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‘The Last Rights?’

Accessing Rights to Information and Consultation in the Time of Covid-19

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Abstract

Historically, the statutory frameworks governing an employee's entitlement to Information and Consultation rights were virtually unknown outside of legal and academic circles. More recently however, the grave public health emergencies and economic turmoil precipitated by the Covid-19 pandemic have brought these regimes into significantly sharper focus; infusing them with a renewed sense of purpose. Against that backdrop, this article examines how these important labour protections have fought to retain this new-found expression against the tide of an increasingly deregulatory politico-economic landscape. It firstly explores I&C obligations in the context of Health and Safety, chartering how a deliberate governmental and regulatory prioritisation of national-level economic subsistence effectively combined with the pre-existing tensions in both the individual and collective enforcement frameworks to stifle any attempts by unions to deploy these safeguards in practice. A detailed examination of the government's initiatives under TULR(C)A 92's Collective Dismissal framework reveals a similar trend, with both the Coronavirus Job Retention (Furlough) Scheme, and the new statutory Code of Practice on fire-and-rehire each proving distinctly underwhelming in their protection of I&C rights. The article thus concludes that, notwithstanding some notional advancements of these rights in theory, their practical application too often remains tantalisingly out of reach.

Introduction

Health; safety; and economic turmoil. Perhaps more than any other, these simple yet instantly recognisable conceptual expressions of global fragility will forever be synonymous with our contemporary struggle against the ravages of the Covid-19 pandemic. So indelibly seared onto our collective consciousness have these Cov-idioms become, it is now difficult to imagine an area of our societal experience that has not been disturbed by their ubiquitous presence. Nowhere has the influence of these pandemical hallmarks been more keenly felt however, than in their practical application to a series of much-neglected domestic labour rights pertaining to Information and Consultation ("I&C"), which, in the face of an increasingly deregulatory politico-economic environment,[1] have unwittingly found themselves at the avant-garde of the scholastic debate on the enhancement and protection of workers' rights.

Ostensibly occupying a somewhat lower rung on the hierarchical ladder of collective labour entitlements than their domestically favoured bargaining counterparts,[2] I&C rights have always been somewhat anathematic to the UK's system of labour relations.[3] Predominantly deriving their authority from EU-based sources,[4] they arise domestically in four circumstances: collective dismissals, transfer of undertakings, health and safety ("H&S") matters, and certain training regimes.[5] Now, as our society cautiously emerges from the grip of the worst public health emergency in over a century,[6] this article seeks to examine the challenges faced by the two most prominent of these obligations (H&S & collective dismissal consultations) in meeting with their intended regulatory objectives throughout the pandemic, concluding that, thanks largely to a concerted governmental effort to prioritise national and sectoral level economic stability over individual H&S and job security, these rights have consistently failed to translate into genuinely viable labour protections.

1 Phil James, *HSE and Covid at Work: a case of regulatory failure* (Institute of Employment Rights 2021) 36.
2 Sherry Arnstein, 'A Ladder of Citizen Participation' (1969) July JAIP 216, 217 – 219.
3 Hugh Collins, Keith Ewing, and Aileen McColgan, *Labour Law* (2nd edn, CUP 2019) 635.
4 Owen Warnock, 'Health and Safety Representatives', *Harvey on Industrial Relations and Employment Law* (Issue 295, March 2022) 3507. See also: Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L183/29.6.
5 Zoe Adams, Catherine Barnard, Simon Deakin, and Fraser Butlin, *Deakin & Morris' Labour Law* (7th edn, Hart Publishing 2021) 848.
6 All About History, 'Spanish flu: The deadliest pandemic in history' (*Live Science*, 12 March 2020) <https://www.livescience.com/spanish-flu.html> accessed 29 March 2022.

The H&S Regulations

Boldly described by Ewing and Hendy as a system in decay,[7] the statutory regulations governing collective H&S consultation requirements for both unionised[8] and non-unionised[9] workplaces has always represented a particularly inharmonious transposition of EU normative values into our domestic jurisprudential framework.[10] In essence, these regimes seek to magnify conceptual notions of worker voice by providing a statutory mechanism for the appointment / election of designated workplace H&S representatives,[11] with whom an employer is then obliged to engage on any proposals effecting the H&S of its workforce.[12]

Unhelpfully however, for reasons over which much ink has historically been spilt,[13] a different (and more preferential) set of regulations applies to workplaces where trade unions are formally recognised,[14] than to those where no recognition agreement exists.[15] Whereas the former grants trade union appointed representatives a fairly generous range of investigative, inspectional and consultative powers,[16] the latter provides only for the election of employee representatives[17] whose remit is far more tightly circumscribed,[18] and whose role is only necessitated where an employer has chosen not to consult with the effected individuals directly.[19] When set against the well-documented complications associated with obtaining recognition under the Schedule A1 procedure,[20] these structural imbalances become ever-more pronounced.

Furthermore, despite the Framework Directive upon which these entitlements are based[21] specifically extending protection to limb (b) workers ("workers"),[22] both sets of regulations relate

7 Keith Ewing and Lord John Hendy, 'Covid-19 and the Failure of Labour Law: Part 1' (2020) 49 (4) ILJ 497, 531.
8 Safety Representatives and Safety Committee Regulations 1977.
9 Health and Safety (Consultation with Employees) Regulations 1996.
10 Warnock, 'Health and Safety Representatives' (n 4) 3509. See also: Case C-382/92 *Commission v United Kingdom* [1994] ECR I-2435; and Case C-382/93 *Commission v United Kingdom* [1994] ECR I-02479.
11 SRSCR 1977 (n 8), r 3(1); and HSCER 1996 (n 9), r 4(1)(b).
12 ibid r 4(1), r 3; and Health and Safety at Work Act 1974, s 2(6). Although see: HSCER 1996 (n 9), r 4(1)(a).
13 See: Mark Hall and Paul Edwards, 'Reforming the Statutory Redundancy Consultation Procedure' (1999) 28 (4) ILJ 299, 300 – 303.
14 SRSCR 1977 (n 8).
15 HSCER 1996 (n 9).
16 SRSCR 1977 (n 8), r 4(1).
17 See: Health and Safety Executive, 'A fair and open election' (*HSE*) <https://www.hse.gov.uk/involvement/elections/fairandopen.htm> accessed 30 March 2022.
18 HSCER 1996 (n 9), r 6.
19 Peter Andersson and Tonia Novitz, 'Risk Assessment and COVID-19: Systems at work (or not) in England and Sweden' (2021) 4 2021 CLSSLR 66 (forthcoming), 19.
20 See: Trade Union and Labour Relations (Consolidation) Act 1992, Schedule A1; and Alan Bogg, 'The Death of Statutory Recognition in the United Kingdom' (2012) 54 (3) JIR 409.
21 Directive 89/391/EEC (n 4).
22 Employment Rights Act 1996, s 230(3)(b).

solely to employees.[23] Thus, although workers may benefit indirectly from the H&S activities of employee representatives, these parasitical safeguards are predicated on the erroneous assumption that workers are universally engaged in unionised workplaces, and/or alongside employees; an assumption that renders many workers (particularly those in the gig economy) unable to enjoy their protection. Whilst workers are afforded other, less valuable informational entitlements and H&S securities,[24] these too remain a pale imitation of the rights bestowed upon employees. Somewhat inevitably then, these deep-rooted paradoxical inequities consistently translate into demonstrably poorer H&S outcomes for both non-unionised and worker-dominated organisations;[25] a pressure which, as the following analysis of its approach to the practical application of these rights during the Coronavirus pandemic demonstrates, the government has done little to alleviate.

A Political Pandemic Polemic

Even from the very earliest stages of the Covid-19 pandemic, it was already tolerably clear in which direction the political winds of change were blowing for I&C rights. Indeed, one need only examine the various guidance notes produced by the Department for Business, Energy and Industrial Strategy ("BEIS") on making workplaces 'covid secure' to understand the ideological premium that the (now defunct) Johnson executive placed on ensuring that our economy continued to function effectively for the duration of the viral insurgency.[26] Whilst itself unremarkable in a time of great economic precarity, the notable omission of any detailed consideration of an employer's I&C obligations in the implementation of such measures is of significantly greater moment.[27]

Aside from the most glancing of references, these responsibilities are similarly absent from the widely-panned Covid-19 publications of the Health and Safety Executive (HSE),[28] whose conspicuous inaction and overtly pro-business approach throughout the pandemic has attracted sharp criticism.[29] Indeed, in its 22-page pamphlet misleadingly entitled: '*Talking with your workers*

23 ibid, s 230(1), SRSCR 1977 (n 8), r 2(1), HSCER 1996 (n 9), r 2(1); and HSWA 1974 (n 12), s 53(1). See also: Aude Cefaliello, 'Beyond status: the long road towards effective health and safety rights for on-demand workers' (*UK Labour Law Blog*, 16 June 2021) <https://uklabourlawblog.com/2021/06/16/beyond-status-the-long-road-towards-effective-health-and-safety-rights-for-on-demand-workers-by-aude-cefaliello/> accessed 2 April 2022.

24 See: HSWA 1974 (n 12), ss 2 & 3; and Management of Health and Safety at Work Regulations 1999, r 8(1)(a).

25 Andrea Oates, 'Health and Safety at Work', *Tolley's Employment Law Service* (Issue 160, April 2022) H2114; and David Walters, Theo Nichols, Judith Connor, Ali C. Tasiran, and Surhan Cam, 'The role and effectiveness of safety representatives in influencing workplace health and safety' (HSE 2005) 20.

26 UK Health Security Agency, 'Coronavirus (COVID-19): guidance' (*HM Government,* 3 March 2020) <https://www.gov.uk/government/collections/coronavirus-covid-19-list-of-guidance> accessed 2 April 2022.

27 James, *HSE and Covid at Work* (n 1) 2.

28 Health and Safety Executive, 'Talking with your workers about coronavirus' (*HSE*) <https://www.hse.gov.uk/news/assets/docs/talking-with-your-workers.pdf> accessed 2 April 2022; and Health and Safety Executive, 'Coronavirus (Covid-19) – Advice for workplaces' (*HSE,* March 31 2022) <https://www.hse.gov.uk/coronavirus/index.htm> accessed 2 April 2022.

29 See: Ewing & Hendy, 'Failure of Labour Law' (n 7), 19 – 21; and Andersson and Novitz, 'Risk Assessment and COVID-19' (n 19), 12 – 14.

about preventing coronavirus' the duty is mentioned just once,[30] and only then in a hastily drafted revision following publication of the IER's stinging rebuke of its sluggish response to the initial viral outbreak.[31] It's opaque proclamation that H&S risk assessments should be made in conjunction with employees; not on account of any legal obligation, but merely because '*they will usually have good ideas*'[32] is similarly uninspired. When combined with other equally generic, outdated guidance documents,[33] and a tokenistic injection of capital from government in May 2020 (following a decadelong campaign of economic castration),[34] these tepid interventions have understandably done little to quell the voices of dissent amongst many labour law commentators.[35]

Moreover, when contrasted against the repeated and unambiguous references to I&C rights simultaneously emanating from the analogous guidance notes of several leading trade unions during this period,[36] it becomes almost impossible to regard these glaring omissions as anything other than deliberate policy decisions of a government, at best, recklessly indifferent to the rights of its citizens, and at worst, opportunistically downplaying mediums of democratic workplace voice architecture in furtherance of its own ideological proclivities. Accordingly, when viewed through the prism of an already flawed legislative framework, and the virtually non-existent capacity and/or appetite of the HSE to provide any meaningful degree of regulatory oversight, this deliberate obfuscation of I&C rights and prioritisation of economic stability has unsurprisingly resulted in *workers* engaged in critical service occupations on the frontline of the pandemic experiencing significantly worse Covid-19 morbidity outcomes than almost any other section of our domestic populace.[37]

30 Health and Safety Executive, 'Talking with your workers about preventing coronavirus' (HSE May 2020) 2.

31 Howard Fidderman, 'Government is responsible for HSE's "lamentable" pandemic' (2021) 498 HSB 15.

32 Health and Safety Executive, 'Managing risks and risk assessment at work' (*HSE*) <https://www.hse.gov.uk/simple-health-safety/risk/steps-needed-to-manage-risk.htm> accessed 2 April 2022.

33 See: Health and Safety Executive, 'Consulting employees on health and safety' (HSE 2013) <https://www.hse.gov.uk/pubns/indg232.pdf> accessed 2 April 2022; Health and Safety Executive, 'Ventilation in the workplace' (*HSE*) <https://www.hse.gov.uk/ventilation/overview.htm> accessed 2 April 2022; Health and Safety Executive, 'Using personal protective equipment (PPE) to control risks at work' (*HSE*) <https://www.hse.gov.uk/ppe/overview.htm> accessed 2 April 2022; and Health and Safety Executive, 'Involving your workforce in health and safety' (HSE 2015) <https://www.hse.gov.uk/pubns/priced/hsg263.pdf> accessed 2 April 2022.

34 Health and Safety Executive, *Health and Safety Executive Annual Report and Accounts 2020/21* (HC 2021–204) 14.

35 See: James, *HSE and Covid at Work* (n 1); Ewing & Hendy, 'Failure of Labour Law' (n 7); and Andersson and Novitz, 'Risk Assessment and COVID-19' (n 19).

36 See: TUC, 'COVID-19 – Coronavirus Guidance to Unions' (TUC 2020) 16 – 18; and Unite the Union, 'Coronavirus Work Rights – UK Advice for Coronavirus from Unite' (*Unite,* 14 April 2022) <https://www.unitetheunion.org/campaigns/coronavirus-covid-19-advice/> accessed 2 April 2022. See also: Hazards Campaign, 'What is your employer doing during the current crisis over Covid-19 pandemic to support workers and the community?' (GMHC) 1 – 3.

37 Public Health England, 'Disparities in the risk and outcomes of COVID-19' (OGL 2020) 50 – 53.

IWGB to the Rescue?

No doubt mindful of this rather dispiriting correlative association between governmental socio-economic policy and Covid-19 infection and mortality rates, there have recently been several high-profile attempts aimed at bolstering the I&C entitlements of this vulnerable labour grouping; all to varying degrees of success.[38] For our purposes, the most pertinent of these interventions is the IWGB's successful challenge to the UK's longstanding transposition of the European Union's PPE, and Framework Directives.[39] In recognition of the increasingly vociferous clamour from its (mainly gig) membership base for greater I&C-based protections following the lamentable failures of many employers to implement systems of responsible H&S management throughout the formative stages of the pandemic,[40] the IWGB argued that, by failing to extend certain rights to workers,[41] the UK's implementation of the Directives was incomplete.

Notwithstanding the HSE's untimely intervention in support of the government (once again exposing its status as an impotent vassal of executive convenience), the court agreed with the union's submission,[42] concluding that; alongside employees, workers should also be entitled to adequate supplies of PPE, and to protection against detriment under s.44 of the Employment Rights Act 1996 ("ERA 96").[43] Indeed, the government has since legislated to bring these long overdue proclamations of regulatory equality onto statutory footing,[44] thus demonstrating not only the centrality of unified consultative voice for gig workers,[45] but also its methodological prowess as an effective bulwark against deregulatory executive overreach.

Although these new-found protections are undoubtedly welcome however, significant impediments to their application in practice continue to persist unabated. For example, given the situational and temporal unpredictability of pandemical trends, both workers and employees are likely to encounter significant difficulties in establishing the reasonableness of their belief as to the seriousness and

38 See: *Adiatu v HM Treasury* [2020] EWHC 1554, [2020] IRLR 658.

39 *IWGB v Secretary of State for Work and Pensions* [2020] EWHC 3050, [2021] IRLR 102. See also: Directive 89/391/EEC (n 4), Art 16(1); Council Directive 89/656/EEC of 30 November 1989 on the minimum health and safety requirements for the use by workers of personal protective equipment at the workplace (third individual directive within the meaning of Article 16 (1) of Directive 89/391/EEC) [1989] OJ L393; and Personal Protective Equipment at Work Regulations 1992.

40 ibid [5] – [8].

41 PPE at Work Regulations 1992 (n 39), r 4(1); and ERA 1996 (n 22), s 44.

42 Although note: IGWB v SSWP (n 39) [105] – [113], [141].

43 ibid [114] – [141].

44 See: Employment Rights Act 1996 (Protection from Discrimination in Health and Safety Cases) (Amendment) Order 2021, SI 2021/618; and Personal Protective Equipment at Work (Amendment) Regulations, SI 2022/8.

45 Catherine Hobby, 'Workers' Rights: A Public Health Issue: R (on the application of The Independent Workers' Union of Great Britain) v The Secretary of State for Work and Pensions' (2021) 50 (3) ILJ 467, 482; and Jeremias Prassl, 'Collective Voice in the Gig Economy: Challenges, Opportunities, Solutions' (*UK Labour Law Blog,* 22 October 2018) <https://uklabourlawblog.com/2018/10/22/collective-voicein-the-gig-economy-challenges-opportunities-solutions-jeremias-prassl/> accessed 4 April 2022.

imminency of the threat posed at the precise moment any pre-emptive action crystallises. This subjective enquiry depends upon myriad factors, such as: localised Covid-19 circulation and transmissibility rates; the severity of symptoms associated with differing viral strains; workplace demographic and environmental risk factors; the sufficiency of protective measures adopted; vaccination uptake and continued potency; and any clinical vulnerabilities of the individual concerned. As was graphically illustrated in a recent (and hitherto only) Tribunal and EAT decision on this issue,[46] Covid-19 likely *could* qualify as a sufficiently serious and imminent danger to justify the cessation or avoidance of workplace activities in appropriate circumstances,[47] but only where the individual's protestations are causatively linked to the particular danger(s) posed to the workplace they are seeking to avoid,[48] and – because these rights can only be exercised *in extremis49* – where all other conventional routes have already been exhausted.[50]

Additionally, albeit workers now enjoy security against detrimental treatment under s.44 ERA 96,[51] the analogously framed sister protection against dismissal[52] remains the preserve of employees,[53] for whom, the hazy distinction drawn between the characterisation of these rights as individual employment protections, and the collective nature of industrial action against unsafe working practices remains a source of much consternation.[54] Indeed, whilst the statutory procedure mandated under Part V of The Trade Union and Labour Relation (Consolidation) Act 1992 ("TULR(C)A 92"),[55] may appear temporally inapt to address the immediacy of risk occasioned by this highly transmissible airborne pathogen,[56] employees remain bound by its legislative pronouncements when acting in conjunction with others and/or under an inducement from a representative trade union, lest they risk forfeiting the protectional embrace of s.100 ERA 96.[57] To this end, by continuing to artificially conceptualise these rights as legitimate expressions of individualised choice, their practical utility as apparatus for the empowerment of collective H&S voice is almost entirely nullified.

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46 *Mr D Rogers v Leeds Laser Cutting Limited* [2020] UKET 1803829/2020. Upheld on appeal in *Mr D Rogers v Leeds Laser Cutting Limited* [2022] UKEAT 69.
47 ibid [64].
48 ibid [37], [65].
49 See: *Castano v London General Transport Services* [2019] UKEAT/0150/19, [2020] IRLR 417 [24] – [32].
50 *Rogers v Leeds Laser Cutting* (n 46) [56] – [57].
51 See: ERA 1996 (n 22), s 44(1A).
52 ibid, s 100(1).
53 IGWB v SSWP (n 39) [128].
54 James, *HSE and Covid at Work* (n 1) 15.
55 See: TULR(C)A 1992 (n 20), ss 219 – 244.
56 Stuart Brittenden, 'The Coronavirus: Rights to Leave the Workplace and Strikes' (*UK Labour Law Blog*, 27 March 2020) <https://uklabourlawblog.com/2020/03/27/the-coronavirus-rights-to-leave-the-workplace-and-strikes-by-stuart-brittenden/> accessed 7 April 2022.
57 See: TULR(C)A 1992 (n 20), ss 226(1) and 237(1)(a). See also: *Torquay Hotel Co Ltd v Cousins and Others* [1968], [1969] 1 All ER 522, 537 – 538 (CA); and *Govia Thameslink Railway v ASLEF (No. 2)* [2016] EWHC 1320, [2016] IRLR 686 [60].

Regrettably then, when contextualised into the hostile politico-industrial landscape of a government steadfastly committed to the marginalisation of these important legislative safeguards in favour of national-level economic subsidence, it quickly becomes apparent that these applicational limitations look set to fatally confine the advancement of these embattled labour rights to largely theoretical terms. Truly, as Andersson & Novitz candidly observe, "*these rights are not easy to exercise*."[58]

Collective Dismissals under TULR(C)A 1992

Just as the invidious tendrils of political dogmatism seek to frustrate the advancement of I&C rights under our domestic H&S frameworks, so too can their poisonous effects be felt under our collective dismissal legislation. In this guise, I&C rights are expressed through a series of prescriptive obligations that are only germane where an employer proposes to dismiss as redundant at least 20 employees from any one establishment[59] within a period of 90 days or less.[60] Unlike under the ERA 96,[61] a redundancy dismissal is defined for these purposes as any "*reason not related to the individual concerned*."[62] Similarly, whereas under the H&S regulations the precise nature and quality of the I&C required to be disclosed is somewhat vague,[63] here the temporal and substantive nature of the requirements are significantly more exacting.

In short, the legislation lays down a regimented catalogue of informational necessities which employers are obliged to provide to either employees or their representatives in advance of any formal consultation process,[64] which itself must always involve, as a minimum, individual[65] and meaningful[66] consideration of; how dismissals could be avoided, or else their numbers reduced, and any strategies that may assist in mitigating their consequences where any do prove necessary.[67] These topics must be consulted on for at least 30 days (or 45 days where the proposal concerns 100 or more employees) prior to the date on which the first dismissal takes effect.[68]

Mechanisms for the election of employee representatives (absent formal trade union recognition) are similarly formulaic, with detailed responsibilities placed on employers to stipulate the parameters

58 Andersson and Novitz, 'Risk Assessment and COVID-19' (n 19), 23.
59 See: Case C-80/14 *USDAW v Woolworths* [2015] ECLI 2015/291
60 TULR(C)A 1992 (n 20), s 188(1).
61 ERA 1996 (n 22), s 139(1).
62 TULR(C)A 1992 (n 20), s 195.
63 Nicholas Humphreys, 'Joint Consultation in Safety – Safety Representatives, Safety Committees, Collective Agreements and Works Councils' *Tolley's Health and Safety at Work Service* (Issue 154, April 2022) J3027.
64 TULR(C)A 1992 (n 20), s 188(4).
65 *Middlesbrough Borough Council v. TGWU & Anor* [2001] UKEAT/26/00/045, [2002] IRLR 332 [45] – [47].
66 See: *Radin Ltd v GMB* [2004] EWCA Civ 180, [2004] IRLR 400 [46].
67 TULR(C)A 1992 (n 20), s 188(2).
68 ibid, s 188(1A).

of the electoral process,[69] and to reasonably ensure its operational integrity.[70] Thankfully, unlike under the H&S regulations, there is (now)[71] no distinction drawn between the powers and privileges afforded to trade union representatives vis-à-vis their employee counterparts; albeit that the professionally-endorsed proposals of the former will usually enjoy greater coherence in practice. Once again, a notable lacuna in the jurisdictional ambit of this regime lies in its unjustifiable exclusion of workers, whom, somewhat perversely in light of Chamberlain J's reasoning in *IGWB v SSWP,72* do not benefit from the considerable security offered under its auspices.[73]

Confusing Covid Conundrums

Following the Prime Minister's now infamous announcement on 23rd March 2020 that a strict nationwide lockdown was being imposed,[74] pleas for tangible guidance on how these newly pre-eminent labour rights could continue to be observed soon followed. Predominantly, these concerns related to matters such as; the organisation and facilitation of remote ballots & consultation meetings; ensuring the continued secrecy of such ballots; and the dissemination of information to those unable to participate in digitalised forms of employee engagement.[75] With the additional complications associated with self-isolation rules, uncertainly surrounding how (in some cases permanent) home working arrangements would impact upon the definition of 'one establishment,' and the unsustainable pressure placed upon the Redundancy Payments service by a growing numbers of businesses announcing their immediate liquidations without first discharging their I&C obligations,[76] it is disappointing that these progressively louder calls have repeatedly fallen on (wilfully) deaf governmental ears; an insipidity that once again proves axiomatic of a broader disinclination towards the promotion of I&C rights.

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69 Although see: *Phillips v Xtera Communications Ltd* [2011] UKEAT/0244/10, [2011] IRLR 724 [27] – [33].

70 TULR(C)A 1992 (n 20), s 188(A)(1).

71 See: Case C-382/92 *Commission v United Kingdom* [1994] (n 10).

72 See: IGWB v SSP (n 39), [114] – [128] & [141]; Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies [1998] OJ L225, Arts 1 – 4; and Case C-229/14 *Balkaya v Kiesel Abbruch – und Recycling Technik GmbH* [2015] ECLI 2015/455 [33] – [34], [44] & [52].

73 TULR(C)A 1992 (n 20), s 295(1); and Mark Butler, 'A 'Pick and Mix' Approach to Collective Redundancy: USDAW' (2018) 47 (2) ILJ 297, 302; and Charter of Fundamental Rights of the European Union [2012] OJ EC 326/391, Art 27. Although note: Case C176/12 *Association de médiation sociale v Union locale des syndicats CGT and Others* [2014] ECLI 2014/2 [51].

74 The Prime Minister's Office, 'Prime Minister's statement on coronavirus (COVID-19)' (10 Downing Street, 23 March 2020) <https://www.gov.uk/government/speeches/pm-address-to-the-nation-on-coronavirus-23-march-2020> accessed 8 April 2022.

75 TULR(C)A 1992 (n 20), s 188(A)(i)(i).

76 See: Emma Munbodh, 'Former Debenhams workers win £350,000 in legal battle over redundancies' *The Daily Mirror* (London, 11 April 2022); and Sahar Nazir, 'TM Lewin former staff win legal battle after retailer failed to warn of job losses' *The Retail Gazette* (London, 14 April 2022) <https://www.retailgazette.co.uk/blog/2022/04/tm-lewin-former-staff-win-legal-battle-after-retailer-failed-to – warn-of-job-losses/> accessed 14 April 2022.

There are however, two discrete ways in which the government has sought to intervene in this area during the pandemic; both times almost entirely unhelpfully. The first of these contributions pertains to the implementation of arguably the most significant executorial enactment of the crisis thus far – The Coronavirus Job Retention Scheme ("CJRS"). First announced by the Chancellor on 20th March 2020,[77] this emergency measure of economic life-support was devised on the working hypothesis that, through a sustained governmental commitment to assume responsibility for up to 80% of an employee's wages, the economy could continue to function effectively, thereby alleviating the necessity for mass redundancies and business closures. Despite these lofty ambitions however, the scheme is notably bereft of any entitlement to I&C rights in advance of any furlough decisions being made.[78] Given that its raison d'être is so closely affiliated with a legislative framework which heavily depends upon these essential protections, this jarring omission is likely not coincidental. Thus, when viewed through the lens of attitudinal disdain towards these apparently expendable labour fortifications, one suspects that although the CJRS has drastically curtailed an employer's ability to utilise the pandemic in order to bypass its statutory obligations under the 'special circumstances' defence,[79] this is almost certainly by accident rather than design. The point is therefore somewhat moot.

Secondly, following the unprecedented public backlash against P&O Ferries' recent decision to summarily dismissal over 800 of its employees and replace them with more cost-effective agency workers,[80] the government moved to clamp down on these so-called 'fire and re-hire' practices by announcing a new I&C Statutory Code of Practice in March 2022.[81] In essence, referring to a procedure under which an employer dismisses a typically large number of employees, before immediately re-engaging them (or in this case alternative labour) on ostensibly less favourable terms,[82] these practices have long since been denounced as injurious bastardisations of the statutory I&C framework. Unfortunately, as was graphically illustrated in the recent decision of the Court of Appeal in *Union of Shop, Distributive and Allied Workers & Others v Tesco Stores Ltd* [2022],[83] the

77 The Chancellor's Office, 'The Chancellor Rishi Sunak provides an updated statement on coronavirus' (HM Treasury, 20 March 2020) <https://www.gov.uk/government/speeches/the-chancellor-rishi-sunak-provides-an-updated-statement-on-coronavirus> accessed 14 April 2022.

78 Ewing & Hendy, 'Failure of Labour Law' (n 7), 516.

79 TULR(C)A 1992 (n 20), s 188(7); and Michael Ford and Alan Bogg, 'Not Legislating in a Crisis? The Coronavirus Job Retention Scheme, Part 2' (*UK Labour Law Blog,* 31 March 2020) <https://uklabourlawblog.com/2020/03/31/not-legislating-in-a-crisis-the-coronavirus-job-retention-scheme-part-2-by-michael-ford-and-alan-bogg/> accessed 16 April 2022. See also: *Clarks of Hove Ltd v Bakers' Union* [1978] ICR 1076, 1086 (CA); and *Carillon Services Ltd v Benson* [2021] UKEAT0026/21 [21] – [23], [36] – [38].

80 HC Deb 21 March 2022, vol 711, cols 38 – 92.

81 HC Dec 29 March 2022, vol 711, col 693; and Department for Business, Energy & Industrial Strategy, 'New statutory code to prevent unscrupulous employers using fire and rehire tactics' (BEIS, 29 March 2022) <https://www.gov.uk/government/news/new-statutory-code-to-prevent-unscrupulous-employers-using-fire-and-rehire-tactics – see also parliamentary session> accessed 15 April 2022.

82 Adam Bernstein, 'Current trends in employment law' (2022) 45 (8) CSR 116.

83 *Union of Shop, Distributive and Allied Workers & Others v Tesco Stores Ltd* [2022] EWCA Civ 978.

existing safeguards (including the CJRS) are broadly powerless to restrain the continued deployment of this controversial practice by employers.[84] It is highly suspect then, that despite the widespread usage of fire-and-rehire throughout the pandemic,[85] the government only acted when it became politically untenable to do otherwise. When benchmarked against the audaciously frank admission of P&O Ferries' Chief Executive Peter Hebblethwaite in evidence to the BEIS Select Committee that, far from misunderstanding its responsibilities, his company had made a calculated business decision not to comply with its I&C obligations,[86] it becomes painfully apparent that this ill-fated pledge to restate an employer's obligations (even with the threat of a 25% uplift to protective awards where it is not followed),[87] is unlikely to dissuade similarly-minded employers from taking equally destructive action.

As acknowledged by Bogg, whereas an outright ban on this vicious debasement of labour rights is unlikely to be viable,[88] more robust intervention is evidently warranted. For as long as the government tacitly allows fire and re-hire to remain an attractive option for some, the credibility of our I&C system as a conceptually viable conduit for the protection of core labour standards will continue to be impugned. Accordingly, whilst the announcement of this new Code should of course be welcomed, it is certainly no cause for celebration. Indeed, having so far failed to otherwise engage with the comprehensive recommendations of ACAS's recent report into this practice,[89] it is difficult to conclude that such grandiose declarations are anything other than yet another tokenistic gesture by government, without any genuine underlying commitment to the protection of the industrial fabric of I&C rights more broadly.

Conclusion

In conclusion, although the Covid-19 pandemic appears to have elicited some modest advancement of I&C rights in theory, the realistic outlook for these embattled labour protections is distinctly more foreboding. By systematically exploiting the mainly pre-existing frailties in their structural frameworks, the government's aggressively economic deregulatory approach to the pandemic has served to ensure that the application of these rights in practice has remained largely un-adumbrated. Moreover, with anti-EU Brexit sentiment and post-pandemic reconstruction continuing to dominate

84 ACAS, 'Dismissal and re-engagement (fire-and-rehire): a fact-finding exercise' (ACAS 2021) 15 – 17, 72; and Simon Deakin and Tonia Novitz, 'Covid-19, Labour Law, and the Renewal of the Social State' (2020) 49 (4) ILJ 493, 495.
85 ibid 18 – 23 and 52 – 57; Transport Committee, *Oral Evidence: Coronavirus: implications for transport* (HC 268 2020–09) Qs 621 – 659; and Business, Energy & Industrial Strategy Committee, *Oral evidence: The impact of coronavirus on businesses and workers* (HC 219 2021–02) Qs 329 – 361.
86 Business, Energy & Industrial Strategy Committee, *Oral evidence: P&O Ferries* (HC 1231 2022–03) Qs 193 – 194.
87 BEIS, 'New statutory code' (n 81).
88 Alan Bogg, 'Firing and Rehiring: An agenda for reform' (*IER,* 9 October 2020) <https://www.ier.org.uk/comments/firing-and-rehiring-an-agenda-for-reform/> accessed 17 April 2022.
89 ACAS, 'fire-and-rehire' (n 84) 74 – 84.

our socio-economic narrative, the practical challenges faced by those who seek to deploy these increasingly enfeebled EU-based structures of social democratic worker participation show little signs of amelioration.

It is not without irony then that the uncertain path forged by government in; abandoning social distancing,[90] mandatory testing,[91] face mask,[92] self-isolation,[93] and Covid-19 specific risk assessment requirements;[94] closing the CJRS and SEISS;[95] and replacing workplace H&S guidance with more general public health advice,[96] continues to present challenges that our domestic I&C machinery appears almost uniquely well-placed to address. Perhaps now more than ever before then, these critical systems for the amplification of collective worker voice *must* continue to find expression through practical means; lest we find ourselves unwittingly somnambulating from one crisis to another.

90 The Prime Minister's Office, 'Prime Minister's statement on coronavirus (COVID-19)' (10 Downing, Street 21 February 2022) <https://www.gov.uk/government/news/prime-minister-sets-out-plan-for-living-with-covid> accessed 18 April 2022.

91 Department of Health and Social Care, 'Government sets out next steps for living with COVID' (Department of Health and Social Care, 29 March 2022) <https://www.gov.uk/government/news/government-sets-out-next-steps-for-living-with-covid> accessed 18 April 2022.

92 BBC, 'Covid passes and face mask rules end in England' (BBC, 27 January 2022) <https://www.bbc.co.uk/news/uk-60147766> accessed 18 April 2022.

93 UK Health Security Agency, 'People with symptoms of a respiratory infection including Covid-19' (UK Health Security Agency, 1 April 2022) <https://www.gov.uk/guidance/people-with-symptoms-of-a-respiratory-infection-including-covid-19#what-to-do-if-you-have-a-positive-covid-19-test-result> accessed 18 April 2022.

94 HSE, 'Coronavirus (COVID-19) – Advice for workplaces' (n 28).

95 HM Revenue and Customs, 'Claim for wages through the Coronavirus Job Retention Scheme' (HMRC, 29 October 2021) <https://www.gov.uk/guidance/claim-for-wages-through-the-coronavirus-job-retention-scheme> accessed 18 April 2022; and HM Revenue and Customs, 'Check if you can claim a grant through the Self-Employment Income Support Scheme' (HMRC, 1 October 2021) <https://www.gov.uk/guidance/claim-a-grant-through-the-coronavirus-covid-19-self-employment-income-support-scheme> accessed 18 April 2022.

96 UK Health Security Agency, 'Reducing the spread of respiratory infections, including Covid-19, in the workplace' (UK Health Security Agency, 1 April 2022) <https://www.gov.uk/guidance/reducing-the-spread-of-respiratory-infections-including-covid-19-in-the-workplace> accessed 18 April 2022.

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