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Labour law without labour law: The United Kingdom's labour market response to COVID-19

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Abstract:

The United Kingdom's response to the COVID-19 crisis in respect of labour law and the protection of workers and working relationships had several idiosyncratic aspects which distinguished it from ostensibly similar attempts to protect jobs during the pandemic. While most other advanced economies made use of relatively familiar methods of labour law, alongside macroeconomic intervention and state support, the UK's response was largely devoid of any traditional labour law content, and did not make use of labour law categories or methods, in particular the placing of obligations on the employer. This meant that the UK's approach reflected a form of 'labour market' regulation which aimed, unusually, at solidifying rather than deregulating the labour market. While this approach comes with many significant complexities and risks, it provides a potential model for future interventions which do not rely on sometimes tired or outdated labour law categories.

1. Introduction

This paper presents the United Kingdom's legal response to the COVID-19 crisis from the viewpoint of labour law and labour market intervention. While attempts to protect both economic stability and reduce potential job losses were broadly in line with other post-industrial economies, elements of the model adopted were noteworthy for their lack of use methods and institutions of labour law.

The analysis suggests that the model adopted by the United Kingdom represents a noteworthy case study of legal intervention in the field of work without significant intervention in the employment relation itself, and without interference with the general managerial prerogative which exists in relation to question of strategic business decisions. In particular, the job retention scheme represents an approach to labour law which is neither clearly deregulatory or re-regulatory of the employment relationship, disrupting the standard model of analysis and of legal interventions. Instead, the approach adopted eschews labour law and instead adopts a labour market intervention method. The author concludes with some reflections around the significance of this model of intervention and its limitations.

2. The UK and its Labour Law

Like most national labour law models, the UK approach possesses some relatively universal elements, such as the centrality of the contract of employment and core terms, with some more idiosyncratic aspects, such as a lack of clear legal status of trade unions and collective agreements. Broadly speaking, the UK system of labour law, both through its historical genesis and due to incremental policy choices, is a complex mixture of 'social-democratic' worker's rights and entitlements, on the one hand, and 'liberal' elements, on the other. There is a relatively limited approach to interference in the formation, conduct and termination of employment relationships (Davies and Freedland 1993; 2007). The system is thus characterised by an uncomfortable balancing of labour market flexibility and core labour standards, sitting within a universalist but comparatively ungenerous system of social support. There is a decentralised and relatively patchy system of industrial relations, with various legal interventions which limit the ability of trade unions to take industrial action in various circumstances. There are, relatively speaking, high levels of self-employment and new 'gig economy' models of employment-on-demand are comparatively

widespread (Prassl 2018; Johnes 2019). The service sector and the tertiary economy are dominant, in particular in certain parts of the country.

In the period prior to the COVID-19 pandemic, there had been broad uncertainty and general legal flux regarding the number of people who operate in the 'grey' areas of labour law, that is between classic 'employment' models and clearly independent workers and business people. The emergence of the platform economy had exacerbated this trend, but the prevalence of atypical workers was already relatively pronounced, with an ambivalent approach taken by UK law in certain respects (Mason 2021). On the one hand, the UK has a relatively long-standing 'third' intermediate employment status, that of 'worker',[1] to which the law affords a number of employment protections, On the other hand, there has, largely, been a marked ambivalence to the emergence of new models of work, whether connected to the emerging platform economy or otherwise, meaning that a growing number of people work outside of the traditional protections of labour law. As has been the case in many advanced economies, this has led to a series of cases before the appellate courts in which the contours of the employment contract have been explored in the evolving industrial context.[2]

The COVID-19 pandemic, and its profound economic impact, posed particular challenges to the pre-existing labour law system in the United Kingdom for a number of reasons. Firstly, there exists a broad field of discretion of the part of the employer regarding decisions to terminate the contract of employment compared to many other jurisdictions (Howe 2018). While there do exist contractual and legislative limits to this managerial prerogative concerning dismissals, in reality the cumulative effect of these restrictions creates a space within which the employer is able to dismiss employees

[1] s.230(3) Employment Rights Act 1996.
[2] Uber BV v Aslam [2021] UKSC 5; Pimlico Plumbers v Smith [2018] UKSC 29.

as long as certain processes are followed and the reason for dismissal is one of a number of prescribed grounds. Notably, in the case of economic dismissals, as long as the decision to dismiss is genuinely related to an economic restructuring as defined by the relevant legislative provisions, the law refuses to intervene in the justifiability of any such decision. Equally, where dismissals are made for reasons connected to the employee, as long as the reason is 'potentially fair', the law allows a relatively broad scope to the employer, only intervening when the decision is one which no reasonable employer could have made. Secondly, the financial disincentive, whether in the form of compensation for an unjustified dismissal or in the form of a redundancy payment in the case of economic dismissals, is deliberately limited to as not to impose too great a burden on employers seeking to re-organise their workplace. Thirdly, there does not exist any comprehensive, or even *ad hoc*, system of social dialogue in the UK which would allow for a negotiated response to a moment of crisis, bringing together the state, employers and employees. Where such practices do exist within industry, they tend to be more focused on the negotiation of collective agreements and other such narrow 'economic' matters rather than anything approaching a co-determination-style approach which could broad matters such as policy health emergencies.

3. UK social policy in the pre-COVID-19 period

In the very immediate period preceding the pandemic, the UK had also found itself in a complex and delicate political situation, with potential indirect and direct effects on any legal response to the COVID-19 crisis. The United Kingdom had very recently formally left the European Union following an extremely fraught legal and political process, leaving the UK's constitutional order, and socio-economic model, extremely uncertain. Following changes in government since the Brexit referendum of 2016, the stated ideology, if not yet the concrete legislative agenda, of the new government at the time of the start of the COVID-19 pandemic was a complex combination of

mercantilist internationalism, libertarianism, nationalism and statism, with no clear agenda for labour law outside of the European Union, whose 'European Social Model' had been extremely influential in UK employment law over the previous two decades or so. In particular, it was not clear whether the future social policy envisaged by the government was one of heightened protections for workers or of a deregulatory agenda, or some mixture of the two. At the moment of the COVID-19 pandemic, the UK enjoyed comparatively low levels of unemployment, although inequality levels were high by comparative standards.

4. COVID-19 and the initial UK response

In line with the general initial approach on an executive and legislative level, the response to the initial threat of COVID-19, following the first cases in the UK, was rather anaemic, with no specific employment-focused measures introduced at first. The first stage of the government's response was the closure of certain service sector and hospitality venues. However, there were no accompanying labour law or labour market measures to complement these steps. This left employers free to terminate and vary contracts according to ordinary principles, and also to withhold payment for work not performed during this period where the contract permitted this. This was particularly significant in the UK labour market context, due to the fact that was a large proportion of workers who are on what are commonly known as 'zero-hours' contracts, that is contracts which, ostensibly, to not require the employer to offer, nor the employee to work, any particular number of hours in any given time period, with this to instead be arranged on an ongoing basis. This meant that employers were able to simply not pay such workers for the unworked hours following the closure of said services.

5. 'Lockdown' and the Labour Market Intervention

5.1 Lockdown and the emergence of new categories of workers

This relatively laissez-faire approach to the situation underwent a radical shift shortly afterwards, with the UK, like many other countries, entering a national period of 'lockdown',[3] during which many parts of society and the economy were drastically curtailed and people were instructed to 'stay at home', with legal sanctions for those who did not follow this instruction. The introduction of this lockdown policy immediately created new *de facto* and *de jure* categories of workers, previously unknown to UK labour law, including the new semi-official category of 'critical worker', which was later joined by the broader category of 'key worker'. These were workers to whom certain exceptions applied in the context of broader restrictions which were progressively introduced, and were often seen as central to the delivery of core public services and logistics. This was an interesting development from a labour law perspective, as UK labour law has not traditionally recognised significant subcategories of workers. This taxonomisation could allow for interesting future developments in labour law if utilised in different forms moving forwards. Significantly, while new categories of worker were introduced, they did not have a direct impact on labour law categories or statuses themselves. Similarly, the initial lockdown created a new dichotomising categorisation in labour law. On the one hand, under the lockdown and its subsequent iterations, travel to work remained a 'reasonable excuse' to leave one's home. However, those whose job permitted this were expected to work remotely, from home. In the subsequent year or so, this has developed, at least rhetorically, into a 'right' to work from home, which may emerge as a new regulatory focus of labour law in the near future. In the context of the lockdown, there were also additional rules requiring people to self-isolate in case of infection, contact with an infected person and in the case of extremely vulnerable people. These new categories clashed with the pre-existing structures of sickness leave and sickness pay, which vary between contracts above a relatively

[3] Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, SI 2020/350.

minimal base, and incremental changes were made to that regime in order to provide more protection to such workers and to incentivise self-isolation in such circumstances.

5.2 'Furlough': labour law without labour law

As well as the impact of lockdown and its variable rules for different workers, and the consequent official and semi-official new taxonomies of worker outside of the auspices of labour law, there was a large and unprecedented 'Coronavirus Job Retention Scheme',[4] commonly known as the 'furlough' scheme. This was an administrative scheme set up under the broad powers first granted to the government through broad delegatory legislation which aimed to lessen the huge macro-economic shock of COVID-19 and the national lockdown. This scheme was particularly significant due to its separation from what one might term a labour law 'mode' of legal intervention or regulation, which both refused to intervene in the core obligations between the parties in the employment contract, while also cutting across some of the core 'gateway' questions of labour law and broadly ignoring the categorisations which usually distinguish between those workers who are subject to labour law and those which are not. In this way, the intervention sought to radically reduce the number of dismissals due to a retraction in the economy and the closing of business operations during the lockdown, but did so in a way which did not ostensibly limit the legal right of businesses to terminate contracts, and did not require workers to belong to traditional labour law categories to benefit from the scheme.

The Coronavirus Job Retention Scheme has constituted, without doubt, the largest single intervention in the labour market, and possibly in the general economy, in modern British history. The basic structure of the scheme is relatively simple: the State pays, through the employer's

[4] Ss. 71 and 76 Coronavirus Act 2020.

ordinary payment system, a large proportion of the worker's ordinary wages, via support paid to the employer, meaning that the employer is not required to pay the worker who is not working nor make that worker redundant. According to the basic structure of the system, the employer places the worker 'on furlough', a status not previously formally recognised in UK labour law nor routinely utilised in English employment contracts. Workers placed on furlough were then no longer required, and indeed initially not allowed, to work. They received, according to the initial scheme, 80% of their ordinary wages, subject to a maximum amount. The scheme has subsequently been developed to allow for partial furlough, permitting workers to work a proportion of their ordinary working hours, and has been progressively scaled back in terms of the proportion of the wages which the State is prepared to pay. However, despite these steps to scale back its cost and coverage, and despite various changes and nuances since its inception, the Scheme has remained relatively stable in terms of its basic structure. Rather than examine the minutiae of the Scheme, which has been considered by other authors (Mangan 2020), this section considers its novel relationship with 'ordinary' labour law categories.

The introduction of the furlough Scheme was controversial from a legal and constitutional standpoint at the outset, as there was not at first a clear legal basis for its introduction as an administrative step. However, the Scheme itself has run relatively smoothly since its inception. It has of course led to an enormous level of State expenditure and an unprecedented level of intervention in the relatively deregulated British labour market, with the cost spiralling quickly into the tens of billions of pounds. Unlike many other European legal systems, which sought to limit unemployment during the COVID-19 crisis by limiting the ability of employers to terminate the contract of employment while making use of payments to support workers at the same time, the furlough Scheme did not, ostensibly, place any new significant obligations on employers. Crucially, the

employer was granted, as part of their broader managerial prerogative, the power to decide whether to place their employees 'on furlough' or not. There was no procedural or substantive duty on the employer to either consider placing employees on furlough, nor to base such decisions on certain prescribed reasons. There was of course an indirect incentive to do so, as the State would effectively take over the payment of the employee's salary during this period, this allowing the employer to potentially continue their business during a downturn in activity and revenue, elements which would usually force the business into restructuring or even closure. In this manner, the furlough scheme aimed to protect both businesses and workers by reducing the costs of the former and maintaining the income of the latter, while also allowing a continuity in the employment relationship during the envisaged subsequent economic upturn and the lifting of lockdown measures.

The furlough scheme evolved gradually over the subsequent months. At first, it covered all workers paid through the automated national income tax scheme known as 'Pay As Your Earn', meaning that it cut across ordinary employment law categories of 'employee' and other workers paid through this system. Those in the intermediate category of 'workers' were also entitled to the payments, if employers placed them on furlough, regardless of contractual intricacies, such as so-called 'zero hours' contracts, and a mechanism for calculating the ordinary wages of such individuals was introduced. The original scheme did however exclude a large number of workers, whether due to working arrangements, contractual status, or the freelance nature of their work. In industries where freelance and short fixed-term contractual relationships were the norm, such as the theatre, much of the workforce was excluded from the scheme due to its mechanics. However, piecemeal extensions were gradually made to the scheme to allow these workers to benefit from it, something which was more easily achieved as the original scheme had not been based on employment law

structures as such. Equally, a similar scheme for genuinely self-employed workers was introduced. This was however a complementary approach, known as the Self-Employment Income Support Scheme, in which the benefit 'belonged' to the worker rather than being dependent on the employer choosing to place the worker on furlough. In the first months of its operation, the furlough scheme was an 'all-or-nothing' affair, in which the worker ceased all work, and indeed was prohibited from working. As the scheme went on it evolved in two ways. Firstly, it began to allow the partial furloughing of workers, in which an employee worked a proportion of their ordinary working time, and a further proportion was paid by the State. Secondly, the scheme was progressively scaled back, reducing the proportion of the worker's wages which the scheme would pay, effectively encouraging the employer to reintegrate the worker back into work (or alternatively to make economic dismissals or attempt contractual variations). At the time of writing, the scheme remains partially in place.

6. Labour law without labour law

The COVID-19 emergency forced many legal and policy measures which were both improvised and unorthodox. In almost all advanced economies, it triggered unprecedented levels of intervention in the economy and in the labour market. However, in most European economies, a significant proportion of the response made use of employment law structures in order to limit the deleterious impact of the crisis. As the overview presented here has demonstrated, this was not the case in the United Kingdom, although certain labour law questions have emerged as a result. The decision not to limit the managerial prerogative in terms of the termination of employment contracts, and, perhaps even more radically in the circumstances, the choice to leave the question of whether employees and selected other workers should be placed on furlough to the employer, demonstrated the significant impact which legal intervention can have in the employment field without any

attempt to regulate the employment relationship in the traditional sense. Indeed, this model has been seen as both the renewal of a moribund 'social state' by some authors, and a demonstration of the failure of the structure of UK labour law by others (Deakin and Novitz 2020; Ewing and Hendy 2020).

It has become commonplace in recent decades to discuss the regulation of the labour market as much as the employment relation as a core focus of employment law policy and scholarship (Supiot 1999). However, the COVID-19 response in the UK demonstrates the potential significance of this approach when it is extended yet further. In particular, much of the work on labour market intervention has focused on the creation of a fluid and flexible labour market, and the attachment of rights to workers as market agents rather than in discrete employment contracts. The UK COVID-19 response is an instance of this approach being applied in order to rigidify and cement (at least temporarily) employment relationships and to prevent their termination. Although, like many measures taken in the early stages of the COVID-19 crisis, this was a largely improvised set of steps with little ideological or doctrinal coherence or forethought, the structure of the response demonstrates the far-reaching consequences of labour market intervention. It is significant perhaps that there was no marked difference in the change in unemployment rates in the UK compared to other advanced European economies during the crisis (Su et al. 2021).

7. Critical reflections: the possibilities and dangers of a labour law without labour law

To some extent, this presentation of the COVID-19 response in the UK is an interpretivist reconstruction of an improvised emergency measure, locating within in it a regulatory paradigm which was not entirely intended. However, the significance of the contours of such are response are striking. On the one hand, the approach brought with it significant advantages from the perspective of universality and expediency. It was able to cut across complex questions of employment status,

and even extend relatively seamlessly to genuinely self-employed people. It was able to achieve significant social and economic benefits in part through by-passing the complex questions of the obligations and rights of the employment relationship. It stands therefore as a potential model for future interventions.

However, and just as importantly, an approach divorced from the traditional unity of labour law is not without significant risk. These issues stem from the failure to impose some kind of procedural or substantive duty on the employer, of course the very essence of traditional employment regulation in many ways. The failure to impose procedural obligations on the employer to place certain workers on furlough, or to even consider doing so, meant that employers were broadly unencumbered regarding their managerial decisions. This has subsequently led to a number of labour law controversies, including significant litigation, relating to decisions to make dismissals rather than place workers on furlough for instance. The broad danger of labour market interventions will always be that they do not mesh neatly with labour law principles, or with the complex 'cathedral' of the employment relationship, with its multifarious rights and duties. Similarly, the furlough scheme made no changes to legal structures which allow, for instance, companies to dismiss workers and then rehire them on less favourable terms, a phenomenon which has seemingly risen in prevalence as the pandemic has progressed. Furthermore, the scheme's structure meant that a refusal by an employer to place on furlough a worker with no fixed hours could result in a dramatic reduction in income with no ostensible contractual breach by the employer, demonstrating a flaws in the scheme's aspirations to universality regardless of employment status. Equally, the UK approach was striking, in comparative terms, due to its lack of engagement with any process of social dialogue, whether at national, sectoral or enterprise level. The structures of worker representation of this type are so weak in the UK, due in part to a particular tradition of collective bargaining, that any such

involvement would possibly not even have been feasible given the short time frame without the creation of new *ad hoc* infrastructure. However, this kind of social dialogue-based approach would also have served as a bulwark against any excesses or abuses of the furlough system which the unfettered managerial prerogative allowed.

It is striking that even these superficial reflections, of which there are numerous other potential variants, lead one to the conclusion that the failure to integrate such a labour market-model intervention into the general structures of labour law partly negated their benefits. However, that now long-standing aspiration of going 'beyond employment' in the realisation of social rights, creating a new unity of labour law outside the employment relation paradigm, does seem to have been achieved to a small extent within this scheme. The large number of people already operating outside the employment paradigm in the UK necessitated a broader approach, in particular due to their vulnerability. The furlough scheme demonstrates that there exist models which are capable of reinstating a form of legal unity, providing a model of protection, or at least intervention, which captures most such working models. The retention of the employer's managerial prerogative regarding selection for the furlough scheme however represents a challenge for this regulatory model. On the one hand, it demonstrates a clear departure from the traditional employment relation paradigm, with all its limits. On the other hand, what re-emerges from this regulatory choice is, paradoxically, the very power which labour law has always striven to counterbalance or channel for broader economic and social goals. In many ways therefore, this particular regulatory model re-establishes the same social dynamics which necessitate further labour law intervention, as demonstrated by the consequent controversies regarding the selective use of the furlough scheme. The scheme therefore represents a novel regulatory model, but does not magically make the perennial social and economic challenges of labour law disappear, and may create new complexities.

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