
The Right to Work and Rights in Work during the Coronavirus Pandemic: The Response of the United Kingdom

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I. Introduction

With many of us now working from home and some commentators even predicting the 'end of the office', we cannot but fail to notice the impact of the Coronavirus outbreak on our terms and conditions of employment.¹ For those essential workers on the frontline, the situation is altogether more serious.² The effects of the Coronavirus on the world of work are beginning to be explored, with the current academic analysis largely focused on discrete areas of employment law, for example the health and safety of workers,³ protection from unfair dismissal, the right to paid annual leave,⁴ and the interaction between the UK Government's furlough scheme and the background rules of domestic employment legislation.⁵

This paper will seek to present an overarching analysis of the virus' intrusion into working conditions through the lens of the 'right to work'. The right to work is a social right identified in a number of international rights instruments, notably the International Covenant on Economic, Social and Cultural Rights (the Covenant), the European Social Charter (the Social Charter) and the European Union Charter of Fundamental Rights (the EU Charter).⁶ This paper will explore the components of the right to work that are particularly relevant in the context of the Coronavirus pandemic, notably the State's obligation to prevent unemployment, the right to decent conditions of work and crucially, the right not to work.

The right to work is also linked intimately to the freedom of employers to pursue their business. The consequences of this connection for workers' rights is a potential cause for concern. Of course, all of these issues clearly transcend the current pandemic, but the Coronavirus provides an important impetus to explore a concept that despite extensive academic analysis, has so far failed to gain much traction as a standalone fundamental social right.

II. What is the Right to Work?

The first hurdle in any consideration of the right to work is that the content and scope of the concept is difficult to define, with various meanings being ascribed to it depending on

¹ Daniel Thomas, Stephen Morris and Andrew Edgecliffe-Johnson, 'The End of the Office? Coronavirus may Change Work Forever', *The Financial Times*, 1 May 2020.

² James Robottom, 'The Legal Rights of Healthcare Workers to Personal Protective Equipment during the COVID-19 Pandemic', UK Labour Law Blog, 13 April 2020.

³ Stuart Brittenden, 'The Coronavirus: Rights to Leave the Workplace and Strikes', UK Labour Law Blog, 27 March 2020.

⁴ Alan Bogg and Michael Ford, 'Furloughing and Fundamental Rights: The Case of Paid Annual Leave', UK Labour Law Blog, 6 April 2020.

⁵ Alan Bogg and Michael Ford, 'Legislating in Times of Crisis: The Coronavirus Job Retention Scheme', UK Labour Law Blog, 23 March 2020; Alan Bogg and Michael Ford, 'Not Legislating in a Crisis? The Coronavirus Job Retention Scheme, Part 2', UK Labour Law Blog, 31 March 2020.

⁶ UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, UN Treaty Series, vol. 993, p. 3; Council of Europe, European Social Charter (Revised), 3 May 1996, ETS 163; EU, Charter of Fundamental Rights of the European Union, 26 October 2012, [2012] OJ C26/02.

the context. It could, first of all, be conceived as a legally enforceable right, with a corresponding obligation on the State to provide employment, although this is unlikely to stretch to a right to a particular job.⁷ Second, the right to work might be viewed as encompassing a right to decent work, being tied with the concept of fair and just working conditions, explored below. Going further still, it can be thought of as a right destined to provide for human self-realisation.⁸ More controversially, the right to work has been linked with the correlative *duty* to work.⁹ As argued in this paper, the right to work may also be construed as a right not to work, or at least the right not to work in dangerous conditions.

The scope and content of the right to work is complicated by the fact that it is a right that can potentially be raised against a variety of actors, namely the State, the employer or trade unions. As against the State, the right to work can be viewed as a duty to maintain conditions of full employment, to protect the right of every worker to earn a living freely chosen and to provide employment services and vocational training for all workers.¹⁰ The second actor against whom the right to work could conceivably be raised is the employer. Every worker has the right to be engaged on a non-discriminatory basis, a right to be given work while employed, a right to remain in continuous employment and to be reinstated in cases of unfair dismissal.¹¹ However, the right is probably not broad enough to encompass a guarantee of satisfying or rewarding work from the employer. Finally, the right to work can be invoked against trade unions in closed-shop situations, providing a right for workers who are not members of a union to seek and maintain employment.¹² The latter has led to the right to work being treated with a great deal of suspicion within employment law circles, and overlooks the role that trade unions can play alongside the State and private employers in ensuring the realisation at national level of a meaningful right to work.¹³

III. The Right to Work as a Fundamental Social Right

The right to work is scattered across a number of international rights instruments. To begin with, Article 23(1) of the Universal Declaration of Human Rights provides that '[e]veryone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment'.¹⁴ The content of the right to work is further specified in other UN rights instruments, most notably the Covenant. Article 6 of the Covenant attests to the recognition by the States Parties of the right to work 'which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts'. Steps to be taken to safeguard this right include technical and vocational guidance and training programmes, policies, and techniques to achieve economic, social, and cultural development and productive employment under conditions that safeguard the

⁷ Bob Hepple, 'The Right to Work' (1981) 10 ILJ 65, 73; Council of Europe, *European Social Charter: A Short Guide*, 2000, 119.

⁸ Hugh Collins, 'Is There a Human Right to Work?' in Virginia Mantouvalou (ed), *The Right to Work* (Hart 2015) 17, 29.

⁹ Guy Mundlak, 'The Right to Work, the Value of Work' in Daphne Barak-Erez and Aeyal Gross (eds), *Exploring Social Rights: Between Theory and Practice* (Hart 2007) 341, 343.

¹⁰ Hepple (n. 7) 69.

¹¹ *ibid* 73.

¹² *ibid* 79.

¹³ Alan Bogg, 'Only Fools and Horses: Some Sceptical Reflections on the Right to Work' in Virginia Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart 2015) 149; Colm O'Cinneide, 'The Right to Work in International Human Rights Law' in Virginia Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart 2015) 99, 109.

¹⁴ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

fundamental freedoms of the individual. The provisions of Article 6 enjoy particular prominence as the first substantive right set out in the Covenant.¹⁵ The UN Committee on Economic, Social and Cultural Rights has sought to flesh out the concept of the right to work, highlighting that '[w]ork as specified in article 6 of the Covenant must be *decent work*. This is work that respects the fundamental rights of the human person as well as the rights of workers in terms of conditions of *work safety* and remuneration'.¹⁶

At the European level, the right to work can be found in both the Social Charter, which is the social rights equivalent of the European Convention on Human Rights and also in the EU Charter. Article 1 of the Social Charter calls on the Parties to undertake:

(1) to accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment; (2) to protect effectively the right of the worker to earn his living in an occupation freely entered upon; (3) to establish or maintain free employment services for all workers; (4) to provide or promote appropriate vocational guidance, training and rehabilitation.

The focus of this provision is on the State's obligation to achieve full employment, although it also roots the right to work in the right of every worker to earn their living in an occupation or profession *freely* entered upon. Essentially, this means that every worker has the right to enter the workforce without constraint or coercion, ie it is the 'liberty' component of the right to work.¹⁷

The EU Charter similarly conceives of the right to work as the freedom to choose an occupation, thereby overlooking the other components of Article 1 of the Social Charter, which as we just saw, also ground the right to work in wider issues of access and availability of work.¹⁸ Article 15 provides that '[e]veryone has the right to engage in work and to pursue a freely chosen or accepted occupation'. This provision has a very wide personal scope when compared to other EU Charter rights, applying to "everyone", but the corresponding duty to ensure the right's protection is framed by the EU Charter's horizontal provisions, which specify that it is addressed to the EU's institutions and the Member States when they are implementing EU law. The Explanations attached to the EU Charter note that Article 15 is derived from the Court of Justice of the European Union's pre-existing case law on the freedom to pursue a trade or occupation as a general principle of EU law.¹⁹ The Explanations thereby link Article 15 to the freedom to enter a freely chosen occupation found in Article 1(2) of the Social Charter. Again, this implies a right to access employment (or not to be deprived of employment) in a non-discriminatory manner. The difficulty here is that the terminology used has been inconsistent. For example, the Explanations attached to Article 15 refer to the 'freedom to pursue an economic activity', while the case referred to does not use that formula at all, instead referring to the 'freedom to choose and practice their trade or profession'. As explained further below in the context of the freedom to conduct a business, there are perhaps different connotations to being able to freely enter an occupation and the freedom to choose an economic activity.

¹⁵ O'Cinneide (n. 13) 104.

¹⁶ UN Committee on Economic, Social and Cultural Rights: General Comment No 18, *The Right to Work*, UN Doc. C/C/12/GC/18, 6 February 2006 para. 7.

¹⁷ Guy Mundlak, 'The Right to Work: Linking Human Rights and Employment Policy' (2007) 146 Int'l Lab Rev 189, 193.

¹⁸ Diamond Ashiagbor, 'Article 15' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights* (1st edn, Hart 2014) 423, 428.

¹⁹ Case C-4/73 *Nold* ECLI:EU:C:1974:51.

The nebulous nature of the right to work's focus on the 'availability' and 'accessibility' of work is somewhat tempered by its close connection to other more 'substantive' rights which seek to guarantee work that is 'acceptable'.²⁰ As O'Connell remarks in relation to the Covenant and the Social Charter, 'the placing of work at the beginning of the list of substantive rights is no accident, but rather reflects its fundamental importance in the overall scheme of social rights'.²¹ Most obviously, we rely on work as a source of income to fulfil our basic human needs such as food, housing, and health. More widely, work can be seen as an act of human self-expression and socialisation.²² The freedom to pursue a freely chosen trade or profession also has clear links to the concept of self-determination and human dignity. The idea is, that although not all of us want to work, or at least not all of the time, work gives us a sense of purpose, community, and self-respect.²³ The right to work is also linked to protections against unfair dismissal and discrimination in access to employment. Finally, the right to work has a clear relationship with other fundamental employment rights such as the right to fair and just working conditions.²⁴

Having set out the content and scope of the right to work, we are now in a position to assess the implications of the Coronavirus pandemic for that right.

IV. The Implications of Coronavirus for the Right to Work

The Coronavirus poses obvious challenges for the right to work, but at the same time, the right to work can potentially be relied on to ensure a robust employee-protective response to the pandemic. Three situations will be distinguished, with the Coronavirus pandemic creating different right to work implications in each category. namely: (a) the right to work implications for those of us now working from home; (b) the consequences for those who are no longer working either due to having been furloughed or made redundant and finally and (c) the right to work implications of going to work while the pandemic continues.

a) Those who are working from home

At least since the beginning of the UK's initial general lockdown on 23 March, a large proportion of the population have been working from home, with the Coronavirus Regulations permitting travel for the purposes of work only where it is not 'reasonably possible' to do this.²⁵ In certain respects, those of us who are able to work from home are in a privileged category from a right to work perspective, with our continued employment likely to be facilitated for the duration of the pandemic.²⁶ Having said that, the wider right to (decent) work implications of working from home are potentially numerous.

The most obvious consequence of working from home is the further blurring of the home and work distinction, already under strain from the ever-presence of email. The deployment of new workplace technologies to facilitate staff meetings, such as Zoom add to the sense that we never really leave the workplace and that work never really leaves us. The added

²⁰ Collins (n. 8) 120.

²¹ O'Connell (n. 13) 112.

²² Mundlak, 'The Right to Work, the Value of Work' (n. 9) 342.

²³ Ashiagbor (n. 18) 425.

²⁴ For example, Article 31(2) of the EU Charter.

²⁵ The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020.

²⁶ COVID Inequality Project, <<https://sites.google.com/view/covidinequality/home>> .

pressure to be 'always on' also places strain on employment rights found in domestic legislation, notably the Working Time Regulations 1998, which implement the EU's Working Time Directive 2003/88/EC. The Directive entitles workers to a minimum number of rest periods during the day, a limited working week and a right to paid annual leave. In a long line of case law, the EU Court of Justice has ensured that any such break period must be for the purpose of rest and relaxation from work and any time spent not working, but on-call, at the employer's disposal or even on sick leave, cannot count as time off.²⁷ But, how does one ensure that adequate rests breaks are taken when the office is also the home and when, at least in the early stages of the lockdown, frequently going outside was not an option?

Anyone whose travel plans have recently been disrupted will also know that there are definite consequences of the pandemic for the exercise of the right to annual leave. Is it really possible to switch off and relax when confined to the home which has also been serving as your workplace? Recently adopted legislation recognises these difficulties, providing that where, due to the Coronavirus, it is not reasonably practical for the worker to take leave during a particular leave period, the entitlement to annual leave can transfer to the next period.²⁸ As Bogg and Ford argue, these Regulations should be interpreted as preventing the employer from insisting on workers taking annual leave while the pandemic persists, including for those employees on furlough.²⁹ Such a reading is reinforced by the right to fair and just working conditions found in Article 31(2) of the EU Charter, perhaps in conjunction with the right to work in Article 15. The Court of Justice has already held that, as a fundamental social right, the obligation is on the employer to ensure that the employee is able to exercise the right to annual leave.³⁰ However, the Government's current advice seems to be that the employer can indeed specify when the employee should take leave, an interpretation that does not sit well with the purpose of the underlying right.³¹

In the grand scheme of a global pandemic, these issues might seem insignificant, but there is always the risk that hard-won employment rights will be eroded. Working time protections are already vulnerable to Brexit, with the UK Government having long-demonstrated the protections granted in the Working Time Directive.³² Indeed, the Charter itself will strictly speaking no longer apply in the UK once the transition period has ended, although its interpretative pull may live on. When the floor of rights currently guaranteed by EU legislation and the EU Charter is removed, it may be a whole lot easier to justify the suspension of working time rights found in domestic legislation. It is here where reliance on wider international standards such as the right to work guaranteed in the Social Charter and the Covenant may prove useful.

A more immediate issue is the particular effect that working from home has for those with childcare responsibilities. Balancing work with childcare has obvious consequences for the accessibility limb of the right to work. There are also clear gender dimensions to this issue, with the burden of childcare and housework continuing to fall disproportionately on female

²⁷ Case C-151/02 *Jaeger* ECLI:EU:C:2003:437; Joined Cases C-350/06 and C-520/06 *Stringer* ECLI:EU:C:2009:18.

²⁸ The Working Time (Coronavirus) (Amendment) Regulations 2020.

²⁹ Bogg and Ford (n. 4).

³⁰ C-214/16 *King* ECLI:EU:C:2017:914.

³¹ UK Government, 'Holiday entitlement and pay during coronavirus (COVID-19)', 13 May 2020.

³² Case C-84/94 *UK v Council* ECLI:EU:C:1996:431.

workers.³³ There have long been calls for greater recognition of the value of work done in the home. If the right to work is to have any real meaning, we need to decide what is meant by 'work'. As a fundamental social right, the concept of work should be defined broadly. If nothing else, the Coronavirus pandemic has shown us that it is those in the most precarious and often low-paid industries who we now depend on the most.

Finally, the increased reliance on home-based technology raises further issues as to access to such technology, for example computer equipment and high speed internet and the consequent rise in energy bills, which are unlikely to be met by increased wages.³⁴ All of these issues clearly engage the non-discriminatory access to employment aspect of the right work, but it is not at all obvious who bears the responsibility for responding to these challenges. The existing legal framework in the employment context, which was not designed to meet the current circumstances, and is already creaking under the weight of new technology and increasingly flexible forms of work, is unlikely to be of much assistance. The contractual model underpinning the employment relationship is very adaptable to permitting non-traditional (and less protective) forms of work, while at the same time, alterations to terms and conditions of employment are not so easily facilitated without falling foul of contractual principles.

b) Those who are no longer working

As already mentioned, those who can work from home are in a relatively secure position. For those who have been made redundant, or who have been furloughed, the situation is more precarious. Particular difficulties have been caused for those employed by shops and restaurants, most of which were forced to close temporarily, meaning that many of these already low-paid workers are likely to have been furloughed.³⁵ Furloughing is provided for in the Coronavirus Job Retention Scheme, which allows employers to apply for an 80% reimbursement of wages (up to £2,500) for employees who have been placed on furlough, for an initial period of three months (now extended until October 2020), the purpose being to prevent redundancies in situations where it is no longer possible for the employee to continue working due to the restrictions on businesses opening.

The Scheme has been criticised from the outset, notably for its initial differentiated approach to the various categories of employment status.³⁶ This is partly because it cannot be divorced from the background of the existing inadequacies in domestic UK employment law, which, as mentioned, do not allow for much flexibility in the variation of terms and conditions of employment. By contrast, the law is much more permissive of dismissals at both common law and under statute, albeit that the latter engages further procedural and substantive protections, thereby incentivising employers to dismiss their workforce and reengage them later on under new terms and conditions.³⁷ The only real protection derives from the Equality Act 2010, which would prevent discriminatory selection for furlough and potentially other contractual mechanisms such as the implied term of mutual trust and confidence.³⁸ If the Scheme, combined with the existing legislative backdrop, were

³³ Donna Ferguson, "I feel like a 1950s housewife": how lockdown has exposed the gender divide', *The Observer*, 3 May 2020; COVID Inequality Project (n. 26).

³⁴ Joanna Partridge, 'UK household energy bills to soar by £32 per month', *The Guardian*, 4 May 2020.

³⁵ Andy Verity, 'Coronavirus: More than 9 million expected to be furloughed', *BBC News*, 8 April 2020.

³⁶ Bogg and Ford (n. 5).

³⁷ *ibid.*

³⁸ *ibid.*

(inadvertently) to lead to widespread redundancies, this would clearly be at odds with the State's obligation under the Covenant and the Social Charter to devise labour market policies that support employment. The same is true of the State's handling of the wider economic impact of the pandemic.

c) Those who are still going to work

As already mentioned, the Regulations stipulate that workers can leave their home to go to work where it is not 'reasonably possible' to work at home. As the lockdown begins to ease, more of us will also return to work. This raises significant health and safety issues for those who are required to go to work, particularly those in essential frontline services such as the NHS, transport, and food supply. The lack of access to Personal Protective Equipment (PPE) has gained much attention in recent weeks. There is a raft of legislation guaranteeing the health and safety at workers at work.³⁹ For example, the EU's Framework Directive 89/391/EEC stipulates that workers should not suffer any detriment for having exercised their right to protect their safety. The UK implementing legislation stipulates that any dismissal resulting from an exercise of these rights will be automatically unfair and incapable of justification by the employer. The right not to suffer a detriment or dismissal covers a situation where an employee refuses to work, leaves the workplace or refuses to enter certain parts of the workplace due to a reasonable belief that there are circumstances of 'serious and imminent danger'.⁴⁰ These provisions have been interpreted widely to cover not only the individual employee themselves, but also other workers and potentially family members.⁴¹ Brittenden suggests that given the seriousness of the pandemic and the Government's own use of the terms 'serious and imminent', it is highly likely that an employee refusing to work out of fear of infecting themselves or others, will be protected. It is suggested that such a reading can be bolstered by reliance on the right to work.

Of course, many of us expect to return to work at some point in the near future. The Government has issued draft guidelines for getting employees to return to work while the pandemic is on-going.⁴² These non-binding guidelines have been criticised by the Trade Union Congress as putting workers' health at risk.⁴³ The guidelines leave it to employers to decide whether it is safe for their business to reopen but provides little detail beyond stating that social distancing and handwashing "should" happen. Given the risks while at work or travelling to work, the question arises as to whether the right to work can also encompass a right not to work.

Most of us, regardless of need, derive a strong sense of identity and value from our chosen trade or profession and value the social connections that work can bring. It would be a stretch, to say the least, to argue that the right to work as a fundamental human right, encompasses the right not to work at all. However, it may be interpreted as including a right to refuse to work under certain circumstances or to perform certain tasks. Such a

³⁹ Framework Directive 89/391/EEC; ss 44 and 100 Employment Rights Act 1996; Directive 89/656; The Personal Protective Equipment at Work Regulations 1992; Workplace (Health, Safety and Welfare) Regulations 1992; Management of Health and Safety Regulations 1999; Health and Safety at Work Act 1974.

⁴⁰ Brittenden (n. 3).

⁴¹ *Masiak v City Restaurants* [1999] IRLR 780.

⁴² UK Government, 'Working safely during coronavirus (COVID-19)', 11 May 2020.

⁴³ Rowena Mason, 'Coronavirus plan for returning to work puts employees at risk, says TUC', *The Guardian*, 4 May 2020.

refusal to work will usually constitute a breach of contract. We have already seen that this rule is to an extent tempered by the fact that the employee has a right not to suffer a detriment for refusing to work in the face of serious and imminent danger. The employer is also required to comply with health and safety legislation. But is this really enough for an employee who genuinely fears the health repercussions of continuing to work during the pandemic? The right to work might help in one respect, namely the idea that work must be “freely” chosen or entered upon. Making the choice between potentially be dismissed for falling on the wrong side of the concept of “serious and imminent danger” and continuing to take the risk of going to work is really no choice at all.

Of course, the right to work, like most rights, is not absolute, but may be limited, provided that any such limitations are necessary, justified, and proportionate. It should be recognised that employers and the Government are reacting to a fast-developing situation, but this is no excuse to overlook fundamental social rights. There is also the danger that some of the rapid changes to working conditions that have taken place in the immediate wake of the crisis will solidify, leading to a semi-detached body of regulation that sits uneasily with existing employment law. If nothing else, the current situation has highlighted flaws within the current regulatory regime, notably the continued exclusion of some of the most vulnerable workers from legislative protections, income inequality and the continued gendering of household work.

Another issue, is that, as mentioned, the employer has competing rights that may undermine any invocation of the right to work. The freedom to conduct a business found in Article 16 of the EU Charter is a clear example. Quite clearly, businesses that have been closed due to the Coronavirus, will want to reopen as soon as possible and it can conceivably be argued the decision to require many businesses to shut their doors infringes their freedom to conduct a business. The invocation of business freedoms to challenge the lockdown has potential implications for the health, safety and working conditions of employees.

Both Articles 15 and 16 of the EU Charter derive from the EU Court’s earliest case law on the freedom to pursue economic activity as a general principle of EU law.⁴⁴ Although both rights are, in theory, also subject to the same limitations, the reality is that the CJEU has granted a wide interpretation of the concept of freedom of contract within Article 16, to the detriment of employee-protective legislative rights.⁴⁵ The CJEU has confirmed that both Articles 15 and 16 are closely related, with both protecting individual autonomy, linked to the performance of economic activity. Where the two provisions differ is that the right to work is connected to the concept of free choice and personal autonomy of the individual, while the freedom to conduct a business protects entrepreneurial values, such as freedom of contract.⁴⁶ The right to work is also infused with (and indeed infuses) other fundamental employment rights, such as the right to fair and just working conditions. This symbiosis can lead to a more worker-friendly reading of employment legislation even in the face of the strains posed by the current pandemic.

⁴⁴ Case C-4/73 *Nold* ECLI:EU:C:1974:51.

⁴⁵ Case C-426/11 *Alemo-Herron* ECLI:EU:C:2013:521.

⁴⁶ Advocate General opinion in Case C-190/16 *Werner Fries* ECLI:EU:C:2017:225.

V. Conclusion

The Coronavirus pandemic has clear implications for the world of work, from both the perspective of the wider shape of the economy and on the basis of our individual terms and conditions of employment. The right to work, while often indeterminate and difficult to enforce, can serve to highlight the fundamental nature of the social rights underlying our everyday experiences at work. It also acts as a unifying force, bringing together what can at times appear a rather disparate medley of individual employment rights, found both in international social rights instruments and domestic law. The right to work, being closely linked with autonomy concepts, can act as a strong counterpoint to the freedom to conduct a business of employers, many of whom are now keen to return to business as usual in the wake of the pandemic.