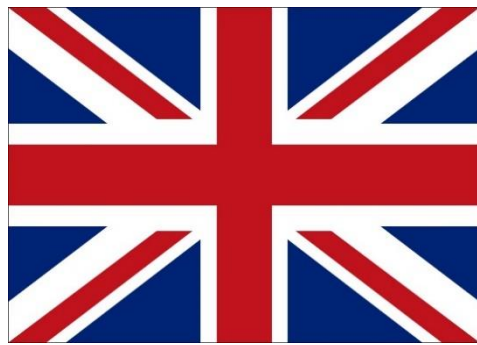


# UK National Report



EWL seminar Naples 2022

Edina Keresztes

Livia Mueller

## 1. The legislative framework for the employers' obligations to ensure OHS with a reference also to working time.

The Health and Safety at Work etc Act (HSWA), enacted in 1974, forms the basis of the legislative framework for occupational health and safety (OHS) in the UK. However, the history of statutory OHS regulation dates back more than 200 years, to the time of the industrial revolution. With the disruptive changes brought about by the transition from an agrarian and handicraft economy to one dominated by technology and automation, dangerous and unhealthy working conditions for workers emerged.<sup>1</sup> Increasing public intolerance of such conditions led to the involvement of government, in form of increasing regulation of labour, starting with the first of many Factories acts: the Health and Morals of Apprentices Act in 1802.<sup>2</sup> Initially, the legislation attempted to control working hours and the working conditions of children.<sup>3</sup>

The 'safety' of workers was introduced early on therein, with the 1844 Factory Act including provisions for the fencing of dangerous machinery.<sup>4</sup> Over the next century, a multitude of subsequent health and safety acts were introduced, in response to emerging social and political concerns as well as disastrous events such as the devastating mill fire in Keighly.<sup>5</sup> However, in absence of a consolidating legislative framework, the many pieces of legislation had resulted in "a labyrinthine and fragmented mass of law."<sup>6</sup>

It was not until the enactment of the HSWA in 1975 that an overarching primary legislation, defining the fundamental structure and authority of regulation and enforcement was finally introduced<sup>7</sup> and it continues to represent the foundation of British occupational health and safety law until today.

The HSWA seeks to protect the health, safety, and welfare of persons at work or persons although not at work but in connection with the activities of persons at work.<sup>8</sup> Based on the principle that those who create risks to employees or others in the course of carrying out work activities are responsible for controlling those risks, it imposes legal responsibilities for:

- Employers to ensure the health, safety and welfare at work of all their employees<sup>9</sup>;
- Employers and self-employed persons to conduct their undertaking in a way that persons not in their employment who may be affected thereby are not exposed to risks to their health and safety to persons other than their employees<sup>10</sup>;

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<sup>1</sup> Catherine Mills, *Regulating Health and Safety in the British Mining Industries 1800-1914* (Ashgate Publishing Limited) 2010), <<https://dspace.stir.ac.uk/bitstream/1893/3288/1/Regulating%20Health%20and%20Safety%20in%20the%20British%20Mining%20Industries.pdf>>, accessed 23 February 2022

<sup>2</sup> John Harrison, 'Occupational Safety and Health in the United Kingdom: Securing Future Workplace Health and Wellbeing,' (2012) 50 IH, <[https://www.jstage.jst.go.jp/article/indhealth/50/4/50\\_MS1376/\\_pdf](https://www.jstage.jst.go.jp/article/indhealth/50/4/50_MS1376/_pdf)>, accessed 23 February 2022

<sup>3</sup> Christopher Sirrs, 'Risk, Responsibility and Robens: the Transformation of the British System of Occupational Health and Safety Regulation, 1961-1974', <[https://researchonline.lshrm.ac.uk/id/eprint/2572245/1/2016\\_Sirrs\\_Risk,%20Responsibility%20and%20Robens.pdf](https://researchonline.lshrm.ac.uk/id/eprint/2572245/1/2016_Sirrs_Risk,%20Responsibility%20and%20Robens.pdf)>, accessed 23 February 2022,

<sup>4</sup> Ibid

<sup>5</sup> Robens Committee, *Safety and Health at Work: Report of the Committee 1970-72*, 2 vols. (London 1972), p.4

<sup>6</sup> Sirrs (n 3), p. 2

<sup>7</sup> Harrison (n 2)

<sup>8</sup> Health and Safety Executive, 'Health and Safety at Work etc Act 1974,' 2022, <<https://www.hse.gov.uk/legislation/hswa.htm>>, accessed 23 February 2022

<sup>9</sup> Section 2

<sup>10</sup> Section 3

- Persons concerned with premises to ensure all means of access thereto or egress therefrom are safe and without risks to health to persons other than their employees<sup>11</sup>;
- Persons in control of certain premises in relation to harmful emissions into atmosphere to prevent the emission of noxious or offensive substances and render harmless and inoffensive such substances<sup>12</sup>;
- Manufacturers of articles and substances for use at work to ensure their safety<sup>13</sup>; and
- Employees at work to take care of their health and safety and that of other persons affected by their work and enable their employer to comply with their health and safety duties<sup>14</sup>.

The obligations for employers to protect the health, safety and welfare of their employees encompass both physical as well as non-physical requirements. Employers are obligated to:

- provide and maintain safe and risk-free systems of work;
- maintain safe work equipment, provide and maintain safe workplace conditions; and
- ensure that any materials are handled, transported, used and stored safely.<sup>15</sup>

Furthermore, employers have to:

- provide health and safety information, instructions, training and supervision;
- put in place a OHS policy that is regularly updated and made known to all employees; and
- ensure that adequate welfare provisions are made through the appointment of safety representatives that are consulted for the making of the arrangements as well as for the monitoring of their effectiveness and through the establishment of a safety committee to review the measures taken if requested by the safety representatives.<sup>16</sup>

Employees on the other hand are required to do their part in ensuring the health and safety of a workplace by:

- following the health and safety training they received by their employer
- taking care of their health and safety as well as that of their co-workers
- cooperate with their employer on health and safety
- and alert their employer of any health and safety risks they are aware of.<sup>17</sup>

For both the employer and the employees, these obligations are expressed within the HSWA as goals or targets to be accomplished 'so far as is reasonably practicable',<sup>18</sup> based on the recognition that health and safety dangers form an inherent risk within a workplace that cannot be completely

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<sup>11</sup> Ibid, s 4

<sup>12</sup> Ibid, s 5

<sup>13</sup> Ibid, s 6

<sup>14</sup> Ibid, s 7

<sup>15</sup> HSWA 1974, s 2

<sup>16</sup> Ibid

<sup>17</sup> Health and Safety Executive, 'Health and Safety Law: What you need to know,' 2009,

<<https://www.hse.gov.uk/pubns/law.pdf>>, accessed 1 April 2022

<sup>18</sup> HSWA

eliminated. However, the statute fails to provide any further guidelines or objective benchmarks on how to interpret what ‘reasonably practical’ means, beyond exercising ‘adequate control’ and taking ‘appropriate’ steps.

To add detail to the duties in the HSWA and ensure the proper operationalization of its provisions, secondary regulation on the different subject matters set out by the statute have been enacted, based on proposal made by the Health and Safety Executive (HSE) which are informed by the expertise of inspectors, scientists and technologists and approved by the Secretary of State for Work and Pension.<sup>19</sup> These regulations are often accompanied by approved codes of practice (ACOPs), which “provide practical guidance on complying with the general duties of the HSW Act or the requirements of goal-setting regulations.”<sup>20</sup>

Today, more than 200 other OSH-related acts and subsidiary regulations are complementing the HSWA, with legislative pieces ranging from the Noise at Work Regulations 1989 to the Personal Protection Equipment (Enforcement) Regulations 2018.<sup>21</sup> The enforcement of health and safety legislation is allocated to the HSE and local authorities through the Health and Safety (Enforcing Authority) Regulations 1998<sup>22</sup> (for more information on sanctions and responsibilities for the violation of safety obligations, see Question 5.) In addition, particular areas related to occupational health and safety, such as asbestos, lead or other dangerous chemicals, are covered by specific regulations.<sup>23</sup>

Many of the more recent statutory instruments therein are the result of negotiations and transpositions of European legislation relating to occupational health and safety, with the European Union’s health and safety framework directive (89/391/EEC) being central thereto. In response to the framework directive calling for its transposition into national law by EU member states, the UK implemented a ‘six pack’ of health and safety regulations into its legislation: the Management of Health and Safety at Work Regulations<sup>24</sup>, the Manual Handling Operations Regulation<sup>25</sup>, the Display Screen Equipment Regulations<sup>26</sup>, the Workplace (Health, Safety and Welfare) Regulations<sup>27</sup>, the Personal Protective Equipment at Work Regulations<sup>28</sup>, and the Provision and Use of Work Equipment Regulations<sup>29</sup>. Together, they reinforce the HSWA and provide the basic framework for the management of health safety in workplace, making explicit the general duties of employers,

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<sup>19</sup> Health and Safety Executive (n 8)

<sup>20</sup> Ibid

<sup>21</sup> Inter-alia the Management of Health and Safety at Work Regulations 1999; Workplace (Health, Safety and Welfare) Regulations 1992; Health and Safety (Display Screen Equipment) Regulations 1992; Personal Protective Equipment at Work Regulations 1992; Provision and Use of Work Equipment Regulations 1998; Manual Handling Operations Regulations 1992; Health and Safety (First Aid) Regulations 1981; The Health and Safety Information for Employees Regulations 1989; Employers’ Liability (Compulsory Insurance) Act 1969; Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995 (RIDDOR); and the Noise at Work Regulations 1989. For a full list, see: <https://www.hse.gov.uk/legislation/statinstruments.htm>

<sup>22</sup> 1998 No. 494

<sup>23</sup> Chemicals (Hazard Information and Packaging Supply) Regulations 2002; Construction (Design and Management) Regulations 1994; Gas Safety (Installation and Use) Regulations 1994; Control of Major Accident Hazards Regulation 1999; Dangerous Substances and Explosive Atmospheres Regulations 2002

<sup>24</sup> Health and Safety Executive, ‘Health and safety regulation: a short guide,’ 2003, <<https://www.hse.gov.uk/pubns/hsc13.pdf>>, accessed 1 April 2022

<sup>25</sup> 1992 No. 2793

<sup>26</sup> 1992 No. 2792

<sup>27</sup> 1992 No. 3004

<sup>28</sup> 1992 No. 2966

<sup>29</sup> 1998 No. 2306

including the requirement to put in place arrangements to control health and safety risks. Additional legislation specific to certain types of health and safety risks, such as the Control of Substances to Health 2002 (COSHH)<sup>30</sup>, further expands on those duties.

Another important health and safety regulation that originated in Europe are the Working Time Regulations 1998. Enacted to implement the European Union's Working Time Directive, which was approved in 1993<sup>31</sup>, laying down minimum safety and health requirements for the organization of working time by setting minimum periods of daily and weekly rest, annual leave, and breaks, as well as maximum weekly working time, with extra protection being awarded to young workers.

Additional directives, implemented through national regulations, address:

- the management of specific workplace risks
- the protection of specific groups of workers
- measures to complete and maintain a single market in the EU; and
- the protection of the environment.<sup>32</sup>

With the UK withdrawing from the EU on 31 January 2020, the impact of Brexit on the aspects of UK health and safety law that are derived from EU legislation is of concern. As the HSWA is of British origin, the cornerstone of the framework will remain as it is. However, the secondary legislations that were put in place as a consequence of European Directives can be repealed should the UK government want to do so. So far, most health and safety regulation has remained, with only some minor changes to health and safety law having been made. Concretely, large amounts of UK law had to be amended to remove references to the EU and fix deficiencies, with around 80,000 changes to statutes such as the Personal Protective Equipment at Work Regulations 1992 and Working Time Regulations 1998.<sup>33</sup> Furthermore, some new rules and procedures had to be established to continue to place chemicals, civil explosives and work equipment and machinery on the UK market.<sup>34</sup> While it is unlikely that the UK government will embark anytime soon on widespread changes to the country's health and safety system<sup>35</sup>, the fact Brexit theoretically awarded it the power to change important secondary regulations unilaterally means that only time will tell where the legislative framework for UK health and safety will go from here as the EU no longer is setting the standards to follow.

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<sup>30</sup> 2002 No. 2677

<sup>31</sup> 2003/88/EC

<sup>32</sup> Health and Safety Executive (n 8)

<sup>33</sup> Commodious, 'How will Brexit affect Health and Safety in the UK?' 2022, <<https://www.commodious.co.uk/knowledge-bank/brexit>>, accessed 1 April 2022

<sup>34</sup> Health and Safety Executive, 'The UK has left the EU,' 2022, <<https://www.hse.gov.uk/brexit/index.htm>>, accessed 1 April 2022

<sup>35</sup> DAC Beachcroft, 'Health, Safety and Brexit', 2020, <<https://www.dacbeachcroft.com/es/gb/articles/2020/january/health-safety-and-brexit/>>, accessed 1 April 2022

## **2. The specific requirements on the Individual worker's cooperation to the fulfillment of OHS in the pandemic (e.g., quarantine, obligation to remote work, vaccination requirements, specific safety requirements for essential workers).**

### *Background*

UK labour law is generally less extensive and less stringent than its European neighbours, so level of intervention during the pandemic was unprecedented and notable.

Some of the changes made by the UK government during the pandemic have been deregulatory and served to erode protection for workers (for example, through increasing flexibility in working time for key workers: Working Time (Coronavirus) (Amendment) Regulations 2020: <https://www.legislation.gov.uk/ukSI/2020/365/made>). For the most part though, these changes have increased worker protection and provided significant support for UK businesses and employees. The two furlough schemes, the Coronavirus Job Retention Scheme (CJRS) and the accompanying Self-Employment Income Support Scheme have been widely judged as pandemic success stories, with the CJRS supporting 11.6 million people and playing a clear role in limiting job losses: [permanentfurloughreport2.pdf \(tuc.org.uk\)](#). Likewise, changes to the statutory sick pay system during the pandemic have been positive, serving to increase access to the scheme and reduce the administrative burden on both employees and their employers.

However, this support was only ever envisaged as temporary, and all these schemes have been or are in the process of being disbanded. Under the UK's 'Living with COVID-19' report, published in February 2022, ([COVID-19 Response - Living with COVID-19.docx \(publishing.service.gov.uk\)](#)), the government set out its deregulatory agenda, and its intention to replace 'specific interventions for COVID-19 with public health measures and guidance' (para 35). All self-isolation and testing requirements ended on 24 February 2022, and from the 24 March the changes made to statutory sick pay were reversed. Furthermore, from 1 April, the recommendations regarding the use COVID passes for gaining entry for to entertainment venues will be scrapped and employers will no longer be required to specifically consider coronavirus as part of their health and safety risk assessments.

### *Initial legislative restrictions – self-isolation and the move to remote work*

In the UK, the restrictions on business were implemented under emergency legislation which came into force on 26 March 2020: [The Health Protection \(Coronavirus, Restrictions\) \(England\) Regulations 2020 \(legislation.gov.uk\)](#). This mandated the closure of business premises (Regulation 4), and dramatic restrictions on movement (Regulation 6). Where possible services were made to move online and individuals were advised to work from home. This was followed by the Coronavirus Act 2020 which set out further powers for the government, and further restrictions (the closure of educational establishments). In the Act there were also powers to change statutory sick pay to encourage individuals to fulfil the self-isolation mandate for those testing positive for coronavirus or coming into close contact with someone testing positive for coronavirus (Regulations 39-44).

The working from home guidance continued until 1 August 2020, when the government announced that employers could mandate a return to the office in most sectors after consultation with employees. However, homeworking guidance returned periodically with subsequent lockdowns, and the percentage homeworking or hybrid working has remained much higher than at the start of the pandemic: [Working from home statistics UK \[Updated for 2022\] — The Home Office Life](#). The stay-at-home guidance for workers did not apply to those considered 'key workers'. These workers are listed here: [Coronavirus and key workers in the UK - Office for National Statistics \(ons.gov.uk\)](#).

There is no 'right' to demand homeworking in the UK, although employees can request flexible working arrangements which could include home working. In the UK, employees have the right to request a contractual change to allow them to work from home, as long as they meet certain qualification criteria regarding length of service and the nature and form of the request (section 80F (1) (a) (iii) Employment Rights Act 1996).

### *Safety Requirements in the workplace*

The government supplemented the provisions of the Coronavirus Act with guidelines on the management of health and safety risks posed by coronavirus.<sup>36</sup> In general the measures mirrored the protective measures under section 3 of the COSHH Regulations (see question 1), with all employers asked to increase the frequency of cleaning and hygiene procedures and encouraging hand-washing, increasing recourse to home work where possible, taking reasonable steps to maintain social distancing and managing the risk of transmission where people cannot be two metres apart.<sup>37</sup> The government then produced sector-specific guidelines for the management of COVID-19 risk, detailing those sectors where the provision of PPE is necessary and giving instructions for the use of that equipment to maximise protection. For example, PPE was necessary for health-care professionals. Details on the use of PPE in the healthcare sector was detailed separately, as this was managed through Public Health England, an executive agency sponsored by the Department of Health and Social Care.<sup>38</sup>

Despite the existence of these measures, it is clear that the workplace remained a major site of coronavirus transmission risk: between 10 April 2020 and 13 March 2021, 31,380 occupational disease notifications of COVID-19 in workers were reported to enforcing authorities (HSE and local authorities), including 367 death notifications.<sup>39</sup>

There are a number of reasons which might be put forward to explain this transmission risk. First, the provision of adequate PPE (in line with government guidelines) was problematic. Particularly in the early stages of the pandemic, there were shortages of PPE, and this led to a greater transmission risk in some sectors. There have also been recurrent problems with the quality of PPE through the pandemic. In the healthcare sector, PPE was supplied which did not meet the required safety standards, and thus workers were not adequately protected, or supplies were abandoned. There was also a particular problem in the social care sector where the quality requirements for PPE were not as stringent as for other areas of healthcare.<sup>40</sup>

Second, there was mounting evidence that employers were not complying with the legal requirements under health and safety law or the government guidance which supplements it. A survey of union health and safety representatives conducted by the TUC in March 2021 found that only 77 per cent of representatives in the food or drink manufacturing sector reported that their employer had conducted

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<sup>36</sup> UK Gov, 'Working Safely during Coronavirus (COVID-19) available at <https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19/offices-and-contact-centres>. This guidance has since been replaced with updated guidance: <https://www.gov.uk/guidance/working-safely-during-covid-19>.

<sup>37</sup> UK gov, 'Five Steps to [Staying COVID-19 Secure notice \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

<sup>38</sup> COVID-19, Infection Prevention and Control, [COVID-19: infection prevention and control \(IPC\) - GOV.UK \(www.gov.uk\)](https://www.gov.uk)

<sup>39</sup> HSE, Management Information: Coronavirus Disease Reports (undated) <https://www.hse.gov.uk/statistics/coronavirus/index.htm> last accessed 30 March 2021.

<sup>40</sup> Public Accounts Committee Oral evidence: Covid-19: Government procurement and supply of personal protective equipment HC 928 Thursday 10 December 2020 Ordered by the House of Commons to be published on 10 December 2020 <https://committees.parliament.uk/oralevidence/1373/default#page=9> accessed 30 March 2021



an updated risk assessment in light of COVID-19 and only 76 per cent of those in essential retail.<sup>41</sup> Furthermore those representatives reported failures amongst their employers to provide adequate PPE, to implement social distancing, increase cleaning frequency or modify patterns of work to reduce transmission risk. Relatively few representatives reported that their employers had conducted additional risk assessments in respects of workers at heightened risk of severe coronavirus symptoms.

Third, the adequacy and suitability of the government guidance might be brought into question. The sectoral approach based on risk tended to focus on certain high-risk areas (such as healthcare) whereas the risks in other areas were downplayed.<sup>42</sup> For example, the narrow sectoral guidance on the need for PPE has been criticised.<sup>43</sup>

In February 2022, the government produced its Living with Covid report, and started to remove coronavirus restrictions. The government still has guidance on avoiding transmission in the workplace on a sectoral basis: <https://www.gov.uk/guidance/working-safely-during-covid-19>, but mandatory OHS safety compliance in respect of coronavirus ended on 1 April 2022 (employers not having to undertake COVID related health and safety assessments).

### *Vaccinations*

The vaccination programme is hailed as a success by the government and precipitated its move to removing coronavirus restrictions and being able to ‘live’ with the virus. However, even with the advent of the vaccine, the transmission risks at the workplace will not be reduced to zero. Some workers will not take up the offer of a vaccine as a matter of personal choice, lack of employer support<sup>44</sup> or for medical reasons and this will potentially cause ongoing problems of transmission risk at work.

Vaccinations became mandatory for care home staff in November 2021, but this policy was quickly revoked: [Javid signals end to mandatory vaccination of social care staff - Community Care](#). There were also plans to extend mandatory vaccinations to all health and social care staff, but this was also abandoned following a consultation: [Revoking vaccination as a condition of deployment across all health and social care: consultation response - GOV.UK \(www.gov.uk\)](#).

For a brief time, there was an issue with companies removing sick pay for unvaccinated members of staff. This followed an announcement by the government for differential self-isolation periods according to vaccination status. This was potentially problematic, if not to say illegal: [Firms are cutting sick pay for the unvaccinated – what does employment law say? \(theconversation.com\)](#) However, given the removal of self-isolation periods this issue is likely to disappear now.

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<sup>41</sup> TUC, ‘Union Health and Safety Reps Survey’ (2020-2021) available at <https://www.tuc.org.uk/sites/default/files/2021-03/Safety%20reps%20survey%202021.pdf> last accessed 30 March 2021, p 30

<sup>42</sup> This will be discussed in more detail in Q4.

<sup>43</sup> The Gig Economy and Covid-19: Fairwork Report on Platform Policies April 2020 <https://fair.work/wp-content/uploads/sites/97/2020/06/COVID19-Report-Final.pdf> last accessed 29 April 2021

<sup>44</sup> TUC, ‘Risks: Health and Safety News’ (23 March 2021) [https://www.tuc.org.uk/news/risks-union-health-and-safety-news-number-990-23-march-2021#\\_Toc67393420](https://www.tuc.org.uk/news/risks-union-health-and-safety-news-number-990-23-march-2021#_Toc67393420) last accessed 31 March 2021



### **3. The role of workers' representation within the undertaking and collective bargaining in the view of ensuring the OHS rights and duties during the pandemic.**

Trade union density is low in the UK, there has been a steady decrease in membership from 34.2% in 1995 to only 23.7% of UK employees being members of a trade union today.<sup>45</sup> It is higher in the public sector than in private sector,<sup>46</sup> biggest representation is seen in the education, and health and social care sector and lowest in the accommodation and food service sector.<sup>47</sup> There has also been a steep decline in trade unions and employers' associations with only 141 trade unions and 84 employers' associations currently operating in the UK.<sup>48</sup>

The UK is famous for de-regulation, namely minimising legislation that could unduly burden employers. During the leadership of Margaret Thatcher (1975-1990), in the spirit of deregulation and economic growth, a significant reform took place concerning trade unions and collective bargaining. Until 2016 trade union relations were governed by the Trade Union and Labour Relations (Consolidations) Act 1992 (TULRCA). In 2016 the UK government enacted the Trade Union Act 2016, amending TULRCA. The new Act introduced further restriction to collective rights such as new increased ballot thresholds for strike action, requiring 50% of members to vote in such ballots,<sup>49</sup> and in six important public service areas (e.g., health and education) a further requirement of 40% of all members voting in favour of strike action for this to go ahead was also introduced.<sup>50</sup> It also changed the information provided on ballot papers, who this would need to be provided to and when employers should be informed,<sup>51</sup> introduced union supervision for picketing,<sup>52</sup> as well as strengthened the powers of the certification officer who regulates trade union affairs (this is relevant for discussions on union actions in response to COVID below).<sup>53</sup>

Under the Health and Safety at Work etc Act 1974, recognised trade unions have the right to appoint safety representatives in the workplace.<sup>54</sup> A safety representative should be employed by the organisation that they become a representative for. Employers are required to cooperate and consult with these representatives around health and safety matters,<sup>55</sup> this may be done through a health and safety committee established by the employer.<sup>56</sup> The Safety Representatives and Safety Committees Regulations 1977 provides a detailed overview of the responsibilities of the safety representatives which include: carrying out various investigations into potential hazards, accidents and employee complaints relation to health and safety, presenting findings and proposals to the employers, representing the employees in consultations relating to health and safety with the employer or health and safety authorities, and attending health and safety committee meetings to carry out their duties.<sup>57</sup> A health and safety committee will be established if two or more safety representatives request the

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<sup>45</sup> Department for Business, Energy and Industrial Strategy, 'Trade Union Membership, UK 1995-2020: Statistical Bulletin', (2021), 1.

<sup>46</sup> *ibid*, 19.

<sup>47</sup> *ibid*, 13.

<sup>48</sup> Annual Report of Certification Officer 2020-21, 9.

<sup>49</sup> Trade Union Act 2016, s2.

<sup>50</sup> *ibid*, s3.

<sup>51</sup> *ibid*, s5-7.

<sup>52</sup> *ibid*, s10.

<sup>53</sup> *ibid*, s16-20.

<sup>54</sup> Health and Safety at Work etc Act 1974, s 2(4).

<sup>55</sup> S2(6).

<sup>56</sup> S2(7).

<sup>57</sup> The Safety Representatives and Safety Committees Regulations 1977, SI1997/500, Reg4.

employer to establish one,<sup>58</sup> and this should be set up no later than three months after the request. Health and safety representatives also have the right to paid time off to attend training and to carry out their duties.<sup>59</sup>

Where there are no recognised trade unions, and therefore no appointed safety representatives, as defined under the 1977 Regulations, employers are still required to consult with employees regarding health and safety.<sup>60</sup> This consultation can take place directly with the employees or through employee representatives.<sup>61</sup> Where consultation takes place through employee representatives, the employer is responsible for ensuring they received adequate training to be able to carry out their role.<sup>62</sup> Just like safety representatives, employee representatives are also entitled to paid time off to attend training and carry out their duties.<sup>63</sup> These regulations have led to an increase in consultation around health and safety, in fact in 2004 only 1% of employers (with ten or more employees) failed to consult with employees/representatives on health and safety.<sup>64</sup>

Safety representatives had a central role in supporting organisations during the Covid-19 pandemic. According to the TUC, 73% of representatives they surveyed said they had spent additional time carrying out health and safety representative functions during the pandemic., many of whom have done so in their own time.<sup>65</sup> Mental health concerns have also accelerated during the pandemic, resulting in 65% of representatives reporting dealing with increased number of mental health issues in the workplace,<sup>66</sup> especially within the voluntary sector, health services, education, local government, and in the retail sector.<sup>67</sup> This likely contributed to the increase in the amount of own time spent by representatives carrying out their duties during this period.

Despite this, only 57% of representatives stated that their employer consulted them during the preparation and production of Covid-19 risk assessments for the workplace,<sup>68</sup> a worrying number considering employers are required under the legislation to consult with representatives about health and safety risks and mitigations.<sup>69</sup> Whilst there is a requirement to consult with the safety representatives and they have the ability to investigate hazards and dangers, unfortunately their powers are limited as they do not have the ability to stop the work in case they deem it to be dangerous.<sup>70</sup> This means that even if they deemed the workplace not to be 'Covid secure', they would not have had the ability to stop the work of others.

Despite the low membership numbers and their significantly limited ability to carry out their role, trade unions had a significant impact on improving health and safety for employees across the UK during the pandemic. Admittedly, their influence has been greater in areas where union recognition is significant.

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<sup>58</sup> Reg 9(1-2).

<sup>59</sup> Reg 4(2).

<sup>60</sup> The Health and Safety (Consultation with Employees) Regulations 1996, SI 1996/1513, Reg 3.

<sup>61</sup> *ibid*, Reg 4(1)(a-b).

<sup>62</sup> *Ibid*, Reg 7(1)(a).

<sup>63</sup> *Ibid*, Reg 7(1)(b).

<sup>64</sup> Zoe Adams (et al), *Deakin and Morris' Labour Law* (7<sup>th</sup> ed Hart Publishing 2021) 1267.

<sup>65</sup> TUC, 'Union Health and Safety Reps Survey' (2020/2021), 40.

<sup>66</sup> *ibid*, 42.

<sup>67</sup> *ibid*.

<sup>68</sup> *ibid*, 30.

<sup>69</sup> HSE, 'Consulting employees on health and safety-A brief guide to the law', 04/13, 2.

<sup>70</sup> The Hazards Campaign, 'DECENT JOBS AND DECENT LIVES A MANIFESTO FOR A HEALTH AND SAFETY SYSTEM FIT FOR WORKERS', (2019), 19.

Regrettably, the work of safety representatives has not been welcomed everywhere. Health and safety representatives working for Novus, a company providing education services in prisons, who have raised several safety concerns relating to the Covid-19 pandemic, are currently subject to complaints and investigations.<sup>71</sup> This significantly undermines their role, and it makes it impossible for Novus to engage meaningfully with unions around Covid-19 health and safety matters. Due to the increasing concerns over health and safety and the failure of Novus to engage meaningfully around these matters with the union, the Universities and Colleges Union (UCU) is planning to take strike action across prisons in England.<sup>72</sup>

Covid-19 health and safety concerns were also raised at the Driver and Vehicle Licencing Agency (DVLA) by the Public and Commercial Services (PCS) union. The union was working closely with DVLA senior management and the transport secretary, however unfortunately agreement could not be reached surrounding a health and safety agreement to keep workers safe during the pandemic. In response the union sought to engage in strike action, however DVLA senior management encouraged workers not to exercise their voting rights.<sup>73</sup> Despite 79% of those voting voted in favour of strike action, the union did not have a 50%-member turnout rate for the vote, therefore strike action was not possible.<sup>74</sup> This clearly shows that the new legislation is stopping unions carrying out key work to keep workers safe. PCS have pledged to keep campaigning for the health and safety of DVLA workers and continue to work with the management teams to reach an agreement.<sup>75</sup>

Alongside the work done by the health and safety representatives and unions in specific organisation as outline above, the Trade Union Congress and UK unions took a significant role in lobbying and negotiating with the government which led to the introduction of the Coronavirus Job Retention Scheme, later extend to October 2020.<sup>76</sup> Unfortunately, other than their role in the creation of the job retention scheme, it would seem that the TUC and unions were mostly excluded from all other governmental decision-making during the pandemic.<sup>77</sup> Apart from in Scotland, trade unions were marginalised in the Covid-19 health and safety debate by the government.<sup>78</sup> They did not to take part in joint planning or negotiation with the government surrounding return to work plans in May 2021 and were only given 12 hours' notice to provide any comments regarding the government's plans with their recommendations largely ignored.<sup>79</sup>

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<sup>71</sup> UCU, 'Strike ballot to open at prisons across England' (18-March-2021)

<<https://www.ucu.org.uk/article/11466/Strike-ballot-to-open-at-prisons-across-England>>accessed 26-March-2022

<sup>72</sup> *ibid.*

<sup>73</sup> Public and Commercial Services Union, 'DVLA staff vote to strike but anti-trade union laws curtail action' (10-November-2021) <<https://www.pcs.org.uk/news-events/news/dvla-staff-vote-strike-anti-trade-union-laws-curtail-action>>accessed 26-March-2022.

<sup>74</sup> *ibid.*

<sup>75</sup> *ibid.*

<sup>76</sup> Tanya Warlock, 'Unions show organising strength during global pandemic' (03-July-2020)

<<https://www.tuc.org.uk/blogs/unions-show-organising-strength-during-global-pandemic>>accessed 26-March-2022.

<sup>77</sup> The Guardian, 'Unions could have helped to avoid this 'pingdemic' mess – but no one asked them' (27-July-2021) <<https://www.theguardian.com/commentisfree/2021/jul/27/unions-pingdemic-tories-england-workers>>accessed 26-March-2022.

<sup>78</sup> K D Ewing, Lord Henry QC, 'Covid-19 and the Failure of Labour Law: Part 1', (2020) 49 ILJ 497, 532.

<sup>79</sup> *ibid.*,528.

Regardless, the TUC and unions continued to campaign for greater provision of PPE, influence the debate surrounding working conditions and safety of key workers,<sup>80</sup> highlight the unsafe conditions and low-pay many workers face in the UK, especially those in 'insecure job' such as those in the gig-economy or on atypical working arrangements.<sup>81</sup> Those in the gig-economy seem to be at the biggest disadvantage since most UK Covid-19 protections are aimed at employees. This was further enhanced by the fact that during the pandemic 'platforms' such as Deliveroo, Uber, Just Eat, have not engaged or collaborated with worker associations representing interest of workers to improve their safety in the gig-economy.<sup>82</sup> Despite this, the Independent Workers Union of Great Britain won a landmark health and safety challenge against the UK government in favour of gig-economy workers,<sup>83</sup> with the high court in the case of *The Independent Workers' Union of Great Britain, R (on the application of) v The Secretary of State for Work and Pensions and others*<sup>84</sup> ruling that the UK failed to properly implement the EU health and safety directives.<sup>85</sup> This meant that health and safety protections will be extended to gig-economy workers in the future. This is an important win for the union and a significant step towards safety protections for workers, since it means gig-economy workers are now entitled to the same EU derived health and safety rights as employees.

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<sup>80</sup> TUC, 'Essential workers face major Covid-19 risk because of outdated safety rules' (05-January-2021) <<https://www.tuc.org.uk/news/essential-workers-face-major-covid-19-risk-because-outdated-safety-rules>>accessed 26-March-2022.

<sup>81</sup> TUC, 'TUC sounds alarm over "stark" Covid mortality rates in insecure jobs' (16-April-2021) <<https://www.tuc.org.uk/news/tuc-sounds-alarm-over-stark-covid-mortality-rates-insecure-jobs>>accessed 26-March-2022.

<sup>82</sup> Fairwork, 'The Gig Economy and Covid-19: Fairwork Report on Platform Policies', (2020), 12.

<sup>83</sup> IWGB, 'IWGB wins groundbreaking health and safety legal challenge against the Government' (13-November-2020) < <https://iwgb.org.uk/en/post/iwgb-wins-groundbreaking-health-and-safety-legal-challenge-against-the-government/>>accessed 26-March-2022.

<sup>84</sup> [2020] EWHC 3050 (Admin).

<sup>85</sup> *ibid* [141]

#### 4. OHS authorities, grievances procedures, practitioners.

##### *The Health and Safety Executive (HSE)*

The HSE is an independent health and safety regulator appointed by the British Government and funded by the Department of Work and Pension. It provides free health and safety advice and guidance to organisations, shapes and reviews health and safety regulations, enforces health and safety legislation, and produces research and statistics.<sup>86</sup> The HSE can investigate employers in the UK, however it only investigates *'the most serious work-related incidents, injuries or cases of ill health'*<sup>87</sup> reported to it. The HSE is tasked with the enforcement of health and safety legislation, although it emphasises that its main aim is to *prevent* injury or death. It can issue different types of enforcement action depending on the severity of the issues report which range from simple face-to-face or written advice, formal notices, approval withdrawals, through to cautions and to criminal prosecution.<sup>88</sup>

During the Covid-19 pandemic the HSE took a central role in supporting the cross-government effort led by public health authorities to help reduce the spread of the virus in the community and workplaces.<sup>89</sup> The HSE was not tasked with enforcing the Coronavirus Act 2020, its main role was help reduce infection risk to those in the workplace by providing advice and guidance to organisations across the UK on how to keep their employees safe and limit the transmission of the virus. It also worked with government departments to support the development of policy, guidance, and research; supported the effort to ensure personal protective equipment (PPE) and hand sanitiser supply chains remained safe; and took a regulatory role in ensuring businesses and organisations reduced workplace Covid-19 transmission.<sup>90</sup>

Throughout this time, members of the public and employers were able to submit concerns directly to the HSE. It received thousands of health and safety concerns from workers across the UK surrounding social distancing and other Covid-19 risks.<sup>91</sup> In response the HSE and its field inspectors carried out investigations into these reports but only issued verbal advice in five hundred and twelve cases, written advice in sixty-nine cases and it only enforced prohibition notice on one employer because of Covid-19.<sup>92</sup> There have been no prosecutions under the Health and Safety at Work Act 1974 for failure to provide PPE or to comply with social distancing guidelines.<sup>93</sup>

It is perhaps unsurprising that the UK employment tribunals reported a three-fold increase in claims citing health and safety concerns, with 637 claims relating to health and safety being lodged in the employment tribunals between March 2020 and March 2021.<sup>94</sup> HSE does not currently report on

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<sup>86</sup> HSE, 'HSE's Work' <<https://www.hse.gov.uk/aboutus/hseswork.htm>>accessed 27-March-2022.

<sup>87</sup> HSE, 'When and how we investigate' <<https://www.hse.gov.uk/enforce/when-how-investigate.htm>>accessed 27-March-2022.

<sup>88</sup> HSE, 'Enforcement Action' <<https://www.hse.gov.uk/enforce/enforcement.htm>>accessed 27-March-2022.

<sup>89</sup> HSE, 'Review of enforcement during the coronavirus (COVID-19) pandemic' (28-February-2022) <<https://www.hse.gov.uk/coronavirus/regulating-health-and-safety/enforcement-coronavirus.htm>>accessed 27-March-2022.

<sup>90</sup> *ibid.*

<sup>91</sup> House of Commons Work and Pensions Committee, 'DWP's response to the coronavirus outbreak' (2020), HC 178, 70.

<sup>92</sup> *ibid.*

<sup>93</sup> Ewing, Lord Henry QC, (n78) 525.

<sup>94</sup> Ashleigh Webber, 'Tribunal claims citing health and safety concerns up three-fold' (19-January-2022) <<https://www.personneltoday.com/hr/tribunal-claims-citing-health-and-safety-concerns-up-three-fold/>>accessed 27-March-2022.

workplaces which decided to close voluntarily, without the need for specific enforcement action, following failings identified, therefore the data in this area remains fragmented and the full impact of the HSE during the pandemic is unclear.<sup>95</sup>

The Prime Minister tasked the HSE with the carrying out of spot checks on workplaces to ensure these were 'Covid safe', however, there is no real clarity around how the HSE will select workplaces to check or how many checks it will carry out, and how it will work with local authorities on these checks.<sup>96</sup>

It should be noted that the HSE has seen a 9.4% fall in taxpayer funding since 2015–16, and even prior to the pandemic it was finding it difficult to carry out its work.<sup>97</sup> Considering it is responsible for 900,000 premises and has just over 1000 inspectors it is perhaps unsurprising it only carried out 727 workplace inspections between March and May 2020.<sup>98</sup>

### ***Local Authorities***

The work of the HSE is complemented by the work of local authorities. Depending on the activities carried out on a premises enforcement authority for health and safety legislation may sit with one of 380 local authorities.<sup>99</sup> Local authorities are mainly responsible for retail, wholesale/distribution, warehousing, catering, and leisure premises, as well as offices.<sup>100</sup> The HSE takes responsibilities for factories, building sites, farms, schools, mines, hospitals and nursing homes, utilities premises, central and local government premises.<sup>101</sup> Local authorities, just like the HSE, provide organisations with advice and guidance, have the power to inspect premises and the ability to use enforcement powers to address occupational health and safety issues.<sup>102</sup>

### ***The Advisory, Conciliation and Arbitration Service (ACAS)***

ACAS is an independent public body funded by the government and aims to improve workplace relationships between employers and employees. It provides impartial free advice to UK employers, employees and their representatives regarding employment rights, workplace policies and best practice and workplace conflict resolution.<sup>103</sup> It offers individual and collective conciliation services, arbitration and paid for mediation services and training. It also supports the work of the employment tribunal through a panel of independent experts.<sup>104</sup>

ACAS introduced the Acas Code of Practice on disciplinary and grievance procedures, which sets out the minimum standards employers should follow when dealing with conduct matters and disputes in the workplace. Whilst it is not a legal requirement to comply with the code, employment tribunals in the UK will take into account employers' conformity with the code and may award employees with increased compensation if this was not followed.<sup>105</sup>

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<sup>95</sup> House of Commons Work and Pensions Committee, (n91)71.

<sup>96</sup> *ibid*, 73.

<sup>97</sup> *ibid*, 75.

<sup>98</sup> Ewing, Lord Henry QC, (n78)526.

<sup>99</sup> HSE, 'Local Authority Enforcement' <<https://www.hse.gov.uk/lau/enforcement.htm>>accessed 09-04-2022.

<sup>100</sup> *ibid*.

<sup>101</sup> HSE, 'Is HSE the correct enforcing authority for you?' <<https://www.hse.gov.uk/contact/authority.htm>> accessed 09-04-2022.

<sup>102</sup> HSE, (n86).

<sup>103</sup> ACAS, 'What we do' <<https://www.acas.org.uk/about-us/what-we-do>>accessed 27-March-2022.

<sup>104</sup> *ibid*.

<sup>105</sup> ACAS, 'Acas Code of Practice on disciplinary and grievance procedures' <<https://www.acas.org.uk/acas-code-of-practice-on-disciplinary-and-grievance-procedures>>accessed 27-March-2022.

During the pandemic ACAS reaffirmed the application of the code of practice, however it has issued guidance to employers on how to manage disciplinary and grievance matters throughout this period taking into consideration the impact of the pandemic on workplaces, especially the move to remote working.<sup>106</sup>

Disputes regarding the interpretation of health and safety regulations should initially be addressed through internal dispute resolution processes within an organisation. This could be managed through an informal process or through a formal grievance procedure. Once the grievance procedure is exhausted employees and employers may wish to involve ACAS to help resolve the dispute. Should health and safety representatives (under the 1979 Regulations) or employee representatives (under the 1996 Regulations) wish to raise disputes concerning failure to provide time off for training or to carry out their role, they can do so under internal grievance procedures or directly with the Employment Tribunal. Before lodging a complaint with the Employment Tribunal employees will need to engage in Early Conciliation facilitated by ACAS. ACAS will attempt to resolve the dispute, provided the parties are happy to engage in the Early Conciliation process. Should the parties be unwilling to engage in the process or ACAS be unable to solve the dispute, it will issue an Early Conciliation certificate to the employee to enable them to lodge their claim with the employment tribunal. HSE does not provide dispute resolution in these cases.<sup>107</sup>

Serious health and safety failures or concerns could also be raised under whistleblowing procedure internally (where these exist) or directly with the HSE or other local authorities for investigation.

### ***The Institution of Occupational Safety and Health (IOSH)***

IOSH is an independent Chartered body for health and safety professionals, leading the transformation to make the world of work healthier and safer.<sup>108</sup> Apart from championing for occupational health and safety excellence, it also advises governments and policymakers, provides safety awareness training across the world and guidance to its members, carries out research, and sets international safety standards.

During the pandemic IOSH also took a central role in influencing government and policy and in providing advice to health and safety professionals across the globe. It joined forces with the World Health Organisation to support businesses and workers to manage Covid-19 risks in the workplace. As part of this partnership, it created free online learning surrounding issues such as Covid-19 transmission prevention, managing risks of returning to work, and remote working.<sup>109</sup>

Professional members of IOSH are expected to abide by its code of conduct, and under the code, complaints regarding the misconduct of members can be raised with the body. These complaints would be investigated by the Complaints Review Committee which can refer cases onto the IOSH's Disciplinary Committee,<sup>110</sup> which has the powers to suspend a health and safety professional's membership or expel them from IOSH completely.<sup>111</sup> Health and safety managers in the workplace are likely going to be members of IOSH, therefore complaints related directly to these individual's failings in providing a safe working environment could be raised with IOSH by the employees or the employer.

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<sup>106</sup> ACAS, 'Disciplinary and grievance procedures during coronavirus (COVID-19)' (23-February-2022) <<https://www.acas.org.uk/disciplinary-grievance-procedures-during-coronavirus>>accessed 27-March-2022.

<sup>107</sup> HSE, (n86)5.

<sup>108</sup> IOSH, 'Who we are' <<https://iosh.com/about-iosh/who-we-are/>>accessed 27-March-2022.

<sup>109</sup> Marcus Boocock, 'IOSH and WHO join forces to support businesses and workers manage Covid risks' (26-February-2021) <<https://iosh.com/news/iosh-who-new-course/>>accessed 27-March-2022.

<sup>110</sup> IOSH, 'Code of Conduct, Guidance and Disciplinary Procedure' 10-13.

<sup>111</sup> *ibid*, 13.



**5. Sanctions and responsibilities for the violation of the safety obligation (rights of employees who have been injured due to violation of safety obligations; right to refuse unsafe work; reasonable accommodations for workers whose disability has been caused by the violation of the safety obligation).**

A violation of the safety obligation under the OHS framework consists of the failure to protect workers and others from getting hurt or ill through work. It is important to note that for there to be a violation of the safety obligation under the OHS framework, no actual harm has to have occurred, the existence of a risk of harm is sufficient.<sup>112</sup>

If a safety obligation violation in the workplace occurs, both civil and criminal law can be applied.

*Rights of employees*

As established by the Employment Rights Act 1996, an employee who is affected by violations of safety obligations in the workplace, regardless of length of service, has the right:

- not to be subjected to a detriment (eg denied promotion, being assigned harder or more mundane work, withholding a reference, or rejected training opportunities)<sup>113</sup>, and
- not to be dismissed<sup>114</sup>

For:

- carrying out activities in connection with preventing or reducing risks to health and safety at work<sup>115</sup>;
- performing functions as a representative of workers on matters of health and safety or a member of a safety committee<sup>116</sup>
- bringing to the employer's attention circumstances connected with their work which they believe are harmful or potentially harmful to health and safety<sup>117</sup>
- withdrawing from and refusing to return to a workplace that is unsafe until the safety obligation is rectified<sup>118</sup>;
- taking actions to protect themselves or others from danger<sup>119</sup>.

Although originally only available to labourers with employee status, the Employment Rights Act 1996 (Protection from Detriment in Health and Safety Cases) (Amendment) Order 2021<sup>120</sup>, which came into force in 31 May 2021, extended the protections under section 44 to workers as well. However, workers do not benefit from section 100 as only labourers with an employee status enjoy dismissal rights.

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<sup>112</sup> HSE, *Health and safety at work: criminal and civil law* (2022), <<https://www.hse.gov.uk/simple-health-safety/law/health-safety-law.htm>> accessed 10 March 2022

<sup>113</sup> [Employment Rights Act 1996 c 18, s 44](#)

<sup>114</sup> ERA 1996, s 100

<sup>115</sup> ERA 1996, s 44 (a) and s 100 (a)

<sup>116</sup> ERA 1996, s 44 (b) and s 100 (b)

<sup>117</sup> ERA 1996, s 44 (c) and s 100 (c)

<sup>118</sup> ERA 1996, s 44 (d) and s 100 (d)

<sup>119</sup> ERA 1996, s 44 (e) and s 100 (e)

<sup>120</sup> Employment Rights Act 1996 (Protection from Detriment in Health and Safety Cases) (Amendment) Order 2021

If an employee is forced to leave their job because of violations of safety obligations, they can bring forward a claim for 'constructive dismissal' (this means that they resign because of serious breach of contract by the employer; so the resignation is provoked by the employer and is considered in law as a dismissal) and are entitled to compensation of a basic statutory award based on the length of continuous service and compensatory award in response to the losses sustained.<sup>121</sup> For health and safety cases, there is no cap on the amount of compensation.

Employees do not have to wait until they or someone else suffer injury before they can take action when faced with unsuitably safe working conditions. Instead, the Employment Rights Act 1996, Section 44.1(d) and Section 44.1(e) allow them to take action:

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.<sup>122</sup>

However, recent case law decisions concerning the potential danger posed by COVID-19 demonstrate that the determination of what reasonable circumstances of danger currently depends on an evaluation of the particular facts of that case, without objective criteria guiding that decision making process. In *Rodgers v Leeds Laser Cutting Ltd*<sup>123</sup>, the Employment Tribunal dismissed Mr. Rodgers claim for unfair dismissal. Although accepting Mr. Rodgers significant concerns about COVID-19, the tribunal found that the virus did not create circumstances of serious or imminent danger that warranted statutory protection. Similarly, in *Kubilius v Kent Foods Ltd*<sup>124</sup>, the Employment Tribunal held that the dismissal of the claimant was fair for refusing to wear a facemask, although they were not required by local law at that time.

If an employee is aware of a safety obligation violation, they can report it. An informal and formal reporting mechanism exists for them to choose from. If they choose to do so informally, they can inform their supervisor, their employer, or their union or employee representative with the goal of resolving the issue internally. If they choose the formal reporting pathway, they can submit a report to the HSE (see Responsibilities of HSE in case of safety violations on actions taken by the HSE upon receipt of a report).

If an employee is injured as a result of a violation of the safety obligations in their workplace, they can make a claim for compensation under civil law., either as a claim for breach of statutory duty or negligence. In order to make a claim for a tortious breach of statutory duty, the harm suffered by the claimant must be the kind the legislation was intended to prevent.<sup>125</sup> *Robb v Salamis (M and I) Ltd*<sup>126</sup>

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<sup>121</sup> Landau Law Solicitors, *What compensation would you receive in a Constructive Dismissal claim* (2022) <<https://landaulaw.co.uk/faqs/what-compensation-would-you-receive-in-a-constructive-dismissal-claim/>> accessed 10 March 2022

<sup>122</sup> ERA 1996, Section 44.1(d) and Section 44.1(e)

<sup>123</sup> [2021] UKET 1803829/2020

<sup>124</sup> [2021] UKET 3201960/2020

<sup>125</sup> Lexis PSL, *What is a tort?* (2022), <<https://www.lexisnexis-com.ezproxy4.lib.le.ac.uk/uk/lexispsl/disputeresolution/document/393750/5B2W-M2S1-F18B-82D9-00000-00/What-is-a-tort%3F>>, accessed 8 April 2022

<sup>126</sup> [2006] UKHL 56

provides an example of such a claim for breach of statutory duty, when the House of Lords decided that article 3(1) of the Work Equipment Directive<sup>127</sup> establishes a duty to anticipate accidents, which was breached by the employer when allow the usage of a ladder that was not secured properly. For the person affected to succeed in a claim for negligence, they must prove that:

- 1) The responsible party owed them a duty of care<sup>128</sup>,
- 2) This duty was breached; and
- 3) The person affected was harmed as a result of the breach

To demonstrate that they are owed a duty of care, the affected persons need to satisfy the requirements established in *Caparoo Industries PLC v Dickman* (1990)<sup>129</sup> which are that there was a foreseeability of the damage, that there was a sufficiently proximate relationship between the parties, and that it is fair, just and reasonable to impose such a duty. Upon establishment of such a duty of care, the affected persons then have to demonstrate that there was a breach thereof and that this breach caused injury to them.<sup>130</sup>

COVID-19 has posed potential challenges for employers to meet their statutory obligations and duty of care, requiring them to respond quickly to rapidly changing risk environments, while ensuring business continuity at the same time. The Personal Protective Equipment (Enforcement) Regulations, the Control of Substances Hazardous to Health Regulations (COSHH), the Construction Design and Management Regulations, the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations (RIDDOR) are some of the key regulations guiding employers in that process. While COVID-19 entails the possibility for an increase in compensation claims, the establishment of breach of duty with appropriate control measures in place and properly enforced, will prove difficult for claimants within the current case law context.

Nevertheless, if the claim for personal injury is successful, the affected persons will be awarded damages. These can fall into two categories:

- 1) General damages, which are actual and/or probable loss of future earnings, to be incurred after the case; and
- 2) Special Damages, which refer to quantifiable losses incurred before the case, mainly loss of earnings and medical expenses.

To claim compensation for personal injury, the affected party needs to start proceedings under civil law within 3 years from the date of the negligence that caused the harm, in line with the Limitations Act 1980. While UK courts have discretionary powers to alter the time limits for such claims, such discretion is rarely exercised.<sup>131</sup>

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<sup>127</sup> 89/655/EEC

<sup>128</sup> *Wilson's and Clyde Coal Co v English* established the duty of care of an employer to their employees, when the employer was held liable for the accident, despite having put in charge a colliery agent for safety in the mine. *Wilson's & Clyde Coal Ltd v English* [1938] AC 57

<sup>129</sup> [1990] a AC 605

<sup>130</sup> H.S.E. Education & Certification, *UK Health and Safety Law* (2022) <<https://echo-3.co.uk/what-are-the-laws-around-health-and-safety/>> accessed 10 March 2022

<sup>131</sup> *Ibid*

### *Responsibilities of HSE in case of safety violations*

Health and safety law in the UK is enforced by the HSE and local authorities, depending on the main activity carried out at a particular premise. In general, local authorities are the main enforcing authority for retail, wholesale distribution and warehousing, hotel and catering premises, offices, and the consumer/leisure industries, as well as any enforcement relating to pesticides under the Food and Environment Protection Act 1985, while the HSE is responsible for all other areas<sup>132</sup>. When becoming aware of a violation of a safety obligation, the HSE and local authorities are required to take prompt action. Upon investigation of the case reported, the HSE can choose from a variety of the enforcement decisions depending on the circumstances of the case, which include: issuing (a) cautions, (b) withdrawing approvals, (c) serving prohibition and improvement notes, and (d) criminal prosecution.<sup>133</sup>

- (a) The issuance of cautions forms an important method for the HSE to address low-level issues. The aim of cautions is to deliver swift, simple and effective justice that carries a deterrent effect and reduces the likelihood of re-offending. They are only appropriate for low-level issues, for which a HSE case is not warranted.<sup>134</sup> The issuance of a simple caution to a nail bar for re-using single use needles for semi-permanent make-up procedures, without suitable and sufficient sterilization procedures is an example thereof.<sup>135</sup>
- (b) If significant safety concerns are identified for specific workplace element, the HSE can also choose to withdraw previous approvals.
- (c) Another important enforcement method for the HSE is the serving of improvement and prohibition notices. Improvement notices lay out the safety obligation violation and the required remedy. Prohibition notices provide directions on activities not to be carried out because of their violation of safety obligation.<sup>136</sup> However, the actual effectiveness of this enforcement method during COVID-19 has been heavily criticized, as illustrated by the findings of the Work and Pension Committee no prosecutions or prohibition notices under the HSWA were served for failure to provide PPE or to comply with social distancing to protect against infection.<sup>137</sup>
- (d) When choosing prosecution under criminal law, the HSE or a local authority must prove a breach of duty by the employer to ensure the health and safety. The maximum penalty for failure by an employer to comply with its health and safety obligations on summary conviction is six months imprisonment or an unlimited fine or both. On indictment, the maximum penalty is two years imprisonment or an unlimited fine or both.<sup>138</sup>

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<sup>132</sup> Health and Safety Executive, *Enforcement allocation* (2022) <<https://www.hse.gov.uk/lau/enforcement-allocation.htm>> accessed 8 April 2022

<sup>133</sup> Lexis PSL, *What happens after an incident on site?* (2022), <<https://www.lexisnexis-com.ezproxy4.lib.le.ac.uk/uk/lexispsl/corporatecrime/document/391375/59XM-N2B1-F186-J045-00000-00/What-happens-after-an-incident-on-site%3F>>, accessed 10 March 2022

<sup>134</sup> HSE, *Simple Cautions: HSE guidance* (2022), <<https://www.hse.gov.uk/foi/internalops/og/og-00018.htm>> accessed 10 March 2022

<sup>135</sup> Preston City Council, *Health and safety enforcement actions* (2022) <<https://www.preston.gov.uk/article/1561/Health-and-safety-enforcement-actions>> accessed 8 April 2022

<sup>136</sup> HSE, *Types of notice* (2022), <<https://www.hse.gov.uk/enforce/enforcementguide/notices/notices-types.htm>> accessed 10 March 2022

<sup>137</sup> K Ewing, and Lord Hendy, 'Covid-19 and the failure of labour law: Part 1' (2020) 49 (4) ILJ 497

<sup>138</sup> Lexis PSL, *Failure to carry out health and safety duties under HSWA 1974 – offences* (2022), <<https://www.lexisnexis-com.ezproxy4.lib.le.ac.uk/uk/lexispsl/employment/document/391423/55MD-0YK1-F188-3340->

UK case law has developed sentencing principles for health and safety over many years.<sup>139</sup> The principles from key sentencing cases underpin the offence specific sentencing guidelines for health and safety offences issued by the Sentencing Council.<sup>140</sup> An example thereof is the case of *R v Andrew Gibson*, where the manager of a kitchen manufacturing company was sentenced to 26 weeks in prison, suspended for 18 months, was ordered to carry out 200 hours of unpaid work to pay £17,000 in compensation to the injured employee, for not ensuring the safety of the work equipment, which led to a sawing accident of the employee. The court applied the sentencing options outlined by the Sentencing Guidelines.<sup>141</sup>

### *Responsibilities of employers in case of safety violations*

If violations of safety obligations resulted in fatal accidents, major injuries or conditions which require a medical treatment and dangerous occurrences, the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013 (RIDDOR) require employers to report them to the HSE or the local council immediately, by submitting the appropriate online form or calling the Incident Contact Center. The HSE is responsible for violations related to factories, farms, building sites, mines, schools and colleges, fairgrounds, gas, electricity and water systems, hospitals and nursing homes, central and local government premises, and offshore installations. The local council is responsible for violations related to offices that are not government offices, shops, hotels, restaurants, leisure premises, nurseries and playgroups, pubs and clubs, privately owned museums, places of worship, and sheltered accommodations and care homes.<sup>142</sup> Other injuries or work-related diseases, including accidents that prevent workers from doing their normal work for more than 7 days, poisoning, lung diseases, infections and other health conditions linked to specific types of work, as well as certain gas incidents should be reported quickly, by telephone preferably, followed by a written report within 10 days. Within the specific context of COVID-19, the reporting requirements for cases of harm resulting from coronavirus only apply when an individual has been deliberately working with the virus, such as in a laboratory, or been incidentally exposed to the virus, by working in an environment where people are known to have COVID-19, such as in the social care sector. If one of those conditions are met, a report should be made for:

- an accident or incident at work that has, or could have, led to the release or escape of coronavirus (SARS-CoV-2), which is to be reported as a dangerous occurrence

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[0000-00/Failure-to-carry-out-health-and-safety-duties-under-HSWA-1974%E2%80%94offences](#)> accessed 10 March 2022

<sup>139</sup> *Allison v London Underground LTD* [2008]; *Burgess v Plymouth CC, CA (CIV DIV)*; *EH Humphries (Norton) LTD Thistle Hotels PLC v Fire Alarm Fabrication Services LTD* [2006] EWCA CIV 1496; *Hiles v South Gloucestershire NHS Primary Care Trust, High CT* [2006]; *Lewis v Avidan Ltd* [2005 EXCA CIV 670]; *Pennigton v Surrey County Council & Surrey Fire and Rescue Service* [2006] EWCA CIV 1493; *R v H, CA* [2006]; *Smith v Northhamptonshire County Council* [2008] EWCA CIV 181; *Sutradhar v Natural Environment Research Council* [2006] UKHL 33.

<sup>140</sup> Sentencing Council, *Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences: Definitive Guidelines* (2015), <<https://www.sentencingcouncil.org.uk/wp-content/uploads/Health-and-Safety-Corporate-Manslaughter-Food-Safety-and-Hygiene-definitive-guideline-Web.pdf>> accessed 10 March 2022

<sup>141</sup> Kennedys Law, *Trends in the sentencing of individuals for health and safety breaches* (2019) <<https://kennedyslaw.com/thought-leadership/article/trends-in-the-sentencing-of-individuals-for-health-and-safety-breaches/>>, accessed 8 April 2022

<sup>142</sup> Health and Safety Executive, *Is HSE the correct enforcing authority for you?* (2022), <https://www.hse.gov.uk/contact/authority.htm>> accessed 8 April 2022

- the diagnosis of a worker with COVID-19 attributed to an occupational exposure to coronavirus., which is to be reported as a case of disease

the death of a worker as a result of occupational exposure to coronavirus, which is to be reported as a work-related death due to exposure to a biological agent.<sup>143</sup> Employers are legally obliged to provide first-aiders and inform all employees of the arrangements for getting first aid. Treatment of injured workers must be addressed without delay by an appointed first-aid.

An employer must record all workplace injuries, diseases, dangerous occurrences, or certain near accidents in an accident book. Employees must also report any accidents or illnesses caused by work and record the details in the accident book.<sup>144</sup>

The Employers' Liability Act 1969 requires employers to have insurance that covers compensation payments they might have to pay to employees who have been injured or made ill as a result of work. Exceptions to this requirement are businesses with no employees, family businesses and public organisations such as a local authority or NHS Trust.

Employers have a legal duty, under the Equality Act 2010, Section 6<sup>145</sup>, to make reasonable accommodations for workers whose disability has been caused by the violation of the safety obligation. These accommodations can include the changing of the way employment is structured, the removal or physical barriers to working and/or providing extra support so disabled workers are not disadvantaged.<sup>146</sup> Furthermore, the Industrial Injuries Disablement Benefit Scheme provides a weekly benefit to people who become disabled because of an accident at work or due to certain prescribed diseases<sup>147</sup> caused by their job, or whilst working on an approved employment training scheme course.<sup>148</sup>

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<sup>143</sup> Health and Safety Executive, *RIDDOR reporting of COVID-19* (2022)

<<https://www.hse.gov.uk/riddor/coronavirus/index.htm>> accessed 8 April 2022

<sup>144</sup> CIPD, *Health and safety at work* (28 June 2021), <<https://www.cipd.co.uk/knowledge/fundamentals/emp-law/health-safety/factsheet#6243>> accessed 10 March 2022

<sup>145</sup> 2010 c. 15

<sup>146</sup> Health and Safety Executive, *Employers' duties in protecting disabled workers* (2022)

<<https://www.hse.gov.uk/disability/legislation.htm>> accessed 8 April 2022

<sup>147</sup> See [Appendix 1: List of diseases covered by Industrial Injuries Disablement Benefit](#) for a list of the covered diseases.

<sup>148</sup> Gov.uk, *Industrial Injuries Disablement Benefits: technical guidance* (2022)

<<https://www.gov.uk/government/publications/industrial-injuries-disablement-benefits-technical-guidance/industrial-injuries-disablement-benefits-technical-guidance#:~:text=Industrial%20Injuries%20Disablement%20Benefit%20is,employment%20training%20scheme%20or%20course>> accessed 8 April 2022