Covid-19 and the Failure of Labour Law: Part 1

KD EWING* AND LORD HENDY QC**

Acceptance Date October 26, 2020; Advanced Access publication on December 8, 2020.

ABSTRACT

In this article, we consider how Covid-19 revealed the extent to which, in Britain, the core functions of labour law have been compromised by successive governments stretching back to the 1980s and how workers collectively have been failed as a result by a discipline intended ostensibly in their interests. We seek to measure these deficits against a set of core normative principles rooted in ILO standards which we believe underpin labour law as a discipline of worker protection. We look first at the exploitation of critical workers; second at the failure generally to make adequate provision for income security; and third at issues relating to health and safety at work. Our consideration of these issues addresses both the substantive law and the means for its enforcement. Having considered the systemic failures and lack of resilience of British labour law in this article, we intend to return to the theme in Part II at a later date to address the lessons learned and the overhaul which the pandemic has revealed to be necessary.

1. INTRODUCTION

Much has been written in recent months from across the political spectrum of a famous aphorism attributed to Lenin that ‘there are decades where nothing happens; and there are weeks where decades happen.’¹ This seems particularly apt in the context of Covid-19, which has wreaked havoc across the globe, causing death and dislocation on a scale that few could have imagined. In terms of the impact of the virus, at the time of writing the UK has one of the highest number of casualties in the world. By 26 June 2020, 43,320 people had been reported by the government to have died from Covid-19, a figure almost certainly an under-estimation when compared with the excess death rate of 20.5% nationally.² Others have been critically ill, leaving

¹King’s College, London, email: keith.ewing@kcl.ac.uk.
²Old Square Chambers, email: hendyqc@oldsquare.co.uk.
¹See G. Brown, ‘In the Coronavirus Crisis, Our Leaders Are Failing Us’, The Guardian, 13 March 2020.
²The Guardian, 18 June 2020. Between 7 March and 1 May 2020, there had been 46,380 excess death registrations compared to the five-year average: ONS, Analysis of Death Registrations Not Involving Coronavirus (Covid-19), England and Wales: 28 December 2019 to 1 May 2020, 5 June 2020.
many of the survivors with chronic health conditions. Apart from the health costs, there has been an incalculable economic hit as the British economy has been in a legally imposed lockdown for over three months, with GDP projected to collapse by 25% in the second quarter of 2020. Businesses are likely to be destroyed and what may be millions of jobs are likely to be lost, with economists predicting a recession that will lead to unemployment levels not seen at least since the 1980s, if we are lucky.

Not only is the UK likely to have one of the worst Covid-19 health outcomes, the nature of the British economy—with its emphasis on services, hospitality and tourism—is such that we are thus likely to have one of the worst Covid-19 economic outcomes in the developed world, and one of the slowest recoveries. And as we move from an obvious health crisis to a projected economic crisis, it is possible to speculate also about social and political crises on the distant horizon, particularly if there is to be further dislocation associated with Brexit which is planned to take full effect on 31 December 2020. But while we can lament the bad timing of Covid-19’s arrival in the UK, this does not excuse the lack of governmental preparedness or competence, nor the multiple public administration failures that enabled the virus to have such a disproportionate impact. Nor does it excuse the effect of austerity-driven government programmes (and the economic policy with which they are associated) that have fuelled the unequal impact. Reports that both the heir to the throne and the Prime Minister, respectively, had developed symptoms of/succumbed to the disease do not mask the fact that Covid-19 preys on inequality, as the statistics of the British experience make clear.

We are thus not ‘all in this together’, by any means. The unequal distribution of mortality rates from Covid-19 is staggering. The local authorities with the highest age-standardised mortality rates were London Boroughs, notably Newham with the highest rate with 144.3 deaths per 100,000 population, Brent (141.5) and Hackney (127.4). The most deprived areas of England had a rate of 55.1 deaths per 100,000 and Wales 44.6. These

---

3 The Guardian, 12 June 2020. GDP fell by 20.4% in April 2020, the first full month of the lockdown.
4 The Guardian, 25 June 2020 (Larry Elliot referring to projections of 4 million unemployed).
5 OECD, Economic Outlook 2020, 10 June 2020. This report generated much press coverage.
6 ONS, Deaths Involving Covid-19 by Local Area and Socioeconomic Deprivation: Deaths Occurring between 1 March and 17 April 2020, 1 May 2020. See also Public Health England, Disparities in the Risk and Outcomes of Covid-19, 1 June 2020.
7 ONS, n.6, above.
figures should be compared with a rate of 25.3 in the least deprived English areas and 23.2 deaths in the least deprived Welsh areas. Some affluent postcodes reported no deaths. Equally staggering is the fact that Covid-19 discriminates on the ground of age (the oldest most vulnerable), health (those with underlying morbidities—often associated with low income—most vulnerable), race (those from BAME communities most vulnerable), and in particular social class (those with lower incomes and in frontline jobs most vulnerable). Thus as we discuss more fully below, ONS found that men working in low-skilled or caring, leisure and other service occupations had the highest rates of death involving Covid-19.8 Indeed, as the editor of The Lancet pointed out ‘Covid-19 has revealed, exploited, and accentuated deep socio-economic and racial disparities in the UK’.9

These disparities have many causes. But it would be impossible to ignore working conditions, as contributing directly (health and safety) and indirectly (low pay). Labour law thus does not simply address the narrow relationship between the worker and the employer, but also affects the worker’s relationships and experiences beyond the workplace. That is to say where we live, what we eat and why we become ill; all related in part to where we work, what we are paid, and the nature of the conditions in which we work. Yet according to the UN Special Rapporteur on Extreme Poverty, ‘four million workers live in poverty, an increase of more than half a million in the last five years’, with in-work poverty ‘rising faster than employment and is higher than any time in the last 20 years’.10 If ‘Covid-19 has revealed,

---

8 ONS, Coronavirus (Covid-19) Related Deaths by Occupation, England and Wales: Deaths Registered up to and Including 20 April 2020, 11 May 2020. The fact is that, perhaps with the exception of doctors, the greatest exposure and rates of contraction and death from Covid-19 have been sustained by poorly paid, working-class people living in working class communities.

9 R. Horton, ‘Independent Science Advice for C-19—At Last’, The Lancet, 9 May 2020.

10 Report of the Special Rapporteur on Extreme Poverty and Human Rights on His Visit to the United Kingdom of Great Britain and Northern Ireland, UN General Assembly, Human Rights Council, 23 April 2019, A/HRC/41/39/Add 1, Annex, para 27. According to the report, ‘half of working-age people in poverty are working, and one in six people referred to Trussell Trust food banks is working’. On food poverty during the Covid-19 lockdown, see The Guardian, 26 June 2016. It is estimated that the number of adults who were ‘food insecure’ in Britain quadrupled to more than 16% in the first three weeks of lockdown. This included significant numbers of those in work. In England, alone 2,483 children were referred to hospital because of malnourishment in the first six months of 2020—double the number reported over the same period the previous year. (Figures obtained by Layla Moran MP under the Freedom of Information Act from 80 NHS Trusts of which only 50 responded; if the proportion of malnourished children were the same in the outstanding 30 Trusts the number of children would be 3,982.) Hunger has surged during lockdown with government figures revealing as many as 7.7 million adults cut down on portion sizes or missed meals because they could not afford food:
exploited, and accentuated deep socio-economic and racial disparities in the UK,\textsuperscript{11} it has thus also ‘revealed, exploited, and accentuated’ profound weaknesses in the substance and procedures of labour law of which in-work poverty is but one symptom. Building on work already published and focusing on the first six months of the pandemic,\textsuperscript{12} in the pages that follow we set out to show how Covid-19 revealed the extent to which the core functions of labour law in Britain have been compromised by successive governments stretching back to the 1980s and how workers collectively have been failed as a result by a discipline designed ostensibly for their protection.

2. FUNCTIONS OF LABOUR LAW

The functions of labour law are hotly contested. Indeed, for the last 40 years, labour law has been a battleground of competing ideologies, a space where neo-liberalism has confronted social democracy, and everything else in between. It is thus impossible to write about ‘neutral principles’ in labour law, as it is in any other discipline: all law is either infused by or is the product of politics. Perhaps the best we can do is to fall back on universally accepted international standards as a normative framework for guidance, however inadequately these standards are universally applied. The starting point for this purpose would be the ILO Declarations of 1944, 1998 and 2008, all of which were reaffirmed by the ILO Centenary Declaration on the Future of Work, which in turn has been accepted by the ILO’s Member States. For present purposes, it is immaterial whether there is a high level of compliance: by their action Member States have created a framework of principle which they accept \textit{should} apply. They are the closest we come to ‘neutral’ principles.

It is of course impossible to distil all the core principles of these Declarations, and we do not purport to do so here.\textsuperscript{13} They are nevertheless a reminder that labour law is international, even if our focus in this article

\begin{flushright}
V. Wood, \textit{The Independent}, 12 July 2020 (‘Almost 2,500 children admitted to hospital with malnutrition this year as cases double in England’).
\end{flushright}

\begin{flushright}
\textsuperscript{11}Horton, above n.9.
\end{flushright}

\begin{flushright}
\textsuperscript{12}See the rich collection of articles dealing with the responses of different countries in the special issues (2020) 11(3) \textit{European Labour Law Journal} (September, 2020) and (2020) 13(1S) \textit{Italian Labour Law e-Journal}. See in particular the articles on the UK by David Mangan and Tonia Novitz, respectively. For an overview see ILO, \textit{ILO Monitor: COVID-19 and the world of work}, 6th edn, 23 September 2020.
\end{flushright}

\begin{flushright}
\textsuperscript{13}Nor is it our intention in this article to assess the role of the ILO in response to the pandemic, which is a matter to which we return in our next piece on the subject.
\end{flushright}
is with the situation in the UK. That international dimension was revealed clearly during the Covid-19 crisis in relation to the provision of personal protection equipment (PPE) to protect front-line workers. The shortage of such material was one of many governmental failings during the pandemic, as was the failure of the emergency legislation—notably the Coronavirus Act 2020—to empower government to requisition private property for the production of PPE. But while the government was required to rely to a large extent on global supply chains at a time when many others were doing the same, it was also warned about the ‘slave-like’ conditions of migrant workers making rubber medical gloves in Malaysia. According to the press reports

Malaysia is the world’s largest producer of rubber gloves, but the industry has been accused of grossly exploiting its workforce, mostly impoverished migrants from Bangladesh and Nepal. Illegal recruitment fees, long hours, low pay, passport confiscation and squalid, overcrowded accommodation are commonplace, workers have claimed. Experts say such conditions leave them vulnerable to forced labour and debt bondage, which are modern forms of slavery.14

The foregoing by no means exhausts the international dimension to the Covid-19 crisis. Nevertheless, our concern at this stage is to extract what seem to us to be the irreducible minimum as a context for a critical examination of contemporary British labour law, specifically in the context of the Covid-19 crisis. To this end, there appear to us to be 12 core guiding principles:

(1) Labour is not a commodity;
(2) The prohibition of slavery, modern slavery, trafficking and forced labour; and the prohibition of child labour;
(3) ‘The elimination of discrimination in respect of employment and occupation’;
(4) The rewards for labour (‘wages and earnings, hours and other conditions of work’) should be ‘calculated to ensure a just share of the fruits of progress to all’;
(5) ‘Recognition of the principle of freedom of association’, as a means of improving conditions of labour and of establishing peace; and ‘essential to sustained progress’;
(6) ‘The effective recognition of the right of collective bargaining, the cooperation of management and labour in the continuous improvement of productive efficiency’;

14 The Guardian, 23 April 2020.

15 A related problem was the destitution at the end of supply chains caused by North American and European companies cancelling orders for clothing and other products manufactured in South East Asia: Observer, 21 June 2020.
(7) The right of workers to strike and take other forms of industrial action in support of their legitimate interests;

(8) ‘Adequate protection for the life and health of workers in all occupations’;

(9) The recognition of and need to make provision for workers’ family life and their responsibilities to their families: life comes before markets;

(10) The extension of social security measures to provide a basic income to all in need of such protection;

(11) The universality of protection, ‘including in respect of the recognition of the employment relationship’; and

(12) The effectiveness of labour law, ‘including in respect of the building of effective labour inspection systems’.

The first ten of these principles are drawn directly or indirectly from the ILO Declaration of Philadelphia, reaffirmed by subsequent Declarations, and the last two (the ninth albeit at a stretch) from the ILO Declaration on Social Justice for a Fair Globalisation. Underpinning these 12 principles are of a course a rich series of assumptions, some of which should perhaps be explained. The Declaration of Philadelphia (which is now an appendix to the ILO Constitution) in particular is the product of a much different political environment than that of today. Its principles are infused by what can best be described as a social democratic ideology developed in an era of a strong nation State, in anticipation of a major programme of rebuilding worldwide, following the military conquest of fascism. Presumably all parties could endorse the re-affirmation of the principle that ‘labour is not a commodity’, the Americans and the British as a repudiation of Marx, and for the Soviets a recognition that Marx was correct. But if the latter is a principle rather than a slogan, it must mean something more than an ideological stick with which two sides metaphorically can strike one another. It would be true to say however, that despite contestation about its origin, the substance of the principle has never been fully explored. That said, we believe it to be uncontroversial to conclude that

16 It is, however, an objective of the Universal Declaration of Human Rights 1948 that the ‘universal and effective’ recognition and observance of those rights shall be secured.

17 Marx of course refers to labour power: ‘Labour power, therefore, is a commodity, neither more nor less than sugar. The former is measured by the clock, the latter by the scales’ (K. Marx, Wage Labour and Capital in K. Marx and F. Engels (eds), Selected Works (London: Lawrence and Wishart, 1968), 73).

18 S. Evju, ‘Labour Is Not a Commodity: Reappraising the Origins of the Maxim’ (2013) 4 European Journal of Labour Law 222, responding to the classic piece by P. O’Higgins, ‘Labour Is Not a Commodity’ – An Irish Contribution to International Labour Law’ (1997) 26 ILJ 225.

19 But see the discussion in J. Fudge, ‘“Labour Is Not a Commodity”: The Supreme Court of Canada and the Freedom of Association’ (2004) 67 Saskatchewan Law Review 425. See also K. D. Ewing and Lord Hendy, ‘The Myth of the Labour Market’, Morning Star, 1 September 2020.
what is implied is the idea that terms and conditions of employment should not be market driven. The commonly used phrase a ‘labour market’ is the very antithesis of the principle that labour is not a commodity.

This view is supported by the other principles, and in particular the fourth, fifth, sixth and seventh. The fourth is a paean to social justice and the role of labour law in ensuring a fair distribution of wealth (‘the fruits of progress’), beyond the immediate relationship of employer and employee. It implicitly rejects the idea of rewarding work or labour on the basis of market principles of supply and demand, and indeed goes beyond remuneration related to the economic value of the labour provided. It implies instead a need to develop principles for the valuation of labour provided beyond any strictly market mechanism. The fifth, sixth and seventh principles provide the means by which this can be done—that is to say, strong trade unions creating counter-vailing power to that of the employer, engaged in a process of collective bargaining, which serves more than an economic purpose in setting the rate for the job, in advance of any market consideration. As Flanders taught us, collective bargaining also performs an important political function in the sense that it gives workers through democratic trade unions the means to participate in setting the terms and making the rules by which they will be employed.20 As such it reflects the legislative role of trade unions in the ILO, where by virtue of ‘tri-partism’ they participate with employers in creating a dynamic international labour code.21

Perhaps also not otherwise self-explanatory are the 11th and 12th principles, though both seem integral to any properly functioning system of labour law. The 11th addresses the scope of labour law, including the ‘just share of the fruits of progress’, which is designed to apply ‘to all’. This would seem to preclude the hierarchies of protection based on (i) segmentation within a firm,22 and (ii) legal status, in the sense that labour law entitlements should apply equally to everyone.23 By labour law entitlements, here

20 A. Flanders, ‘Collective Bargaining – A Theoretical Analysis’ (1968) 6 BJIR 1.
21 The principle of tri-partism is also why the principle of freedom of association is so important for the ILO—without strong and autonomous trade unions it would be impossible to sustain the ILO in its current institutional form.
22 On which see H. Collins, K. D. Ewing and A. McColgan, Labour Law: Text and Materials (Oxford: Hart Publishing, 2001), 166.
23 On which see Workers (Definition and Rights) Bill 2017–19, as an alternative to the Taylor Report, discussed below. See also K. D. Ewing, J. Hendy and C. Jones, ‘The Universality
we mean items such as minimum wages, holiday pay, equality law, health and safety and unfair dismissal. It does not mean of course that everyone should be paid the same; but it does mean that people should not be excluded from entitlement on the basis of a *faux* designation, or have entitlement diminished by the application of discriminatory formulae: everyone who works is entitled to all the protections the State ostensibly guarantees. Which brings us to the 12th principle, the idea of labour law effectiveness which is referred to enigmatically in the ILO Declaration on Social Justice in 2008. Again undefined and under-examined, our sense is that the latter principle conveys this idea: if it is the responsibility of the State to regulate in order to ensure ‘a just share of the fruits of progress for all’, it is not the primary responsibility of those least able to assert their rights to ensure that they are enforced.

Much of the foregoing is repeated in the ILO Centenary Declaration on the Future of Work 2019: the preamble alone contains references to the principle that ‘labour is not a commodity’, to the imperative of social justice, and to the importance of social dialogue as contributing to the ‘overall cohesion of societies’, while being ‘crucial for a well-functioning and productive economy’. Nevertheless, the ILO Centenary Declaration reminds us that the focus of labour law has gradually changed since the 1980s, with a shift of emphasis from the responsibility of the State to the responsibility of the individual. This perhaps represents a synthesis between the social democratic inheritance from which the foregoing principles emerged and the more brutal and coercive neo-liberalism practised by some regimes more recently. The synthesis is not about State empowerment and worker protection, but about State support for active ‘labour market’ participation, and is to be seen in the Blairite labour laws in the UK, in the post-austerity European Social Pillar, and now openly avowed in the ILO Centenary Declaration. Although much more explicit in early drafts of the European Social Pillar, this is an agenda captured at a very early point in the Centenary Declaration, where the ILO undertakes to direct its efforts to

---

24 See M. Weiss, ‘The Effectiveness of Labour Law: Reflections Based on the German Experience’ (2006) 48 Managerial Law 275.

25 See A. Bogg and K. D. Ewing, ‘A Tale of Two Documents: The Eclipse of the Social Democratic Constitution’ in E. Nanopoulos and F. Vergis (eds), *The Crisis Behind the Eurocrisis* (Cambridge: Cambridge University Press, 2019), ch 13.
• ‘promoting the acquisition of skills, competencies and qualifications for all workers throughout their working lives’; 26
• ‘facilitating the transition from education and training to work, with an emphasis on the effective integration of young people into the world of work’; 27 and
• ‘supporting measures that help older workers to expand their choices, optimizing their opportunities to work in good-quality, productive and healthy conditions until their retirement, and to enable active ageing’. 28

Yet although labour law is built on shifting sands, there is rock in its foundations, as core principles are constantly restated in free trade agreements and elsewhere, even if they are widely disregarded. We accept that by virtue of the contestability of labour law, these principles are probably not universally accepted, most notably by those who promote a neo-liberal, market-driven approach to economics and labour law. 29 Herein, however, lies a deep contradiction of the neo-liberal project, which purports to be based on the rule of law. 30 It is not possible simultaneously to promote the rule of law on the one hand and to refuse to comply with universally accepted normative standards on the other because they are ideologically unacceptable. 31 If the neo-liberal right is unhappy with these standards, their responsibility is to replace them with a different body of principles, presumably based on ideas of commodification, standards dictated by markets, the discriminatory application of the law and personal responsibility for enforcement of whatever standards are available. But until these subversive principles become the normative standards of the discipline established by a lawful process, labour lawyers are entitled to assess the performance of national labour laws against the principles that have evolved at least since the ILO Constitution of 1919.

26 ILO Centenary Declaration on the Future of Work (2019), Part II(A), para (iii).
27 ILO Centenary Declaration on the Future of Work (2019), Part II(A), para (iv).
28 ILO Centenary Declaration on the Future of Work (2019), Part II(A), para (v).
29 See R. A. Epstein, ‘A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation’ (1983) 92 Yale LJ 1357.
30 See esp F. A. Hayek, The Road to Serfdom (London: Routledge, 1944), said to imply ‘the recognition of the inalienable right of the individual, inviolable rights of man’ (63).
31 On the importance of international law in the context of the contested meaning of the rule of law, see Lord Bingham, ‘The Rule of Law’ (2007) 66 CLJ 67. Also K. D. Ewing and J. Hendy, ‘The Eclipse of the Rule of Law: Trade Union Rights and the EU’ (2005) 4 Revista Derecho Social y Empresa 80.
3. CATEGORIES OF WORKERS

Covid-19 affected workers in different ways, depending to some extent into which three broad categories they fell. The first category of workers was those employed in ‘restricted’ establishments. Thus, on 26 March 2020, the Public Health (Coronavirus, Restrictions) Regulations 2020 imposed a ban on some enterprises from trading, an extraordinary measure unprecedented in modern time.\(^{32}\) Made under the authority of the Public Health (Control of Disease) Act 1984 (as amended in 2008),\(^{33}\) there were several categories of business shut down by these regulations, the broad scope of the restrictions being set out conveniently in the Government’s Explanatory Memorandum:

Regulation 4(1) requires the closure of drinking establishments including bars, pubs and nightclubs, and food and drink venues for consumption on site (excluding hospitals, schools, care homes, homeless services and prison canteens, armed forces canteens and workplace canteens where no practical alternative is possible) but they may provide a service for collection or delivery of food for consumption off the premises. Regulation 4(4) requires closure of entertainment venues including cinemas, theatres, concert halls and bingo halls; museums and galleries; spas, hairdressing and massage parlours; casinos and betting shops; all indoor leisure and sports facilities including gyms, playgrounds, funfairs, libraries, community centres and outdoor markets (non-food). Regulation 5(1) requires businesses offering goods for sale or for hire or providing library services to cease to do so except in response to orders received online, telephone or by mail order—the types of business specified in Part 3 of Schedule 1 are exempt from these restrictions, and regulation 5(2) excludes hot and cold food collection and delivery from the closures restrictions.\(^{34}\)

Although perhaps not immediately obvious, the regulations had massive implications for the workers employed in these businesses. Notwithstanding the furlough scheme considered more fully below, tens of thousands of workers became unemployed as some restricted businesses closed permanently and many others reduced their workforces. An unknown number of workers in supply chains lost their jobs in consequence. This is a matter to which we return.

\(^{32}\) SI 2020 No 350. See subsequently, SI 2020 No 447; SI 2020 No 500; SI 2020 No 558; and SI 2020 No 588. They were later consolidated in SI 2020 No 684. Particular localised shutdowns were achieved for example by SI 2020 No 685.

\(^{33}\) Health and Social Care Act 2008. Inserting a new Part 2A dealing with Public Health Protection.

\(^{34}\) Explanatory Memorandum, para 6.6.
In the meantime, the main focus during the lockdown related to the dependence on a second category of workers, namely those required to keep essential services operating. Among these were the workers in the hospitals and care homes, as well as the transport workers who kept the country moving, and the food production and distribution workers who kept the country fed. Although not directly impacted by the Public Health (Coronavirus, Restrictions) Regulations 2020, these workers were affected by the closure of the schools on 23 March 2020. However, special arrangements were made for these ‘critical’ workers so that some schools were kept open effectively as childcare facilities for the children of ‘critical’ workers only. The latter were defined in Government Guidance to mean those engaged in eight sectors: (i) health and social care; (ii) education and childcare; (iii) key public services (including public sector broadcasters but not private news agencies); (iv) local and national government (but only those dealing with Covid-19 or delivering essential public services, such as the payment of benefits; but not MPs); (v) food and ‘other necessary goods’ (including production, processing, distribution, sale and delivery); (vi) public safety and national security (including police, MI5 and MI6, fire and rescue, and prison staff); (vii) transport (including those ‘keep[ing] the air, water, road and rail passenger and freight transport modes operating during the Covid-19 response’); and (viii) utilities, communication and financial services (such as the oil, gas, electricity and water sectors (including sewerage), and postal services and delivery).

By some way the largest of these categories, there are some three million people employed in health and social care, of whom 1.6 million were employed in the latter. According to the King’s Fund, the characteristics of this group are as follows:

- As in health care, about 80 per cent of all jobs in adult social care are done by women; the proportion in direct care and support-providing jobs is higher, at 85–95 per cent.
- Most adult social care jobs (1.3 million, 74 per cent of the total) involve directly providing care. The rest comprise: 147000 managerial and supervisory jobs, 100,000 professional jobs (including social workers, nurses and occupational therapists) and 204,000 administrative, ancillary and other jobs.

---

35 SI 2020 No 350.
36 Cabinet Office/Department for Education, Critical Workers who can Access Schools or Educational Settings, 16 June 2020 (available online).
More than 20,000 social workers are employed, mainly by local authorities, and their role is changing in response to different models of service delivery. The rest of the social care workforce is relatively unskilled. In 2008 two-thirds (67 per cent) of people working as ‘care assistants and home carers’ claimed to be qualified to NVQ Level 2 or above, and 7 percent had no qualifications at all.37

In contrast, 48% of the health care workforce is professionally qualified.38 We suspect that many of the 52% who are not professionally qualified (yet providing ‘critical’ services) are employed in low wage employment.

And the relevance of this? We return first to the Lancet editorial and the claim that ‘Covid-19 has revealed, exploited, and accentuated deep socio-economic and racial disparities in the UK’.39 More than that, it has imposed an excessive burden during the public health crisis on those who are the victims of these disparities and on whom the community has no legitimate claim to impose or expect such a burden. A significant feature of this group overall is that with notable exceptions it included the worst paid and least legally protected of the entire workforce. These were workers with poor terms and conditions; precarious legal status; insecure and unpredictable hours, income and jobs; and lack of protection of their health, safety and wellbeing. Many of the ‘critical workers’ going to work on the delivery of ‘essential services’—care workers, cleaners, shop workers, bus drivers—were doing so on the minimum wage or marginally above, providing to other people who were able to work from the convenience of home on substantially higher salaries. Although this appeared at the time to induce a national sense of gratitude and perhaps shame, generating short-term gestures of appreciation, the sense of shame in particular seems quietly to have been forgotten once the initial crisis had abated.

Not only were many ‘critical’ workers poorly paid, they had also seen their real incomes fall disproportionately in recent years, as a result of the austerity policies implemented since 2010. Thus according to one source (which appears to use ‘key’ workers as a synonym for ‘critical’ workers), key workers’ hourly earnings have fallen by over 4% over the past 10 years, while earnings for all workers fell by only 0.3%.40 And while noting ‘substantial

37 The King’s Fund, ‘Overview of the Health and Social Care Workforce’ (2020, available online).
38 The King’s Fund, n.37
39 Horton, above n.9.
40 J. Sander, ‘Foreign-Born, Working Dangerously, and Earning Less: The UK’s Key Workers’, LSE British Politics and Policy Blog, 4 May 2020.
differences among “key” workers in different sectors [that] post-pandemic policy responses will need to recognise, the Institute for Fiscal Studies reports that:

The gap between key and non-key employees has been growing over time. After taking into account differences in the characteristics of key and non-key employees, average wages for key workers last year were around 9% lower than for a similar non-key employee. After nearly a decade of wage restraint in sectors such as education and public order, that is nearly twice as large as the 5% gap in 2010.41

This tells us something not only about the way in which work is valued, but also about how we value the people who are doing the work, the great majority of whom in many sectors will be female, and very often migrant workers. It also helps to explain ‘in work’ poverty, the Resolution Foundation reporting that the typical income of low-income households fell in 2016–17 to 2018–19 and was no higher in 2018–19 than in 2001–02.42 Indeed, a survey of shop workers by USDAW in 2018 found that 50% of those surveyed had missed meals to pay essential bills with well over a third missing meals on a regular basis.43 Shop workers of course were designated by the government as critical workers during the crisis.

Yet apart from keeping schools open for the benefit of key workers (albeit anecdotally in a haphazard and arbitrary way), the only initiative taken by government targeted at critical workers in particular served simply to reinforce the inequities identified above. Workers on the frontline exposed to Covid-19 were at greater risk of contracting it. If they developed symptoms, they would be required to stay at home and to self-isolate even if capable of working. Yet British employers have no contractual obligation to have an occupational sickness scheme, in the absence of which workers have no option but to rely on statutory sick pay (SSP) payable by the employer. It is true that on the eve of the crisis the scheme was amended so that the three waiting days were removed,44 and extended to apply to workers who were self-isolating as well as those who were sick (though not those supporting

41 C. Farquharson, I. Rasul and L. Sibieta, Differences between Key Workers, IFS, 22 April 2020. The announcement on 21 July of pay increases for public sector workers added insult to injury since the increases did not match the loss since 2010 in the real value of the incomes of these workers, still less match the sort of reward for their work during the pandemic which the public might have envisaged: Financial Times, 21 July 2020.
42 D. Tomlinson et al., The Living Standards Audit 2020 (London: Resolution Foundation, 21 July 2020).
43 USDAW, Time for Better Pay (Manchester, 2018).
44 SI 2020 No 374.
relatives who were ‘shielding’). But it is also true that the scheme continued to apply only to ‘employees’ (not ‘workers’ despite gig workers being exposed to the risk of infection as critical workers). And despite the vast amounts of money diverted by the government to sustain businesses, SSP was uprated in April only to the rate of £95.85 a week, which represents an hourly rate of £2.39 for a full-time worker on a 40-hour week, and barely more than a quarter of the (in any event inadequate) top national minimum wage hourly rate of £8.72. As was pointed out at the time, the inadequacy of SSP undoubtedly caused many sick workers to continue to work, increasing the risk to those with whom they worked and the public they served.

The very lowest paid workers did not qualify even for the modest SSP benefit. This is because of the lower earnings limit of £118 a week, meaning that part-time workers normally working for up to 14 hours or so on national minimum wage rates fell sick without any financial support at all. The IWGB challenged this limitation in an unsuccessful judicial review claim, in which it was also argued that the SSP amendment regulations unlawfully failed to include so-called limb (b) workers as well as employees in the entitlement to claim SSP, or to increase the low level of SSP. IWGB was concerned that women and BAME employees were (i) more likely to earn less than the £118 weekly lower earnings level qualification for SSP; (ii) more likely to be limb (b) workers; and (iii) more likely ‘to have limited financial resources with no access to occupational sick pay’. For these reasons, it was claimed that ‘a disproportionate number of women and BAME members of the workforce will feel compelled to go to work when they are suffering symptoms of coronavirus or should be self-isolating. They cannot survive on SSP alone.’ As one IWGB activist put it in press material drawing attention to the union’s legal claim: ‘I work as a cleaner and I am a widowed single mother. As important as it may be to self-isolate, having to live for half a month on £94.25 per week would make my life impossible. I would have to choose between buying

45 SI 2020 No 287, amending the Statutory Sick Pay (General) Regulations 1982, SI 1982 No 894.

46 Limb (b) workers are those who enter into or work under a ‘contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual’ (Employment Rights Act 1996, s 230(3)(b)). A limb (a) worker is an employee (Employment Rights Act 1996, s 230(3)(a)).

47 R (Adiatu) v HM Treasury [2020] EWHC 1554 (Admin) at [101]. The claim alleged discrimination on grounds of race and/or sex contrary to EU law, ECHR and the public sector equality duty. It also alleged discrimination in the exclusion of limb (b) workers from the Coronavirus Job Retention Scheme, on which see below.
food for my family and following the Government’s health advice to protect the public.48

Which brings us finally to the third category of workers—those in sectors which were neither (i) restricted, nor (ii) designated as ‘critical’. That is to say, (iii) everyone else. Here the Regulations provided that ‘during the emergency period, no person may leave the place where they are living without reasonable excuse’, but clarified that ‘a reasonable excuse’ includes the need ‘to travel for the purposes of work or to provide voluntary or charitable services, where it is not reasonably possible for that person to work’.

This would apply both to (i) critical workers and (ii) to anyone else in an unrestricted category whose employer was still operating during the pandemic. That said, workers in this unrestricted category were nevertheless advised to work from home where possible to do so, and many businesses adapted their operations as a result. In businesses such as construction and manufacturing, however, it was not possible to work from home, though here too many employers nevertheless closed temporarily. While it may not have been necessary under the Regulations to close, difficulties were created by Government Guidance on social distancing, which required people to be two metres apart.50 In any event, demand collapsed for the goods and services supplied by non-restricted businesses in consequence of orders from restricted businesses drying up and workers in unrestricted businesses (furloughed or made redundant) cutting their spending on everything non-essential. The travel industry in particular was a spectacular victim.

4. CORONAVIRUS JOB RETENTION SCHEME: LAW WITHOUT RIGHTS

For all the problems faced by many of the seven million or so ‘critical’ workers, they would at least be paid. The same was true of workers in the

48 R (Adiatu) v HM Treasury [2020] EWHC 1554 (Admin) at [101]. See also L. Hayes, A. Tarrant and H. Walters, ‘Submission to Women and Equality Committee Call for Evidence into Coronavirus and the Impact on People with Protected Characteristics’ (May, 2020). See also The Guardian, 26 June 2020: report claiming cleaners ‘felt under pressure to keep working in “near empty” offices because of a lack of full sick pay. Instead cleaners who were sick and had to self-isolate were paid statutory sick pay of £95.85 a week’ (‘MOJ failed to investigate potential Covid-19 cluster among cleaners’).

49 SI 2020 No 350, regs 6(1) and (2)(f), respectively.

50 Cabinet Office, ‘Staying at Home and Away from Others (Social Distancing)’ [nd].
notionally unrestricted category above who could work from home and whose employers continued to function. Although the figures vary from month to month, a snapshot on 13 May 2020 revealed that the numbers working wholly or partially from home had risen from 27% to 46% of the workforce, with the numbers working wholly from home having risen from 7% to 38%, this falling back to 27% in late July.\footnote{ONS, \textit{Coronavirus and the Social Impacts on Great Britain}, 24 July 2020 (comparison of weekly samples for 21–24 May, 18–21 June, and 15 and 19 July 2020).} But what about those employed in the restricted category (the hospitality and other sectors closed down as a result of the Public Health (Coronavirus, Restrictions) Regulations 2020),\footnote{SI 2020 No 350.} and those in the unrestricted category (aviation, construction, manufacturing and storage) who could not work from home and whose employers nevertheless decided for a host of reasons to close at least initially? As thousands of businesses were either forced or decided to close, without government support thousands if not millions of workers would be rendered unemployed whether temporarily (for an indefinite period) or permanently, to be nourished in many cases on a diet of statutory redundancy pay, jobseekers’ allowance and universal credit.

Urged by the TUC, in turn inspired by a tripartite agreement achieved in Denmark, the government announced the Coronavirus Job Retention Scheme (CJRS) on 23 March 2020, ‘to provide for payments to be made to employers on a claim made in respect of them incurring costs of employment in respect of furloughed employees arising from the health, social and economic emergency in the UK resulting from coronavirus and coronavirus disease’.\footnote{Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme) Direction 2020, para 2.1.} An employee was defined as being ‘furloughed’ if he or she was instructed by the employer to ‘cease all work in relation to their employment’ for a period of at least 21 days, ‘by reasons of circumstances arising as a result of coronavirus or coronavirus disease’.\footnote{Coronavirus Act 2020 Functions of Her Majesty’s Revenue and Customs (Coronavirus Job Retention Scheme) Direction 2020, para 6.} Financed by monies voted by Parliament on 25 March 2020,\footnote{Contingencies Fund Act 2020, s 1.} the Scheme was contained in a Treasury Direction, a new form of secondary legislation with which labour lawyers (and perhaps virtually all lawyers) will be unfamiliar. Thus, a striking feature of the Scheme was that its legal authority was to be found in a general power in the Coronavirus Act 2020 providing simply that ‘Her Majesty’s
Revenue and Customs are to have such functions as the Treasury may direct in relation to coronavirus or coronavirus disease’ (section 76). It is striking also that the Scheme was introduced without being formally approved by Parliament, despite the fact that by 19 July 2020, approximately 9.5 million jobs, from 1.2 million different UK employers, were furloughed at a cost of £29.8 billion, expected to rise to £80 billion by the date of the Scheme’s planned cessation at the end of October 2020.56

The Scheme thus raised important constitutional questions, reinforced by inconsistency between the Treasury Direction and regularly up-dated Treasury Guidance (which predated the publication of the Direction), the Guidance unlike the Direction having no statutory authority of which we are aware. The cost of the scheme, the number of workers and businesses affected, and the problems encountered by it all pointed to the need for constitutional propriety,57 including full parliamentary scrutiny and approval, public health emergency or not. All the more so for the fact that at the time the CJRS was introduced, the Treasury had no idea just how many employers would make use of it, in respect of how many workers, and at what total cost to the public purse. It would be true to say nevertheless that the welcome arrival of the CJRS wholly deflated any constitutional concerns, and the same was true of the Self-Employment Income Support Scheme (SEISS) announced on 26 March 2020, which offered some protection for the self-employed whose businesses were adversely affected by Covid-19.58 Under the latter scheme, it was possible for those who received at least 50% of their income from self-employment and whose self-employed earnings were less than £50,000 annually, to claim ‘a taxable grant worth 80% of [their] average monthly trading profits, paid out in a single instalment covering 3 months’ worth of profits, and capped at £7,500 in total’59 By 19 July 2020, there had been approximately 2.7 million claims for SEISS at a cost of £7.8 billion.60

56 D. Clark, ‘Number of Jobs Furloughed under the Job Retention Scheme in the United Kingdom between April 20 and July 19, 2020’, Statistica, 22 July 2020.
57 On which see also A. Adams-Prassl, T. Boneva, M. Golin and C. Rauh, ‘Furloughing’ (August 2020), CEPR Discussion Paper No. DP15194.
58 HM Treasury, Chancellor’s Statement on Coronavirus (Covid-19), 26 March 2020. See Coronavirus Act 2020 Functions of Her Majesty’s Revenue and Customs (Self-Employment Income Support Scheme) Direction 2020.
59 HM Revenue and Customs, Guidance: Check If You Can Claim a Grant through the Self-Employment Income Support Scheme, 26 March 2020.
60 D. Clark, ‘Number of claims made to the self-employment income support scheme in the United Kingdom between May 13 and July 19, 2020’, Statistica, 22 July 2020. First payments were made under the SEISS until July 2020 but it was extended on 28 May 2020 to allow a
Though many self-employed workers could not meet the conditions for a claim under the SEISS, it was a matter for them whether to claim or not. Employees, on the other hand, had no entitlement to claim furlough under the CJRS: that was a matter in the total discretion of the employer; and the latter might prefer to dismiss for redundancy. There was no way under the Scheme by which an employee individually or employees collectively could challenge that latter decision, and no way by which an employee could insist on being furloughed rather than be made redundant. Constitutional objections apart, the perception was thus established that CJRS was an initiative designed for the benefit of business, in which workers would be, at best, collateral beneficiaries.\footnote{A point openly acknowledged by the government in \textit{R (Adiatu) v HM Treasury} [2020] EWHC 1554 (Admin) at [65].} As such the scheme was badly flawed, a judgment that takes fully into account two circumstances of its introduction:

- First, was the restricted application of the CJRS to employees as defined by the tax legislation, a matter to which we return below. Not unrelated is this: although the CJRS applied expressly on its face to workers on zero-hours contracts and to agency workers (if the employer or agency wanted it to do so),\footnote{Coronavirus Act 2020 Functions of Her Majesty’s Revenue and Customs (Coronavirus Job Retention Scheme) Direction 2020, para 13.1(e)(ii).} ‘certain aspects of the scheme do not sit easily with the way in which zero hours and other casual workers work, and these issues may discourage employers from furloughing such workers’. As a result, ‘employers may therefore decide to end zero hours or casual workers’ contracts, or simply stop offering them work, rather than put them on furlough.’\footnote{Anon, \textit{Covid-19: Coronavirus Job Retention Scheme (Furlough)} (Thomson Reuters Practical Law Employment, 2020) (available online).}

- Second, as noted the furloughed employee must agree to ‘cease all work in relation to their employment (such agreement may be made by means of a collective agreement between the employer and a trade union).’\footnote{Coronavirus Act 2020 Functions of Her Majesty’s Revenue and Customs (Coronavirus Job Retention Scheme) Direction 2020, para 6.7. The reference to consent via collective agreement was added in a revision of the Direction.} This meant that a furloughed worker would be unable to work part-time for the employer, and thereby kept engaged for productive purposes while wages were partially rather than wholly subsidized. This unfathomable restriction was strongly criticized by trade unions, but not relaxed until the scheme was

second and final payment of up to 70\% monthly profits for a period of 3 months, capped at an overall maximum of £6,570 in August 2020: HM Revenue and Customs, \textit{Guidance: Check If You Can Claim a Grant through the Self-Employment Income Support Scheme}, 28 July 2020.
extended after 1 August 2020, with amendments introducing a new category to the rapidly evolving labour law lexicon, namely ‘flexibly-furloughed employees’.65

Apart from (i) the CJR’s arbitrary eligibility requirements and (ii) the inflexibility of its terms, concern was otherwise expressed about (iii) the level at which pay would be underwritten by the Scheme. Employers could claim only 80% of the employee’s wages up to a maximum of £2,900 a month. The concern was not so much with the cap at the top end, even if it would mean that some higher paid workers would take a hit if their employers were not willing to make up the difference.66 Rather the concern was at the bottom end, with 80% of the minimum wage being less than the employer’s legal obligations under the National Minimum Wage Act 1998. So far as we can tell, there was no obligation on the employer to make up the difference. Indeed, as one law firm vividly advised its employer clients in a since removed posting on its FAQs:

Typically, if an employer paid their employee less than they were entitled to under the National Minimum Wage Act 1998 in respect of the hours the employee worked, the employer would be considered to be in breach of the legislation and the employee would be able to bring a claim in the employment tribunal. However, under the rules governing the operation of the Job Retention Scheme, during any period of furlough an employee should not be working for their employer. Individuals are only entitled to the NMW for the hours they are working. This means that furloughed workers who are not working can be paid the lower of 80% of their salary or £2,500 even if, based on their usual working hours, this would be below the relevant NMW or NLW. An employer would therefore not be in breach of the NMW legislation if they choose not to top up the extra 20% of their employee’s wages as the employee is not considered to be working.67

It seems inexplicable that there was no tapering of the scheme from its inception, to allow the lowest paid to recover at least the minimum deemed by legislation to provide a ‘living wage’, a failure which serves only to reinforce

65 The amendment was made on 25 June 2020, with effect from 1 August 2020.
66 On which see Adams-Prassl et al., above n.57, drawing attention also to the gender discrimination by employers in making up the difference beyond the 80% paid by the CJRS. The latter is a compelling account of the operation of the scheme generally.
67 This extraordinary anomaly is confirmed by Treasury Guidance: HM Revenue and Customs, Steps to Take Before Calculating Your Claim Using the Coronavirus Job Retention Scheme, 12 June 2020: ‘Furloughed workers who are not working can be paid the lower of 80% of their wages or £2,500 even if, based on their usual working hours, this would be below their appropriate minimum wage.’
the point that the minimum ‘wage’ is nothing of the kind, but simply a minimum hourly rate.

But just as important as these substantive flaws was a major procedural omission, namely the failure to build into the scheme any obligation on the part of employers to inform and consult recognised trade unions or employee representatives when use of the CJRS was first contemplated by the employer. As we have seen, the scheme applied only to those workers who had been instructed by their employer to cease all work in relation to their employment. For this purpose, the employer and the employee must have agreed in advance that the employee would cease all work, the Treasury Direction providing that the agreement could be with the employee personally or by means of a collective agreement. But as suggested, there is no obligation on the part of the employer to inform and consult a trade union even where the union is recognised, far less seek an agreement with a trade union in negotiations. Given the statutory obligation to inform and consult in relation to proposed collective redundancies (which would be the usual alternative to furlough) and other job related dislocations, it is difficult to see why this courtesy was not extended to the furlough scheme, particularly where there might be selection issues and also a loss of income for those involved. What—for example—would be the employer’s obligation to maintain income levels during the period of the furlough? And what of the obligation to ensure that the scheme did not operate in a discriminatory manner?

It is no doubt the case that many unions would have welcomed the furlough scheme for the protection of their members’ income, a position which is fully justifiable. But the exclusion of information and consultation from the operation of the scheme at enterprise level was nevertheless a timely and salutary reminder of the instinctive differences between EU and UK labour law. All of the current information and consultation obligations in UK law—redundancy, TUPE, health and safety, working time—are a direct

68 TULRCA 1992, s 188. The job dislocations include TUPE transfers, where information and consultation requirements are also underpinned by statute. For non-statutory requirements, see Panel on Take Overs and Mergers, The Takeover Code (2016 ed).

69 A possibility noted by HM Revenue and Customs, Check If You Can Claim for Your Employees’ Wages Through the Coronavirus Job Retention Scheme, 26 March 2020: ‘When employers are making decisions in relation to the process, including deciding who to offer furlough to, equality and discrimination laws will apply in the usual way’.

70 L. McCluskey, ‘Protecting and Creating Jobs Must be a Priority in any Coronavirus Recovery’, The Guardian, 28 May 2020.
result of EU law which it cannot be assumed will continue to be adopted in the future, to which we return below. It may well be of course that unions and workers were content with unilateral decisions of employers, even though in many cases the CJRS may only be a parachute into redundancy and unemployment. But if not, the failure to write an information and consultation obligation into the CJRS might not have been such a concern had the unions embraced with greater enthusiasm the albeit limited Information and Consultation of Employees Regulations 2004,\(^\text{71}\) a part of the EU legacy that seemed tailor-made for decisions under the CJRS. It will be recalled that the standard provisions of the ICE Regulations require consultation ‘with a view to reaching agreement’, on ‘decisions likely to lead to substantial changes in work organisation or in contractual relations’.\(^\text{72}\)

So we can ask questions about the legal form of the CJRS, its substance and its procedures. But above all what the pandemic has revealed is the lack of any effective provision in the UK’s light touch labour law for sudden shocks and dislocation of the kind caused by Covid-19. Nor—perhaps more realistically—is there any procedural architecture through Social Dialogue or sectoral bargaining machinery that would allow for a governmental initiative, a negotiated response and an effective implementation to deal with such eventualities, as there is in other countries.\(^\text{73}\) It was thus left to the TUC to ‘advise’ the government on the need for a taskforce to ‘pull together unions, business and government agencies to minimise the economic and health impact of the coronavirus pandemic’. The aim of the taskforce would be to ‘co-ordinate support and ensure that measures are being effectively targeted, delivered and accessed by employers and workers in need’.\(^\text{74}\)

\(^{71}\)SI 2004 No 3426.

\(^{72}\)SI 2004 No 3426, reg 20. See also M. Ford and A. Bogg, ‘Not Legislating in a Crisis? The Coronavirus Job Retention Scheme, Part 2’, UK Labour Law Blog, 31 March 2020.

\(^{73}\)Compare the position in Scotland where the government seems less embarrassed about its relationship with trade unions: Joint Statement by the Scottish Government and Scottish Trade Union Congress (STUC) on Fair Work Expectations, 25 March 2020 (available on Scottish Government website). This is all the more impressive for the fact that the Scottish government does not have power under the devolution settlement to deal with workers’ rights. That said, the Scottish government attracted some criticism for its mishandling of a Labour amendment to the Coronavirus (Scotland) (No 2) Act 2020 to encourage the sectoral regulation of working conditions in care homes: L. Hayes, ‘Giving Care Workers a Collective Voice is Key to Addressing the Sector’s Problems’, Morning Star, 28 May 2020. The Act does, however, make provision for the creation of a ‘social care staff support fund’ for social care workers ‘whose income is reduced and consequently would experience, or are experiencing, financial hardship’: Coronavirus (Scotland) (No 2) Act 2020, Sched 1, Part 4.

\(^{74}\)TUC, Protecting Workers’ Jobs and Livelihoods: The Economic Response to Coronavirus, 18 March 2020, 15.
This fleeting shadow of a European-style Social Dialogue of course was not promoted by government (at least in an open and properly constituted manner), though it was to the accompanying TUC ‘advice’ ironically that the government did respond—on the need urgently to introduce ‘a wage subsidy scheme to support people in jobs, building on best practice across Europe’.\textsuperscript{75}

5. CORONAVIRUS JOB RETENTION SCHEME, PRECARIOUS EMPLOYMENT AND FLEXIBLE CONTRACTS

Despite a great deal of self-congratulation about the furlough scheme, it is clear that it would have benefited from a more rigorous scrutiny at the time of its introduction, and clear too that some profound failings were due in large part to the shortcomings of the infrastructure onto which it was bolted. But having been introduced quickly without parliamentary scrutiny or approval, the CJRS had to be regularly revised, and its duration extended to the end of October (again without parliamentary approval in advance), and subsequently thereafter. From August, however, employers were required under the CJRS to assume a greater part of the costs of workers who remained on furlough, giving rise to concern that workers would be made redundant by businesses which judge that they cannot afford the balance. That apart, several major defects in the operation of the CJRS attracted criticism notably from Select Committees which have investigated different aspects of Covid-19 and the government’s response thereto. Select Committees have emerged as key players in the structures of constitutional accountability, with wide terms of reference enabling them to investigate well beyond the four walls of government departments and associated bodies as perhaps originally intended. Important investigations in recent years have helped to bring a number of bad employment practices and inadequate regulation to public attention.\textsuperscript{76}

The first problem identified in this way was access to or exclusion from the relief schemes, a problem addressed by the Treasury Committee,\textsuperscript{77} addressing concerns about freelancers in particular as follows:

\textsuperscript{75}TUC, n.74, 16.

\textsuperscript{76}A. Bogg, ‘Employment Status in the Social Democratic Constitution: Law and Politics’ in A. Bogg, J. Rowbottom and A. Young (eds), The Constitution of Social Democracy (Oxford: Hart Publishing, 2020), ch 8.

\textsuperscript{77}Treasury Committee, Economic Impact of Coronavirus: Gaps in Support, HC 454 (2019–21).
In some industries, such as television and theatre, short-term PAYE contracts lasting just weeks or months are the norm, often combined additionally with some self-employed work. The impact of the virus for many freelance workers has meant that they have either been released from their contracts or have not had them renewed as would ordinarily have happened. Entitlement to support under either the SEISS or Job Retention Scheme is not available for many of these individuals either because:

- they were not in a contract at the designated cut-off date—we were informed that this is not uncommon due to the seasonal nature of work in some sectors;
- they have not made more than half of their income from self-employment;
- their employer could not afford to keep them on the payroll until the government’s financial support became available; or
- their employer does not want to apply for support under the scheme on their behalf.78

Out of a self-employed population of five million, the Treasury Committee estimated that about 780,000 could be classified as freelancers and potentially ineligible for government support as a result.79

The matter was also examined by the Work and Pensions Committee, which looked at the CJRS and the SEISS in the context of the ‘substantial increase in the number of self-employed people in the workforce in recent years…due in part to the rise of the “gig economy”, and the increasing prevalence of people using apps to sell their labour’.80 Referring to the ‘confusion about rights and entitlements (sic), and difficulties in distinguishing between genuine and bogus self-employment’, the Committee reported more generally that the ‘impact of coronavirus has been felt acutely by people in precarious and low paid work’, and that it was ‘inevitable that some of them will have found themselves ineligible for both the Coronavirus Job Retention Scheme and the Self-Employed Income Support Scheme’.81 Indeed, eligibility for the CJRS is confined to PAYE taxpayers only, and as noted the exclusion of limb (b) workers formed one of the grounds for the unsuccessful judicial review proceedings initiated by the IWGB referred to above.82

78Treasury Committee, n.78, para 47.
79Treasury Committee, n.78, para 51.
80Work and Pensions Committee, DWP’s Response to the Coronavirus Outbreak, HC 178 (2019–21), para 189.
81Work and Pensions Committee, above n.80, paras 189, 193.
82R (Adiatu) v HM Treasury [2020] EWHC 1554 (Admin), noted above.
As reported in the professional press, the government’s ostensible reason for excluding limb (b) workers was a concern that it could not avoid fraudulent claims if the CJRS were to include them: ‘They can’t distinguish limb (b) workers from the purely self-employed…so it would be reliant upon employees to self declare’.83

Though they too would face the problems confronted by the freelancers referred to above, some gig workers were eligible for the SEISS.84 But as was pointed out in the IWGB publicity surrounding their judicial review claim, income protection under the SEISS was ‘significantly worse than that provided to employees through the CJRS, constituting discrimination against self-employed limb (b) workers, many of whom work in the gig economy’. One aspect was ‘an unacceptable delay’ in the SEISS which was introduced in June 2020, in contrast to the CJRS which was introduced with effect from March.85 And as the IWGB also pointed out in criticisms subsequently echoed by the Treasury Select Committee in a comprehensive and at times granular critique of the different forms of government financial support during the crisis, SEISS excluded workers who became self-employed after 6 April 2020, as well as those who derived less that 50% of their income from self-employment.86 The exclusion of limb (b) workers was nevertheless justified by the Administrative Court essentially on grounds of administrative convenience, which not everyone will find satisfactory:

The JRS is a taxpayer-funded employment support programme on a vast scale, created in circumstances of the utmost urgency to provide help to millions of furloughed employees by seeking to preserve their jobs at least during the worst of the crisis. The Defendant was entitled to take the view that any system which took months to establish would be almost useless, and a system which involved officials making rapid decisions in very large numbers of individual cases while minimising fraud would be impracticable.87

83 R. Moss, ‘Uber Drivers in Court over Minister’s Failure to Help Gig Workers’, Personnel Today, 11 June 2020.
84 IWGB, ‘IWGB and Uber Drivers Suing UK Government Over its Failure to Protect Millions of Precarious Workers’, 7 May 2020.
85 IWGB, n.84.
86 The IWGB was exercised also by the fact that the SEISS excludes workers who ‘became self-employed after 6 April 2019, as well as those who derive less than half their income from self-employment. In addition, it does not cover the ongoing overheads that most self-employed workers have, and covers fewer months than the CJRS’ (IWGB, n.84).
87 R (Adiatu) v HM Treasury [2020] EWHC 1554 (Admin) at [77].
The systemic failures of labour law onto which the CJRS was bolted were not, however, confined to the gig economy, as vividly revealed by the House of Commons Transport Committee. In the mainstream economy with highly segmented firms, the least protected were the most vulnerable to immediate unemployment, whatever the CJRS may have purported to provide otherwise. The problems of agency workers, workers on short-term contracts and those on zero-hours contracts are well documented: from newspapers to universities, from construction to air transport, from cleaning to care homes. But those on permanent contracts were barely more secure in a labour law system that enables employers easily to ‘fire and rehire’ on inferior terms if workers are unwilling to accept contractual variations. Given the enormity of the crisis and the pressure on businesses, it is perfectly understandable that trade unions and workers would agree to pay cuts rather than lose jobs, though it is not clear quite why that would always be necessary whilst furlough on 80% (and later 70%) pay was available. What is less understandable, however, is the way in which major companies have taken advantage of the pandemic to restructure their businesses, facilitated by a labour law system which fails to provide the adequate protection against adverse unilateral employer decision-making.

The problem was highlighted by the Transport Committee which reported on job losses in aviation, highlighting information received that

- British Airways is consulting on cuts of up to 12,000 jobs and to downgrade the terms and conditions of approximately 35,000 employees;
- easyJet is proposing to cut 4,500 jobs; and
- Virgin Atlantic and Ryanair are each proposing to cut around 3,000 jobs. 88

However, it was BA to which most of the Committee’s ire was addressed, noting that

In late April, British Airways wrote to trade unions about its plans to consult on a reduction of up to 12,000 jobs (out of a workforce of 42,000) and downgrade the terms and conditions of the bulk of its remaining employees. The consultation will end on 15 June. In particular, the company is consulting on plans to:

- only meet its minimum statutory obligations on redundancy pay, arguing that enhanced voluntary redundancy is ‘prohibitively expensive’ in the circumstances;

88 Transport Committee, *The Impact of the Coronavirus Pandemic on the Aviation Sector*, HC 268 (2019–21), para 59.
• revise its employment procedures for remaining employees, including its disciplinary, grievance, absence and performance management procedures;
• restructure its cabin crew into a single fleet, with a single set of pay, terms and conditions, including ‘temporary layoff or short-time arrangements’ (British Airways cabin crew currently work on three different fleets, with the newest fleet on less favourable pay, terms and conditions); and
• alter ‘the rostering, scheduling and current operations environment’ for its pilots.89

As part of the context, it is to be noted also at ‘the end of 2019 British Airways’ profit after tax was £1.1 billion. The company also had cash reserves of £2.6 billion and £5.8 billion in shareholder equity’.90

What appeared particularly to annoy the Committee, however, was a letter sent by British Airways to Unite. There the company referred to the possibility of being ‘unable to reach agreement on [its] proposals as part of the consultation process’. In these circumstances, the letter continued, British Airways would ‘give all employees notice of dismissal by reason of redundancy and/or some other substantial reason’, and then ‘offer a proportion of them employment under new terms and conditions’.91 This led the Committee to conclude that ‘British Airways’ current consultation on staffing changes is a calculated attempt to take advantage of the pandemic to cut jobs and weaken the terms and conditions of its remaining employees’.92 Perhaps even more annoying to the Committee was that this was being done while the company was making full use of the CJRS. It repeated the words of the Prime Minister that ‘people should not be using furlough cynically to keep people on their books and then get rid of them. We want people back in jobs’.93 Indeed, so annoyed was the Committee that it condemned BA’s behaviour to its employees in unusually robust language as a ‘national disgrace’, falling ‘well below’ the standards ‘we would expect of any employer’.94

There are two issues illustrated here: the right to fire and rehire, and the redundancy of workers by firms in receipt of CJRS. The first is by no means a new problem and one which was highlighted during the austerity cuts

89Transport Committee, above n.88, para 65. For context, see P. Taylor, S. Moore and R. Byford, Cabin Crew Conflict—The British Airways Dispute 2009–11 (London: Pluto Press, 2019).
90Transport Committee, above n.88, para 69.
91Transport Committee, above n.88, para 66.
92Transport Committee, above n.88, para 80.
93Transport Committee, above n.88, para 79 (quoting the Prime Minister at a meeting of the Liaison Committee on 27 May 2020).
94Transport Committee, above n.88, para 80.
in 2010 and thereafter, as hundreds of thousands of public sector workers faced similar treatment. What is striking about the Transport Committee’s condemnation of BA (which was by no means alone in acting in this way) is the Committee’s failure to acknowledge the defective legal regime in which ‘fire and rehire’ practices are permissible, practices that give ultimate power to the employer, and render contracts worthless. The Transport Committee stated forcefully that a company should not take CJRS money and then make workers redundant; it also condemned the naivete of the government in failing to impose an obligation on companies not to behave in this way, as a condition of receipt of public money. But its conclusion that the government should ‘revise the rules of the Coronavirus Job Retention Scheme to prevent, or strongly penalise, companies for making large-scale redundancies, while in receipt of funds from the taxpayer’ falls far short of the mark.95 What is required is first to understand and second to address the systemic features of a flexible legal framework which permits employers to behave in this way with almost total impunity. In other words, it is to think differently about labour law.

6. PPE, THE HSE AND STATE FAILURE

It is the duty of employers to ensure ‘adequate protection for the life and health of workers in all occupations’,96 and the duty of the State to ensure that this obligation of employers is met. The obligation to provide a safe place of work and obligations related thereto are statutory duties backed by criminal liability, with the enforcement powers of the Health and Safety Inspectorate and Local Authority Environmental Health Officers in their respective spheres now well established. Until the law was changed by the Conservative-led Coalition in 2013, breach of these statutory duties could also give rise to civil liability on the part of employers sued by injured workers or their dependents. The barring of claims for breach of statutory duty forced affected workers to rely instead on the longstanding but less detailed common law obligations of employers, now highly relevant during the pandemic. These health and safety concerns were focused initially on critical workers, as scores of critical workers either lost their lives during the crisis or became ill as a result of exposure to the virus, as we discuss below.

95 Transport Committee, above n.88, para 82.
96 ILO Declaration of Philadelphia, Part III (g).
It is to be emphasised, however, that these health and safety obligations are owed to all workers, giving rise to concerns that would become more widespread as the lockdown was gradually lifted.

Among the 59.7% of critical workers who considered their work was being impacted by Covid-19, the most common concern was about their health and safety (39.6%). These concerns were well-placed, as evidence soon emerged about the risks to critical workers in particular, as was laid bare by the ONS:

- Compared with the rate among people of the same sex and age in England and Wales, men working in the lowest skilled occupations had the highest rate of death involving Covid-19, with 21.4 deaths per 100,000 males (225 deaths); men working as security guards had one of the highest rates, with 45.7 deaths per 100,000 (63 deaths).
- Men and women working in social care, a group including care workers and home carers, both had significantly raised rates of death involving Covid-19, with rates of 23.4 deaths per 100,000 males (45 deaths) and 9.6 deaths per 100,000 females (86 deaths).
- Healthcare workers, including those with jobs such as doctors and nurses, were not found to have higher rates of death involving Covid-19 when compared with the rate among those whose death involved Covid-19 of the same age and sex in the general population.
- Among men, a number of other specific occupations were found to have raised rates of death involving Covid-19, including taxi drivers and chauffeurs (36.4 deaths per 100,000); bus and coach drivers (26.4 deaths per 100,000); chefs (35.9 deaths per 100,000); and sales and retail assistants (19.8 deaths per 100,000).

Details of this kind concealed other alarming figures, captured by newspaper headlines to the effect that ‘six in 10 UK health workers killed by Covid-19 are BAME’.

Indeed, according to the ONS:

Of the 17 specific occupations among men in England and Wales found to have higher rates of death involving Covid-19, data from the Annual Population Survey (APS) show that 11 of these have statistically significantly higher proportions of workers from Black and Asian ethnic backgrounds; for women, APS data show that two of the four specific occupations with elevated rates have

97 Office for National Statistics, *Coronavirus and the Social Impacts on Great Britain* (30 April 2020).
98 Office for National Statistics, *Coronavirus (Covid-19) Related Deaths by Occupation, England and Wales: Deaths Registered Up to and Including 20 April 2020* (11 May 2020).
99 The Guardian, 25 May 2020.
statistically significantly higher proportions of workers from Black and Asian ethnic backgrounds.\(^{100}\)

The disproportionate impact of Covid-19 on social class, race and ethnicity related grounds was reiterated by Public Health England.\(^{101}\) That impact can no doubt be explained by inequalities beyond the workplace. But it nevertheless reinforced and compounded a sense of State failure, which began with the lack of personal protection equipment for critical workers as the crisis unfolded. It was plainly a major State failure that stocks of PPE had not been replaced so that the equipment was out of date. The NHS and other employers were thus obliged to buy protective equipment on international markets in the midst of a pandemic, the effect of the latter being to reduce available supplies and to force up prices. It was a State failure too that there was not the productive capacity nationally to produce PPE, to requisition or direct sufficient urgent production, or even to accept and coordinate the many offers from UK manufacturers to produce that equipment.

The responsibility of the government and employers in relation to PPE was clearly set out in the Personal Protective Equipment at Work Regulations 1992 (as amended), introduced to implement an EU Directive. These provide, among other things, that

\[
\text{Every employer shall ensure that suitable personal protective equipment is pro-
vided to his employees who may be exposed to a risk to their health or safety while at work except where and to the extent that such risk has been adequately controlled by other means which are equally or more effective.}\(^{102}\)
\]

Yet not only was the legislation not complied with by employers, serious questions arose about how effectively the law was enforced by the responsible State agencies. As far as is known at the time of writing, there have been no prosecutions or prohibition notices under the Health and Safety at Work Act 1974 served for failure to provide PPE or to comply with social distancing to protect against infection.\(^{103}\) Apparently two improvement

\(^{100}\)Office for National Statistics, *Coronavirus (Covid-19) Related Deaths by Occupation, England and Wales: Deaths Registered Between 9 March and 25 May* (26 June 2020).

\(^{101}\)PHE, *Disparities in the Risk and Outcomes of COVID-19* (June 2020). This was the publication from which the recommendations to address the disparities described were excised.

\(^{102}\)SI 1992 No 2966, reg 4.

\(^{103}\)There is no reference to any prosecution in the thorough inquiry by the Work and Pensions Committee, ‘DWP’s Response to the Coronavirus Outbreak’, above n.80, though as referred to below there is a reference to one business being required to close. But it is unclear on what basis this requirement was imposed.
notices had been served but in respect of what breaches is not known by us.104 This level of inactivity doubtless largely reflects the fact that both the Health and Safety Executive and Local Authorities have been stripped of staff and resources by years of cuts, particularly in the years of austerity. State funding for the HSE fell from £239.4 million annually in 2009–10 to £128.4 million annually in 2018–19 (with an additional cut of £14 million in 2020); in real terms, the cut was yet greater.105 Between 2004 and 2015, ‘front-line inspectors’ in the HSE dropped by 34%, inspections fell by 69% (preventative inspections fell by 96%), prosecutions resulting in conviction fell by 24%, the service of improvement notices fell by 14% and prohibition notices fell by 35%. The HSE is responsible for 900,000 premises, and on 31 March 2019, it had 1,066 inspectors who carried out 20,000 inspections in the year. Though shocking, it is not surprising to learn that the HSE made just 727 workplace inspections between the beginning of 1 March and 20 May 2020.106

But it may not be only budget cuts that have depleted health and safety protection, as is suggested by the restrained but withering analysis of the HSE by the Work and Pensions Committee. Although it had ‘received thousands of concerns from people concerned about safety at work during the pandemic’, the HSE had ‘required just one business to close’. And despite the crisis in care homes, the HSE had ‘inspected three care homes in the last six months’, but had ‘not inspected a single care home since 10 March 2020’.107 The Work and Pensions Committee report suggests a lack of urgency on the part of the HSE,108 a sense that is conveyed also when the

104 See note 107 below.
105 Various years. HSE Annual Report and Accounts. The emasculation of the State’s health and safety enforcement agency is mirrored in the USA: N. Narea, ‘The Federal Agency That’s Supposed to Protect Workers is Toothless on Covid-19’, Portside, 15 July 2020.
106 Local Authority inspectors are responsible for 1.7 million premises including some of the highest risk workplaces for Covid-19, including call centres, warehouses, shops and hospitality, yet are reduced by austerity cuts to only 543 full-time equivalent inspectors.
107 Work and Pensions Committee, DWP’s Response to the Coronavirus Outbreak, above n.80, para 227. In a letter to the Work and Pensions Select Committee, the HSE asserted that it had issued one prohibition notice to a business since the start of the coronavirus pandemic, this claim was later retracted by the HSE which admitted that, in fact, it had ‘issued no prohibition notices since the pandemic began. Instead, it has issued two improvement notices, which give businesses at least 21 days to address a risk identified by an HSE inspector.’
108 And while on 11 May 2020, ‘the Prime Minister indicated that HSE would carry out spot checks to ensure workplaces are “Covid-secure”’, the use of spot checks by HSE and local authorities decreased significantly in recent years: ‘In March 2015, DWP produced a report showing that HSE had, as planned, cut proactive inspection by around a third from that in
IWGB complained about the failure of employers to provide adequate PPE to drivers and riders in the gig economy. The union's complaint to the DWP was forwarded to the HSE, whose response to the union was leaked to the press:

Under health and safety law, an employer has a general duty to manage workplace risks and should protect workers on non-standard contracts as they do their employees. This will include many temporary workers, agency workers and those who use IT platforms to access work, often referred to as the gig economy. As you will be aware, those working in the gig economy who are self-employed rather than workers have a general duty to manage risks to themselves and others that arise out of their work. We are confident that the health and safety framework provides the necessary protection for workers, including those on non-standard contracts, and have no plans to amend the legislation.\footnote{The Guardian, 12 May 2020.}

The foregoing can speak for itself. As pointed out above, however, the legislation which there is no plan to amend provides that ‘every employer shall ensure that suitable personal protective equipment is provided to his \textit{employees} [note: not workers]’, while ‘every self-employed person shall ensure that he is provided with suitable personal protective equipment where he may be exposed to a risk to his health or safety while at work’.\footnote{SI 1992 No 2966.}

But if none of this is surprising for a host of reasons, nor should we be surprised that the State failures before and during the lockdown should be replicated more generally when attempts were made by the government to get people back to work, in a manner almost reckless in terms of the risk and its consequences. Although BEIS had consulted with unions about easing the lockdown and facilitating a return to work, frankly this looked like an attempt by government to ‘share the ownership’ of difficult decisions to be taken particularly in relation to health and safety. In the words of the \textit{Guardian’s} political editor on 27 April,

\footnote{2010–11, with remaining inspections in high risk sectors only, or where there was some existing information to suggest an intervention may be useful. The same report detailed that the number of local authority proactive inspections decreased by 95\% between 2009–10 and 2013–14: Work and Pensions Committee, above n.80, paras 233, 235. Other basic concerns highlighted by the Work and Pensions Committee related to the under-reporting of occupational disease and deaths, as well as the lack of any awareness about work being done at the time to compile workplace safety concerns into a single dataset.}
Ministers have held a series of high-level meetings with trades unions and business leaders amid fears that millions of people will be too fearful to return to work as pressure intensifies on the government to publish a path out of the national lockdown. The Guardian has been told that both sides of industry have been drafted into seven sector-by-sector meetings chaired by the business secretary, Alok Sharma, in recent days—after concerns arose in Whitehall that many employees may be reluctant to return to the workplace, even when the government gives the green light. Measures under discussion include the use of face masks and hand sanitiser on public transport, one-in-one-out rules and socially distanced queues for non-essential shops, and revised operating procedures for building sites. Some construction projects halted as a result of the virus have already restarted.\textsuperscript{111}

But although the government website reports the TUC acknowledging the new guidelines as a ‘step in the right direction’, the TUC also insisted that the ‘government must get to grips with the ongoing crisis in PPE, as more workers start to require it’.

Individual unions were even more critical, anxieties being expressed by transport and teaching unions in particular, leading to a campaign of vilification against organisations whose caution was soon vindicated.\textsuperscript{112} Unlike in Scotland, there was no indication of any joint planning, negotiation or agreement with the trade unions about the pre-conditions of the return to work, or of the necessary infrastructure being settled before any return to work took place. On the contrary, it appears that trade unions were given 12 hours’ notice of the advice the government intended to publish, and that their recommendations were largely ignored in the Guidance subsequently published on 11 May. So far as the Guidance itself is concerned, this stated that it was not designed to ‘supersede any legal obligations relating to health and safety, employment or equalities and it is important that as a business or employer you continue to comply with your existing obligations’.\textsuperscript{113} That said, each Guide (there are eight) failed to set out or summarise the existing obligations, and each failed to point out that it is not merely ‘important’ to comply, but that it is a criminal offence not to do so. It would have been easy to set out (in a short pamphlet) the duty of every employer to

\textsuperscript{111}\textit{The Guardian}, 27 April 2020.

\textsuperscript{112}\textit{The Times}, ‘Teaching unions are working against the interests of children, says Blunkett’, 14 May 2020; \textit{The Daily Mail}, ‘Social distancing CAN be done in schools, insists government minister amid fury at militant unions for blocking reopening of schools and telling teachers they have a legal right not to return’; and ‘The Corbynite lover of communist Cuba who says the first word she learned was “strike”’, 15 May 2020.

\textsuperscript{113}See eg HM Government, \textit{Working Safely During Covid-19 in Construction and Other Outdoor Work} (11 May 2020), Introduction.
• provide PPE;\footnote{SI 1992 No 2966, reg 4. Also SI 2002 No 2677.}
• keep the workplace and workstations safe;\footnote{SI 1992 No 3004.}
• make a proper risk assessment;\footnote{SI 1999 No 3242.}
• report the contraction of Covid-19 ‘attributed to occupational exposure’;\footnote{SI 2013 No 1471.}
• not to penalise or dismiss a worker for refusing to work where he or she has a reasonable belief of imminent danger of infection.\footnote{Employment Rights Act 1996, ss 44, 100. The latter provisions were largely untested during the pandemic despite the very serious health and safety concerns expressed by some workers in particular—notably in primary, secondary and tertiary education. As one of this paper’s referees helpfully pointed out, the prominence given to this ‘self-help’ provision reinforces the point made in the paper, namely the ‘failure of public responsibility to underwrite and enforce basic labour standards’. As such, the prominence given to these provisions is a ‘mark of regulatory failure, not regulatory success.’ Otherwise, it is another example of legislation diminished by its application to employees only, thereby excluding some of the most vulnerable, and leading to judicial proceedings challenging these exclusions as violating EU law: IWGB, ‘Judicial Review to Force UK Government to Extend Health and Safety Rights to “Gig Economy” Workers’, 12 May 2020. At the time of writing, the case had not been heard.}

This basic information would have been particularly important for the 5,613,000 businesses (96% of all businesses) that employ less than nine workers (together employing 16,630,000 employees, 60% of all employees). They will not all have health and safety officers and many are unlikely to be fully aware of their statutory duties. Yet not only did the Guidance fail to set out the full extent of the employer’s obligations, it appeared by misrepresentation to dilute their content, notably in relation to PPE. According to the Guidance, ‘Workplaces should not encourage the precautionary use of extra PPE to protect against Covid-19 outside clinical settings or when responding to a suspected or confirmed case of Covid-19.’\footnote{HM Government, Working Safely During Covid-19 in Construction and Other Outdoor Work, Part 6.} Such Guidance seems simply a consequence of the State failure to provide adequate supplies for clinical settings and is contradicted by the unequivocal statutory duty to provide PPE. The latter makes it clear that if other steps are insufficient to eliminate the risk of infection, then PPE must be provided. What justification can there be for denying gloves to delivery drivers handling packages, or visors and face masks to those who have to work in confined

114 SI 1992 No 2966, reg 4. Also SI 2002 No 2677.
115 SI 1992 No 3004.
116 SI 1999 No 3242.
117 SI 2013 No 1471.
118 Employment Rights Act 1996, ss 44, 100. The latter provisions were largely untested during the pandemic despite the very serious health and safety concerns expressed by some workers in particular—notably in primary, secondary and tertiary education. As one of this paper’s referees helpfully pointed out, the prominence given to this ‘self-help’ provision reinforces the point made in the paper, namely the ‘failure of public responsibility to underwrite and enforce basic labour standards’. As such, the prominence given to these provisions is a ‘mark of regulatory failure, not regulatory success.’ Otherwise, it is another example of legislation diminished by its application to employees only, thereby excluding some of the most vulnerable, and leading to judicial proceedings challenging these exclusions as violating EU law: IWGB, ‘Judicial Review to Force UK Government to Extend Health and Safety Rights to “Gig Economy” Workers’, 12 May 2020. At the time of writing, the case had not been heard.
119 HM Government, Working Safely During Covid-19 in Construction and Other Outdoor Work, Part 6.
spaces with other people (like shops, offices or schools) or who have to mingle with the travelling public (like ticket inspectors)?

7. THE FAILURE OF LABOUR LAW

The Covid-19 crisis is a perfect case study of labour law failure, at least in terms of the core objectives set out in Section 2 above. At the time of the crisis, British labour law has been largely stripped of its traditional function of underpinning autonomous trade unions and protecting workers from various abuses of employer power. To the extent that these functions survived, they were sustained partly by the weak inheritance from the Blair era (the national minimum wage and the trade union recognition legislation) and partly by the EU legacy (equality, working time limits and paid holidays, health and safety, and consultation). It is likely that this weakened framework contributed to the fragmentation or segmentation of what many now refer to as the British ‘labour market’, itself a term that reveals much about the contemporary status of workers in official circles and among economists. The pre-pandemic high levels of employment disguised a reality in which a growing number of workers were in various forms of insecure and low-paid employment, underpinned by a coercive social security system based on Victorian principles of less eligibility.\textsuperscript{120} The question now is whether a labour law crafted to deal with a programme of austerity and its aftermath is suitable or appropriate to deal with the consequences of a global health pandemic.

It is true as we have seen that the government took powers in the Coronavirus Act 2020 to amend SSP for the benefit of people self-isolating and to enable it to introduce the Coronavirus Job Retention Scheme to maintain the income of nine million or so workers ‘furloughed’ during the pandemic. But in practice these initiatives reinforced the underlying problems of British labour law and contributed to the inequitable way in which the burdens were shared, while the panic to increase HSE

\textsuperscript{120}Report of the Special Rapporteur on Extreme Poverty and Human Rights on his Visit to the United Kingdom of Great Britain and Northern Ireland, UN General Assembly, Human Rights Council, 23 April 2019, A/HRC/41/39/Add 1, Annex: ‘It might seem to some observers that the Department of Work and Pensions has been tasked with designing a digital and sanitised version of the nineteenth century workhouse, made infamous by Charles Dickens, rather than seeking to respond creatively and compassionately to the real needs of those facing widespread economic insecurity in an age of deep and rapid transformation brought about by automation, zero-hour contracts and rapidly growing inequality’ (para 13).
funding was simply symptomatic of a system of health and safety protection in decay. The amendments to SSP did not address the exclusion of the lowest paid, nor did they lead to an increase in the weekly amount payable, thereby reducing the income of already low-paid frontline workers.\textsuperscript{121} Indeed, the omission revealed the danger of poor conditions, in the sense that it created an active disincentive for workers to prioritise public health over poverty. And while the CJRS nevertheless helped to maintain the income levels of more highly paid workers, there are indications nevertheless that some employers used the scheme on a discriminatory basis.\textsuperscript{122} That said, however, it was anticipated that the replacement of the furlough scheme in October 2020 would lead to a wave of redundancies and unemployment.

In terms of the failure of labour law, the foregoing account suggests that this has been serious and systemic. These failures can be summarised as follows, the numbers in brackets referring to the corresponding bullet point referred to in Section 2 above:

- The insecurity and vulnerability of workers on precarious contracts, wholly dependent on employers on whether or not to be furloughed, with no security when the CJRS eventually comes to an end even were they to have been furloughed (1, 11);
- The exploitation of critical workers in essential services, many of whom were employed on or below the minimum wage hourly rate,\textsuperscript{123} which in the circumstances fell far short of fulfilling the obligation to ensure ‘a just share of the fruits of progress to all (4)’;

\textsuperscript{121} Compare Joint Statement by the Scottish Government and Scottish Trades Union Congress (STUC) on Fair Work Expectations, above: ‘No worker should be financially penalised by their employer for following medical advice. Any absence from work relating to COVID-19 should not affect future sick pay entitlement, result in disciplinary action or count towards any future sickness absence related action’.

\textsuperscript{122} According to lawyers Slater and Gordon, there were ‘very noticeable discriminatory tones, where decisions have been made unfairly based on age, ethnicity or sex’: ‘Furlough and Covid used Unfairly to Shed Unwanted Staff’, 8 May 2020 (available online). On discrimination on the ground of maternity on the CJRS, see M. Ford and K. Monaghan, ‘Statutory Sick Pay, the Coronavirus Job Retention Scheme and Pregnant Workers’, UK Labour Law Blog, 28 April 2020, available online. There are indications that maternity discrimination was tailored in different ways into both the CJRS and the SEISS. See further A. Adams-Prassl et al., above n.57.

\textsuperscript{123} The Resolution Foundation estimates that prior to 2016 some 20% of workers over the age of 25 were paid less than the minimum wage. By just prior to the pandemic that had increased to 25%: L. Judge and A. Stansbury, \textit{Under the Wage Floor: Exploring Firms’ Incentives to Comply with the Minimum Wage}, Resolution Foundation, 8 January 2020.
• The double exploitation of low paid critical workers in essential services on the additional ground that those exposed to the risk of contracting Covid-19 were not paid in full during periods of sickness or self-isolation beyond SSP (4);
• The failure on the part of government and employers to provide PPE to protect the health and safety of key workers, and the advice that certain forms of PPE should not be worn at work because of shortages of supply, not need (8);
• An international supply chain for the provision of personal protection equipment (PPE) in which the treatment of workers has been characterized as exposing the workers in question to the risk of modern slavery (2);
• Gender discrimination in the sense that women rather than men were likely to be furloughed under the CJRS rather than retained in employment, and failure properly to protect those who were or had taken maternity leave (3);
• The unequal exposure of workers to the virus, and the disproportionate fatality levels amongst workers from BAME backgrounds, compounded by the disproportionately high levels of fatality in BAME communities as a whole (3, 12);
• Although trade unions secured some policy successes with government particularly in relation to job retention, unlike in Scotland the quality of engagement with Ministers fell far short of the national social dialogue required for a national emergency (6);
• The marginalisation of trade unions in the management of the crisis at enterprise levels, specifically in relation to major decisions affecting employees about the operation of the CJRS and selection procedures thereunder (6), and in ensuring a safe return to work; and
• The ineffectiveness of a system that allows legal obligations relating to health and safety to be broken with apparent impunity, and permits contractual terms and conditions to be changed by strategies of fire and rehire, again with impunity (11).

These impacts all reinforce the point made above that labour law is not simply about the employer and employee, but also affects ‘the worker’s relationships and experiences beyond the workplace’. State failure at multiple levels has reinforced the relationship between labour standards and public health, a point highlighted further when in June 2020 national attention was gripped by well-known and systematic breaches of labour standards in the Leicester clothing industry.124 Apart from failures to comply with minimum wage law because of an indifferent commitment to enforcement

124 See HL 153 Paper, HC 443, 2016–17 (Joint Committee on Human Rights).
by the State, the cramped and unhealthy working conditions were blamed by many as being responsible for spreading Covid-19. Indeed, it was reported that staff were required to work even though unwell and knowingly having tested positive. Yet despite pre-election rhetoric about ‘levelling up’, there is no evidence of any desire on the part of the Johnson government to address broader concerns about workers’ rights in its vision for a post-pandemic future. Shortly before Covid-19 hit these shores, the government had announced but had not yet published an Employment Bill, which had promised ‘a new right for all workers to request a more predictable contract’; and ‘an entitlement to one week’s leave for unpaid carers.’ Although important, such a limited agenda is unlikely to match the gravity of the challenge ahead.

The same is true of proposals from the various Select Committees referred to above. Both the Treasury and Transport Committees, respectively, have been concerned with the operation of arrangements like the CJRS introduced during the period of lockdown, though the Work and Pensions Committee has looked a bit further into the future. One recommendation that is likely to be loudly applauded is that there should be a medium- and long-term plan for the future funding of the HSE, to replace the ‘sticking plaster’ solution adopted during the pandemic when it was given additional cash. Notable also is the recommendation of the Work and Pensions Committee that ‘the Government bring forward the Employment Bill for parliamentary scrutiny as soon as possible, to increase the legal protection available to people in low-paid work and the gig economy’. This recommendation is made in the specific context of the need ‘to clarify the law on employment status’ the Committee endorsing a proposal to this effect by its predecessor Committee working jointly with the Business, Energy and

125 Joint Committee on Human Rights, n. 124 above, paras 38–41. Also, The Guardian, 17 July 2020 (‘Basic labour laws are simply not being upheld’).
126 The Guardian, 11 July 2020.
127 The Guardian, 30 June 2020.
128 Cabinet Office, Our Plan to Rebuild: The UK Government’s Covid-19 Recovery Strategy, CP 239, 2020. There is nothing in the latter about the need to address underlying social, economic or political issues. Compare the document issued earlier by the Scottish Government: ‘the austerity driven response to the 2008 financial crash did not work and worsened the inequality that was part of its cause; we must not repeat those mistakes. Inequality is also worsening the outcomes for those people impacted by the coronavirus’ (Scottish Government, Covid-19—A Framework for Decision-Making [April, 2020], 22).
129 Prime Minister’s Office, The Queen’s Speech, 19 December 2019.
130 Work and Pensions Committee, above n.80, para 242.
131 Work and Pensions Committee, above n.80, para 242.
Industrial Strategy Committee, which in turn had endorsed a proposal in the Taylor Review that the Government should:

Develop legislation and guidance that adequately sets out the tests that need to be met to establish employee or dependent contractor status. This should retain the best elements of case law and better reflect the reality of modern day casual work in terms of the control exercised by employers over their staff.

Modest proposals of this latter kind—acknowledged by their author as being unlikely to make much difference in practice—are like the government’s, in the sense that they run with the grain of the status quo and make only marginal—if any—improvements. The same may be said of the assessment of bodies like the Resolution Foundation, which has proposed an increase in the national minimum wage to two-thirds of the ‘typical’ hourly rate, and the better regulation of zero-hours contracts so that workers have ‘a right to a contract that reflects the actual hours they work, a right to two weeks’ advance notice of work schedules, and a right to compensation where shifts are cancelled without reasonable notice’. But not only does this seem rather arbitrary, it is difficult to see how raising the minimum wage rate would begin to address the extent of the failure of labour law exposed by the Covid-19 pandemic in the UK. At the time of writing an annual salary for a full-time worker on the minimum wage for 40 hours a week × 52 weeks in the year is £18,137. By our calculation the Resolution Foundation’s proposal would increase that by the middle of the decade to £21,569, assuming two-thirds of the typical hourly rate is the same as two-thirds of the median hourly rate at the time of writing (currently £9.86, as against the full adult NMW rate of £8.21).

Other concerns with the Resolution Foundation’s minimalist response is that it makes no reference to employment status (which needs radical reform

---

132 HC 352 (2017–19).
133 M. Taylor et al., Good Work: The Taylor Review of Modern Working Practices (2017), 40. See K. Bales, A. Bogg and T. Novitz, “Voice” and “Choice” in Modern Working Practices: Problems with the Taylor Review’ (2018) 47 ILJ 46.
134 Taylor et al., above n.133, 36: ‘We believe that, if done correctly placing greater emphasis on control and less emphasis on personal service will result in more people being protected by employment law. While this number is likely to be very small in the overall context of employment levels nationally, we believe it is fairer.’
135 This is not to diminish the importance of employment status, which is a key question. Rather it is to question the adequacy of the Taylor proposals.
136 T. Bell, N. Cominetti and H. Slaughter, A New Settlement for the Low Paid: Beyond the Minimum Wage to Dignity and Respect (London: Resolution Foundation, 2020), 16.
not ‘clarification’),\textsuperscript{137} it permits the perpetuation of zero-hours contracts,\textsuperscript{138} and in advocating that the low paid should be paid during sickness, it is not clear whether this simply means that the lower earnings limit should be removed from SSP. More to the point, while acknowledging the ‘uneven distribution of power in the labour market’, the Resolution Foundation proposes little to address the point beyond tweaks to ‘state-set rules’ and very modest initiatives relating to the role of trade unions and collective bargaining. In the case of the former, it is proposed simply that trade unions should have a right of entry to workplaces ‘to raise awareness among workers’;\textsuperscript{139} In the case of the latter, all that is proposed is the re-introduction of an Edwardian-style trade board for ‘a small number of industries in clear need of improved standards, starting with social care’. These ‘21st century’ wage boards ‘should have the power to set sectoral minimum standards, and even wages, to police the blurred boundary between employment and self-employment, and to drive up training’\textsuperscript{140} Yet even here the anxiety is nevertheless palpable: ‘Higher standards could mean higher prices, or, in the case of social care that is predominately publicly funded, higher taxes’\textsuperscript{141}

The question as to what is to be done is one to which we propose to return in a follow up article. However, the answer will depend in large measure on the nature and scale of the anticipated economic crisis, and the policies adopted by government in response. The latter will not be written by labour lawyers, though labour law will play a critical role in their delivery. Whatever happens, perhaps the most fundamental failing exposed by the crisis is the way in which work of great benefit to the community is valued and the way in which the people who provide that work are valued. The Declaration of Philadelphia makes clear that work and its rewards ought not to be determined by the vagaries of a ‘labour market’, but by equity and justice. Fulfilment of that principle would require a paradigm shift in domestic labour law (and indeed globally), demanding a much greater role for the State in creating wage-fixing machinery, in ensuring that the factors

\textsuperscript{137}Work and Pensions Committee, above n.80, para 193.
\textsuperscript{138}Compare K. D. Ewing, J. Hendy and C. Jones (eds) \textit{A Manifesto for Labour Law: Towards a Comprehensive Revision of Workers’ Rights} (Liverpool: IER, 2016).
\textsuperscript{139}Bell, Cominetti and Slaughter, above n.136, 10.
\textsuperscript{140}Bell, Cominetti and Slaughter, above n.136, 27. But why so limited in ambition when according to the report ‘the weakness of sectoral institutions in the UK is a major feature—or rather, limitation—of our economy’ (p 27)?
\textsuperscript{141}Bell, Cominetti and Slaughter, above n.136, 27.
to count in rewarding work are not left to the ‘market’, and intervening to compress the gross inequalities of reward that bear no relationship to the benefits of the work to the community as a whole. It means taking wages out of the market, with potentially disruptive effects for other markets: a wages system based on the core principle of the Declaration of Philadelphia would be a serious challenge to models for the delivery of public services based largely on poverty pay.

8. CONCLUSION

Covid-19 exposed more than a failure of British labour law, as may well be revealed by an inquiry into the government’s handling of the crisis that some have demanded. Any such inquiry will doubtless have to contemplate how shrinking the State by dogmas referred to variously as monetarism, neo-liberalism and austerity left the UK ill-prepared for the Covid-19 crisis, and how this lack of preparation contributed to one of the greatest failures of public administration in modern times. Inquiry or not, it is nevertheless clear that the future of labour law is about to be hotly contested, as free market capitalism continues to be seen by some as the solution to the problem rather than its cause or aggravation. At the beginning of the Covid-19 crisis as the period of the ‘lockdown’ was being discussed — should the virus be contained or be allowed to ‘run hot’ to use the disarming language of one senior member of the Government — the Daily Telegraph carried a provocative piece by their Global Health Security Editor, under the title ‘Coronavirus vs Capitalism’, the piece concluding

How do you adjust business models designed around fractional margins and just-in-time supply chains to a world in which close contacts are greatly restricted? Entrepreneurs and City types seeking inspiration, might turn to The Merchant of Prato by Iris Origo. Its chief protagonist, Marco Datini, emerged from the plagues of 14th century Tuscany an even richer man. He’s seen by some as the forerunner of the modern businessman. He’s certainly proof that if there is one thing as adaptive to change as viruses, it’s capitalism.\textsuperscript{143}

\textsuperscript{142} The Report of Exercise Cygnus in October 2016 found, amongst other things, that: ‘The UK’s preparedness and response, in terms of its plans, policies and capability, is currently not sufficient to cope with the extreme demands of a severe pandemic that will have a nationwide impact across all sectors.’ The full text is in The Guardian, 7 May 2020.

\textsuperscript{143} Daily Telegraph, 20 April 2020.
The praises of free market capitalism had been heard sung by the former Chancellor of the Exchequer less than a week earlier, Sajid Javid claiming in *The Times* that the ‘free market’ is ‘the only way to revive our economy’, and that ‘once this pandemic has passed, we can’t allow the left to win the argument on wealth creation’.

We can reflect at leisure about the propriety of (i) celebrating a fourteenth century entrepreneur (Datini) at a time of global crisis, and (ii) a modern corporate executive concerned to cement ‘the position of the private sector companies in the public sector supply chain’. We can also reflect at leisure about what Javid’s intervention reveals about the economic model which incubated Covid-19. Indeed, not only did it incubate Covid-19, the free market was spectacularly ineffective to prevent its spread in multiple countries, leading to premature death, unemployment and destitution, to say nothing of lives put on hold and liberties lost as a result of a near global lockdown. Rather than the parable of Marco Datini from Prato, we might look more fittingly at the saga of doctors and nurses in British hospitals improvising PPE from plastic bin bags, forever a symbol of the chronic failure of globalisation, free markets and supply chains.

The experience of the pandemic in the UK also revealed the powerlessness of the modern state, unable or unwilling to protect its residents, and the lack of resilience of manufacturing capacity as the country was unable to produce essential equipment. Yet while trade unions were campaigning for better SSP, for the better protection of workers on the frontline, and for safeguarding the jobs of workers who were being made redundant rather than furloughed, the focus on Covid-19 drew attention away from the fact that discussions were still taking place on Brexit. One eye-catching report revealed that negotiations were stalling on the British government’s refusal to commit to respecting the ‘level playing field’ of European social standards, including presumably equal pay, anti-discrimination, working time and paid holiday arrangements, TUPE, and redundancy consultation, all issues relevant to the crisis being played out elsewhere. Other reports tend to confirm that the British government is still manoeuvring for a conventional free trade agreement, such as the one between the EU and Canada.

---

144 *The Times*, 14 April 2020. He was also given time on the BBC Radio 4 *Today* programme to promote the same views.

145 *The Guardian*, 4 June 2020 (leaked email from the Chief Executive of major government contractor). See subsequently by way of explanation, *The Guardian*, 17 June 2020.

146 *The Guardian*, 24 April 2020. According to the report, ‘the UK had ‘failed to engage substantially on this topic’ and had even ‘denounced’ the basic premise of fair competition’.

147 *The Guardian*, 26 April 2020.
Modern Free Trade Agreements—now large in number—are forged on the anvil of globalisation, with a weak commitment to labour standards, which are largely unenforceable. 148 This would be far removed from the hard law, legally binding, and judicially enforceable standards which we are about to lose, however inadequate the European legacy may have been. It is true that a clean break with Europe will enable us to develop our labour law as we think fit. But it will also permit further deregulation by a government whose Prime Minister recently attacked the Working Time Directive, 149 and whose Foreign Secretary was co-author of a book describing the British as being ‘among the worst idlers in the world’. 150 It is not known if the authors in question still subscribe to these views, though the expression of the latter does not invite optimism about the terms of free trade agreements negotiated by the former. These negotiations in the shadow of the Covid-19 crisis nevertheless lay bare the struggle ahead for the soul of labour law.

---

148 See ILO website for details of FTA’s currently in force. For issues and concerns about FTAs and labour standards, see J.-C. Tham and K.D. Ewing, ‘Labour Provisions in Trade Agreements: Neo-Liberal Regulation at Work’ (2020) 17 International Organisations Law Review 153.
149 HC Treasury Committee, Oral Evidence, 23 March 2016, HC 499 (2015–16): ‘stuff such as the working me directive,…the Data Protection Act,…and the solvency II directive, many directives and regulations emanating from Brussels have, either through gold-plating in this country or simply because of poor drafting or whatever, been far too expensive…They are not ideally tailored to the needs of this economy’.
150 See The Guardian, 22 August 2012 (interview with Raab by Andy Beckett). The book—authored by Kwarteng, Patel, Raab, Skidmore and Truss—is entitled Britannia Unchained: Global Lessons for Growth and Prosperity (Basingstoke: Palgrave Macmillan, 2012).