventions might plausibly be said to have always offered a more robust formidable political obstacle to the erosion of regulation at a European level. This is a matter of considerable importance which appears yet to have been fully appreciated by either the UK government or the major UK trade unions.

Moreover, compliance with ILO standards is, to varying degrees, an almost inevitable feature of the free trade agreements the government sets great store by. As we have shown, UK falls woefully short of comparator states in terms of its ratification of health and safety Conventions and Protocols. To demand ratification of ILO treaties and the implementation of ILO standards is therefore something that remains very much on the political agenda whether the current government likes it or not. The government should be

placed under maximum pressure to ensure its ratification record is better than countries such as Cameroon, Comoros Islands, North Macedonia or Saudi Arabia.

However, itis clear that without a major mobilisation across the trade union movement and in workplaces, it would be difficult to see how the pressure could be brought to bear on the government to ratify further ILO health and safety Conventions and Protocols or to implement the ILO standards it is currently bound by. This booklet takes the first step in setting out the case for any mobilisation that might follow.

This is not to argue that securing ILO standards could ever be an end point in a trade union struggle. We see ILO standards as a starting point; a useful mechanism to mobilise demands around. The key problem that we face in securing standards of health and safety in the workplace is the lack of power that workers have to organise around safe working conditions. This lack of power is best addressed by unionising workplaces and winning enhanced powers for trade union safety representatives.[92]

In the post-Brexit world, UK workers will have to seek international solidarity and develop common struggles for labour rights with workers in other economies, not only to stand still and avoid a race to the bottom, but to move forward and demand enhanced rights. This is the same challenge that follows every economic and political crisis. The ongoing crisis precipitated by Brexit is no different.

endnotes

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9 In the UK bogus self-employment status permitting *de facto* employers to avoid statutory protections and disguise poor wages (paid as they are as a gross sum without deductions for tax and National Insurance) are a common feature of precarious work arrangements.

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12 OECD, 2018 op. cit.

13 James and Walters, 2005, *op cit*, p 45.

14 See, for example, ibid, pp33-34.

15 Ibid, p.36; pp. 42-3

16 Tombs, S. and Whyte, D. (2010) *Regulatory Surrender: death, injury and the non-enforcement of law*, London: Institute of Employment Rights.

17 The HSE no longer publishes an estimate of the number of proactive inspections it plans or completes. In its 2017/18 Health and Safety Executive Annual Report and Accounts, it states that it planned 20,000 proactive inspections in the year 2018/19. In 2000/01, it completed 75,000 proactive inspections.

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of duty holders; in 2018/19, the figure was 394.

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29 See the Safety Representatives and Safety Committees Regulations 1977.

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32 *The Daily Telegraph*, 4November 2019

33 Hodkinson, S. (2018) Grenfell Foretold: a neo liberal tragedy, in *Social Policy Review*, vol. 30; Cooper, V., and Whyte, D. (2018). Grenfell, Austerity, and Institutional Violence. *Sociological Research Online*. https://doi.org/10.1177/1360780418800066 (accessed 12 February 2020).

34 The question alluded to here: 'Can UK cut EU red tape for businesses after Brexit?' featured in a BBC Daily Politics debate, available: www.bbc.co.uk/news/av/uk-politics-38736389/can-uk-cut-eu-red-tape-for-businesses-after-brexit (accessed 12 February 2020). Variations on this question have been posed regularly by all major media outlets since June 2016. See also *FT Adviser*, 30 September 2019: 'Chancellor announces 'Brexit red tape challenge,' following Sajid Javid's announcement of a 'Brexit red tape challenge' to identify and strip out unnecessary regulation of EU origin.

35 Towers, B. (1992) Two speed ahead: social Europe and the UK after Maastricht, *Industrial Relations Journal*, vol. 23, no. 2.

36 Which must be distinguished from domestic regulations. EU regulations, however, apply almost as if they were domestic legislation, and are said to be 'directly applicable,' whether or not states choose to incorporate them in domestic law.

37 The European Committee of Social Rights (ESCR) is comprised of 15 members elected by the Council of Europe's Council of Ministers. The ESCR is the body responsible for monitoring compliance of states party to the European Social Charter. On

the 1995 Additional Protocol see https://www.coe.int/en/web/european-social-charter/collective-complaints-procedure.

38 Moretta, A. (2019) *Benchmarking Workplace Rights*, unpublished PhD thesis, University of Liverpool; and Moretta, A. (2020) *Benchmarking Freedom of Association: the UK's non-compliance with international standards*, Liverpool: Institute of Employment Rights.

39 36th National Report on the Implementation of the European Social Charter submitted by the Government of the United Kingdom, Cycle XXI-2 (2017), 11 January 2017.: p.2.

40 HM Government (2020) *The Future Relationship with the EU: The UK'sApproach to Negotiations*, London: HM Government: 16.

41 Ibid.: 3.

42 In particular, Article 3 of Part II of the Council of Europe's 1961 European Social Charter.

43 In particular, through Article 7 of the UNICESCR.

44 The Council of Europe and UN instruments (explicitly in the case of the UN instruments), took Convention 87 as a floor to the protections afforded freedom of association.

45 Conclusions I 1965-1967 Statement of Interpretation Article 3.

46 Tapiola, K. (2011) European and global standards and their interaction Johanson, N. and Mikkola, M (eds.) (2011) *Reform of the European Social Charter*, Helsinki: Ministry for Foreign Affairs of Finland.

47 Ibid., p16.

48 See for example Demir and Baykara v Turkey [2008] ECHR 1345 and Unite v UK [2016] ECHR 1150.

49 See 'The Relationship between European law and the European Social Charter' Council of Europe Working Document 15 July 2014, available at: www. coe.int/en/web/European-social-charter-and-european-union-law para 65 (accessed 12 February 2020)**.** However, 'there exists no presumption of conformity with the Charter where a state may be in conformity with a Directive' (Digest of the Case Law of the European Committee of Social Rights, Council of Europe, December 2018, p 50).

50 See for example the preamble to Directive 2003/88/EC 'concerning certain aspects of the organisation of working time.'

51 Communication from the Commission to the European Parliament, the Council, the ECSR and the Committee of the Regions, 'Renewed social agenda: Opportunities, access and solidarity in 21st Century Europe,' p15 (Brussels 2 July 2008 COM (2008) 412).

52 Council of the European Union (2020) *EU Negotiating Mandate: Annex to Council Decision authorising the opening of negotiations for a new trading partnership with the UK of Great Britain and Northern Ireland* (Brussels, 25th February 5870/20 ADD 1 REV 3): para 109 ,emphasis added. This requirement relates to labour protection as an element of 'sustainable development.'

53 Moretta, 2019 op. cit.

54 The ILO is an agency of the UN.

55 The European Commission has long been aware that UK implementation of the Working Time Directives has been inadequate – see for example COM (2003) 843, 30 December 2003.

56 Nor of finally ratifying Article 2(1) on working time of the European Social Charter which had not been accepted by the Macmillan government in 1962 on the grounds that 'voluntarism' held sway and the UK government could not intervene in negotiations between unions and employers on working hours. Other provisions, however, had been accepted on the basis that while there were no relevant laws in place, the great majority of workers were covered by collective agreements which covered those matters, and that the UK was therefore compliant. Now, of course, the great majority of workers *are not* covered by collective agreements.

57 Tombs and Whyte, op. cit., 2010.

58 All EU member states have ratified this 'priority' or 'governance' Convention. The UK ratified Convention 81 only in relation to industrial inspection, commercial (ie shops and offices) having been excluded ('for the

time being' as the government White Paper put it), as the Convention allowed.

59 The UK has been considerably less cautious about ratifying maritime Conventions, very many of which are health and safety related. Conditions on UK flagged merchant shipping (for most of the 20th Century the British merchant fleet was the largest in the world and it remains one of the largest) and fishing vessels have long tended to be superior to those sailing under foreign flags. Consequently, even the post 1979 governments have generally been happy to seek to impose the proverbial 'level playing field' on the international maritime sector by setting an example and ratifying the relevant Conventions. UK shipping firms seeking to sidestep most UK requirements need in any case only to reflag their vessels, and some Channel and North Sea ferries sail under FOCs (although see the National Minimum Wage (Amendment) Regulations 2019 which extends NMW/NLW protection to the crews of FOC vessels operating in UK territorial waters).

60 Excluding Convention 81. The five were C17 Workmen's Compensation (Accidents) of 1925, ratified in 1949; C115 Radiation Protection of 1960; C120 Hygiene (Commerce and Offices) of 1964; C124 Medical Examination of Young People (Underground Work) of 1965 and C148 Working Environment (Air Pollution. Noise and Vibration) of 1977. More peripherally C10 on Minimum Age in Agriculture of 1921 was ratified in 1963 and a working time instrument, C101 the Holidays with Pay (Agriculture) of 1952 was ratified in 1956.

61 More radical than this inaction however was the unprecedented denunciation of five important Conventions relating to wages, to holidays for agricultural workers, and to requirements for government contractors to bargain collectively with their employees. Never before had a UK government denounced an ILO Convention for political or policy reasons. The denunciations enabled the Conservatives to abolish the Wage Councils (which provided compulsory sectoral minimum terms and conditions of employment), to rescind Parliament's Fair Wages Resolution of 1946, and to legislate to increase the opportunities for employers to make lawful deductions from workers' wages, without the government being held to be in breach of international law. Perhaps more importantly they also saved the government from politically compromising condemnation from the ILO's Committee of Experts and Committee on Freedom of Association.

62 Even UK law and practice had been at variance the 'flexibility' clauses would have served to allow ratification and accommodate a lengthy 'lead in' period. Convention 148 of 1977 had been ratified in 1980 (by the Callaghan rather than the Thatcher government) without UK law and practice being compliant.

63 See the letter from Felicity Harte HSE to Department of Employment 25 January 1994, and the letter from MC Jennings of Health and Safety Services to M Budden Home Office The National Archives, file LAB13/3063/2.At one stage, such was the need to produce plausible excuses for non-ratification the government claimed that Convention 155 compliance would require permitting the emergency services to refuse to put themselves in danger when undertaking rescues.

64 Sections 44 and 100 of the Employment Rights Act 1996 give limited standing to individual employees to seek redress for detriment or dismissal in such circumstances.

65 All of the above comments have been taken from The National Archives, file LAB 13/3063/1.

66 The Discrimination (Employment and Occupation) Convention 1958 (No.111) was ratified in 1999, and the Minimum Age Convention, 1973 (No.138), together with the Worst Forms of Child Labour Convention 1999 (No.182) was ratified in 2000.

67 See below under Enforcement and Convention 81.

68 Convention 155 (essentially requiring a health and safety policy) had been the subject of a Commons 'Early Day Motion' in 2002 pressing the Blair government

to ratify the Convention and adopt the related Recommendation 194 List of Occupational Diseases. The motion was supported by 59, mostly Labour, MPs. Why they failed to include the very important 2002 Protocol to Convention 155 (a binding instrument building, like the non-binding R194, on the requirements to record health and safety incidents, injuries and illnesses) is unknown.

69 ILO General Survey on the occupational safety and health instruments concerning the promotional framework, construction, mining and agriculture 2017 para 18 and note 31 (International Labour Conference 106th Session 2017).

70 The National Archives, file EF7/4956, HSC (1998) HSE Review of Unratified International Labour Organisation (ILO) Conventions Concerning Health and Safety, 4 August. The Policy Unit worked on the project in collaboration with the Department for Education and Employment.

71 The National Archives, file EF7/4956

72 This was a Callaghan government initiative made with the intention of dropping the exclusions as soon as the required legislation was passed (see the White Paper Cmnd. 7420 December 1978). The incoming Conservative government took advantage of the flexibility clause to exclude the shipping and fishing industries for 3 years and (being remarkably conscious of the exclusion of domestic staff from the protection of the Health and Safety at Work Act 1974) it excluded domestic servants in private households from the embrace of the Convention (The National Archives, file EF7/815).

73 See Articles 4 and 3 of the Treaty of the European Union.

74 REIO: Regional Economic Integration Organisation. On the ILO instruments and the EU see European Commission (2014) *Analysis – in the light of the European Union acquis – of ILO up to date Conventions*, European Commission, Luxembourg.

75 The government had declined to ratify the closely associated but primarily health and safety Domestic Workers' Convention (No. 189) 2011, and had abstained from the vote approving the adoption of the instrument at the International Labour Conference.

76 We have used our own 'count' of relevant ILO Conventions. The ILO provides a list of occupational safety and health-relevant Conventions online (https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/occupational-safety-and-health/lang--en/index.htm). Our list is slightly expanded, since it seeks to include Conventions and Protocols, includes working time Conventions and fundamental Conventions that directly impact upon the implementation of health and safety standards. We omit a number of health and safety Conventions that deal with highly specific standards that do not apply significantly to the UK labour force. Our key up-to-date and interim status occupational safety and health and working time instruments include the following: C1 Hours of Work (Industry) Convention 1919; C14 Weekly Rest Industry Convention 1921; C30 Hours of Work (Commerce and Offices) Convention 1930; C47 Forty Hour Week Convention 1935; C77 Medical Examination of Young Persons (Industry) Convention 1946; C 78 Medial Examination of Young Persons (Non Industrial) 1946; C81 Labour Inspection Convention 1947; P81 Protocol of 1990 to the Labour Inspection Convention 1947; C89 Night Work (Women) Convention 1948; P89 Protocol of 1990 to the Night Work Women Convention; C106 Weekly Rest (Commerce and Offices) Convention 1957; C115 Radiation Protection Convention 1960; C120 Hygiene (Commerce and Offices) Convention 1964; C121 Employment Injury Benefits Convention 1964 [Sch.1 Amended 1980]; C 124 Medical Examination of Young Persons (Underground Work) Convention 1965; C 128 Invalidity Old Age and Survivors' Benefits Convention 1967; C129 Labour Inspection (Agriculture) Convention 1974; C130- Medical Care and Sickness Benefits Convention 1969; C132 Holidays with Pay Convention 1970; C138 Minimum Age Convention 1973; C139 - Occupational

Cancer Convention 1974; C148 - Working Environment (Air Pollution, Noise and Vibration) Convention 1977; C152 - Occupational Safety and Health (Dock Work) Convention, 1979 ; C155 - Occupational Safety and Health Convention 1981; P155 - Protocol of 2002 to the Occupational Safety and Health Convention, 1981; C161- Occupational Health Services Convention 1985; C162 Asbestos Convention 1986; C 167 - Safety and Health in Construction Convention 1988 ; C170 - Chemicals Convention 1990; C 171 Night Work Convention 1990; C174 - Prevention of Major Industrial Accidents Convention 1993; C176 - Safety and Health in Mines Convention 1995; C184 - Safety and Health in Agriculture Convention 2001; C187 - Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187); C 189 - Domestic Workers Convention 2011; C190 Violence and Harassment Convention 2019.

77 As above.

78 However, the ILO's Global Database on OSH legislation LEGOSH provides a useful if uncritical guide to the OSH arrangements in each state.

79 The Attlee government did not ratify Article 3, thus excluding 'commercial' workplaces – principally shops and offices (another exception to the UK's supposedly strict ratification rules). The Protocol to Convention 81 which the UK has yet to ratify extends the embrace of the Convention to workers engaged in non-commercial activities.

80 Elliot, C. (2014) *Elliott Review into the Integrity and Assurance of Food Supply Networks – Final Report*, London: HM Government; Tombs, S. (2016) *Social Protection After the Crisis: regulation without enforcement*, Bristol: Policy Press.

81 *Hazards* issue 117 January-March 2012.

82 ILO (2020). ILC.109/III(A). Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III, Part A, International Labour Conference, 109th Session, 2020: 495 (emphasis in the original).

83 Tombs, 2016, op. cit., p140.

84 ILO, 2020, op. cit

85 Ibid.: 496.

86 EU Negotiating Mandate (n.52 above) para 37.

87 *Ibid.*, para 101. The 'preventative principle' is the key distinction between the EU approach to workplace health and safety (most notably manifested in the REACH Regulations on chemicals) and that of the US. Put very simply, the EU requires that it must be shown that a substance, process or procedure is safe while the US approach is that it must be shown that it is not safe. Shortly before the referendum Johnson was asked by the MP Geriant Davies what EU law Johnson objected to. After some thought he named REACH (Guardian, 5 April 2017).

88 Ibid., EU Negotiating Mandate para 102.

89 So that when standards are improved regression is not permitted. (*ibid*., para 110).

90 Ibid, para 109.

91 Ibid, para 118.

92 See, for example, the proposals in the IER *Manifesto for Labour Law* and the Hazards *Manifesto* that include the right to establish 'shared workplace' safety committees; a new right for safety reps to 'stop the job'; an automatic right to reinstatement for safety representatives; the right to issue provisional improvement notices; and new rights for roving and regional representatives. See Hazards Campaign (2019) *Decent Jobs and Decent Lives: A Manifesto for a Health and Safety System Fit For Workers*, Manchester: The Hazards Campaign.

About the Institute

The Institute of Employment Rights seeks to develop an alternative approach to labour law and industrial relations and makes a constructive contribution to the debate on the future of trade union freedoms.

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Institute of Employment Rights

With the coronavirus pandemic dominating global news, health and safety is paramount and nowhere more so than in our workplaces. But with uncertainty surrounding the status of protective regulations in a post-Brexit Britain and the fear that established benchmarks could be negotiated away in future trade deals, the pressing need to abide by collectively recognised international health and safety standards could not be more acute.

In this report the authors examine those treaties that help govern our workplaces. They note that the International Labour Organisation (ILO) is the single most important organisation charged with developing global legal standards for workplace rights. Unfortunately, in a league table of EU states' ratification of ILO standards, the UK ranks 26 out of 28.

But despite this appalling record, the authors explain that the UK remains bound by other treaties covering the UK, each of which use ILO health and safety standards as their primary source. This will remain the case whether or not the UK remains bound by EU treaties and regardless of the type of trade agreements reached.

As Rory O'Neill, says in his Preface, 'the need for global safety standards has never been more acute. When the UK fails to ratify ILO safety Conventions, it sends a signal worldwide that safety beyond its immediate doorstep doesn't matter'. As the coronavirus pandemic shows, threats to the safety and health of global citizens knows no borders.

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