

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.

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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.

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.

We provide the research, ideas and detailed legal arguments to support working people and their unions by calling upon the wealth of experience and knowledge of our unique network of academics, lawyers and trade unionists.

The Institute is not a campaigning organisation, nor do we simply respond to the policies of the government. Our aim is to provide and promote ideas. We seek not to produce a 'consensus' view but to develop new thoughts, new ideas and a new approach to meet the demands of our times.

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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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