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COVID-19 at Work: Exposing how risk is assessed and its consequences in England and Sweden

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COVID-19 at Work:
Exposing how risk is assessed and its consequences in England and Sweden

Peter Andersson and Tonia Novitz*

1. Introduction

The crisis which arose suddenly at the beginning of 2020 relating to coronavirus was immediately centred on risk. Predictions had to be made swiftly regarding how it would spread, who it might affect and what measures could be taken to prevent exposure in everyday social interaction, including in the workplace. This was in no way a straightforward assessment, because initially so much was unknown. Those gaps in our knowledge have since, partially, been ameliorated. It is evident that not all those exposed to COVID-19 become ill, and many who contract the virus remain asymptomatic, so that the odds on becoming seriously ill may seem small. But those odds are also stacked against certain segments of the population. The likelihood of mortality and morbidity are associated with age and ethnicity as well as pre-existing medical conditions (such as diabetes), but also with poverty which correlates to the extent of exposure in certain occupations.[1] Some risks arise which remain less predictable, as previously healthy people with no signs of particular vulnerability can experience serious long term illness as well and in rare cases will even die.[2] Perceptions of risk in different countries have led to particular measures taken, ranging from handwashing to social distancing, use of personal protective equipment (PPE) such as face coverings, and even 'lockdowns' which have taken various forms.[3] Use of testing and vaccines also became part of the remedial landscape, with their availability and administration being

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[1] Public Health England, Disparities in the risk and outcomes of COVID-19 (2 June 2020 - https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/890258/disparities_review.pdf.

[2] Nisreen A. Alwan, 'Track COVID-19 sickness, not just positive tests and deaths' (2020) 584.7820 *Nature* 170-171; Elisabeth Mahase, 'Covid-19: What do we know about "long covid"?' (2020) *BMJ* 370.

[3] Sarah Dryhurst, Claudia R. Schneider, John Kerr, Alexandra LJ Freeman, Gabriel Recchia, Anne Marthe Van Der Bles, David Spiegelhalter, and Sander van der Linden, 'Risk perceptions of COVID-19 around the world' (2020) 23(7-8) *Journal of Risk Research* 994; Wändi Bruine de Bruin, and Daniel Bennett, 'Relationships between initial COVID-19 risk perceptions and protective health behaviors: A national survey' (2020) 59(2) *American Journal of Preventive Medicine* 157; and Simon Deakin and Gaofeng Meng, 'The Governance of Covid-19: Anthropogenic Risk, Evolutionary Learning, and the Future of the Social State' (2020) 49(4) *Industrial Law Journal* 539.

controlled by different states around the globe in different ways, raising also questions of relative ethical responsibilities of governments and individuals.[4]

This complex assessment of risk has then to be translated into the workplace, raising issues of occupational health in terms of exposure to serious illness, ongoing ill health or even potentially death.[5] Many people at work have also experienced stress linked to overwork caused by the effects of the virus on their jobs, namely the increased scale of demands or the new modes of performance of their tasks, for example telework from home (especially in the context of homeschooling when schools are closed).[6] For others, being in a work environment where they are more exposed to the virus and its effects (even subject to guidance as to the best ways to promote safety) does damage to their mental health.[7]

How these risks to physical and mental health are to be factored into any assessment for well-being at work is a highly topical issue and the focus of our analysis here. Further, we are aware that what is meant by being at work is itself controversial, given a growing tendency for putative employers to 'outsource' more risky forms of work, contracting out work when they could face liability for what would otherwise be regarded as occupational risks.[8] It is in this context that we offer a comparative study of England[9] and Sweden.

Current statistics indicate that the UK had the 14th highest death rate in a league table of the European Economic Area (EEA) and the UK, while Sweden came 19th.[10] Allegations have been

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[4] Jessica Nihlén Fahlquist, 'The moral responsibility of governments and individuals in the context of the coronavirus pandemic' (2021) *Scandinavian Journal of Public Health* 6 February 2021, available at: https://doi.org/10.1177/1403494821990250.

[5] See https://post.parliament.uk/covid-19-and-occupational-risk/.

[6] Sherrill Hayes, Jennifer L. Priestley, Namazbai Ishmakhametov, and Herman E. Ray. '"I'm not Working from Home, I'm Living at Work": Perceived Stress and Work-Related Burnout before and during COVID-19' (2020) available at: https://psyarxiv.com/vnkwa/download?format=pdf.

[7] Regarding healthcare and related workers for example, see: Bradley A. Evanoff, Jaime R. Strickland, Ann Marie Dale, Lisa Hayibor, Emily Page, Jennifer G. Duncan, Thomas Kannampallil, and Diana L. Gray, 'Work-related and personal factors associated with mental well-being during the COVID-19 response: survey of health care and other workers' (2020) 22(8) *Journal of Medical Internet research* e21366; Modesto Leite Rolim Neto, Hiure Gomes Almeida, Joana D'arc Esmeraldo, Camila Bezerra Nobre, Woneska Rodrigues Pinheiro, Cícera Rejane Tavares de Oliveira, Itamara da Costa Sousa et al. 'When health professionals look death in the eye: the mental health of professionals who deal daily with the 2019 coronavirus outbreak' (2020 288 *Psychiatry Research* 112972.

[8] Ruxandra Paul, 'Europe's essential workers: Migration and pandemic politics in Central and Eastern Europe during COVID-19' (2020) 6(2) *European Policy Analysis* 238, at 244 and 256; Tae Eom, 'Outsourced lives in South Korea' (2020) 15 *Yale J. Int'l Aff.* 84; and Christina Hiessl and Jaewook Nahm, ''Decent Work challenges for atypical workers in Korea' in Janice R. Bellace and Beryl ter Haar (eds), *Research Handbook on Labour, Business and Human Rights* Law (Cheltenham: Edward Elgar, 2019), 385 describe this as 'the outsourcing of danger'.

[9] Bearing in mind that England as part of the United Kingdom (UK) is subject to regulation under UK statutes and some UK institutions (such as a Health and Safety Executive which operates across the Union); but also that English common law and English institutions (such as Public Health England) affect treatments of health risks in this jurisdiction, in ways which differ from Northern Ireland, Scotland and Wales.

[10] See https://www.statista.com/statistics/1111779/coronavirus-death-rate-europe-by-country/.

made by labour lawyers that the UK Government's handling of the pandemic has been highly problematic, highlighting the failings of the UK's labour laws and social security systems.[11] In Sweden, the excess mortality rate during the pandemic was relatively low in comparison with Europe more generally.[12] Swedes were recommended to work from home as much as possible, although 'lockdowns' like those implemented in the UK were not imposed. This means that questions concerning risk assessment and risk management at work have also been of paramount importance for Swedish individuals and society.

On 9 February 2022, most COVID-19-related public health restrictions ended in Sweden, as well as free public testing. In England most restrictions were abolished on February 24 and free testing is set to end on 1 April 2022, despite criticisms from scientists and medical professionals.[13] Now is a good time to look back at the different the legal responses to the crisis and also to consider the legal duties of employers now that such public health measures have been lifted. The pandemic is in a new phase, arguably making everyday occupational health and safety issues such as risk assessment more important than ever.

In this article, we consider the private and public labour laws and regulatory systems which evaluate and regulate risk at work in our respective countries. The scope (and limitations) of their application and operation have in various respects been exposed in the COVID-19 crisis, such that there may be scope for learning from each others' successes and failings. We should stress at the outset the limitations of this comparative analysis. We are not considering the availability of sick pay and various benefits and allowances made available over the period of the pandemic, and their relative adequacy or otherwise, which has been discussed extensively elsewhere.[14]

We see risk assessment as playing two roles outlined in the next part of our paper. One is pre-emptive so as (in regulatory terms) to prevent harms rather than only compensating for such harms after the fact. The second role is defensive, protecting an employer from liability by demonstrating that due care was taken. Both roles have inherent problems that comes to light in the COVID-19 pandemic.

We then go on to examine who is the legitimate subject of any risk assessment: which 'employees', 'workers' and even 'independent contractors' are the legitimate subject of interest? The fourth part considers what risks are deemed relevant, physical or psychological? Finally, we consider the relevant roles of different actors, which goes beyond a standard dichotomy between 'governments and individuals', considering the functions of labour inspection bodies, employers and trade unions, and scope for remedial redress initiated by individuals at work. We note that the aversion of risk raises issues around provision of state support, including inspection, and engagement with collective worker voice that require further attention.

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[11] Simon Deakin and Tonia Novitz, 'Covid-19, Labour Law, and the renewal of the social state' (2020) 49(4) *Industrial Law Journal* 493; K.D. Ewing and Lord John Hendy, 'Covid-19 and the failure of labour law: Part 1' (2020) 49(4) *Industrial Law Journal* 497; David Mangan, 'Covid-19 and labour law in the United Kingdom' (2020) 11(3) *European Labour Law Journal* 332; and Tonia Novitz. 'COVID-19 and Labour Law: United Kingdom' (2020) 13(1S) *Italian Labour Law E-Journal* available at: https://illej.unibo.it/article/view/10808.

[12] https://www.svd.se/sveriges-overdodlighet-tredje-lagst-i-norden

[13] 'Covid-19: Scientists and medics warn that it is too soon to lift all restrictions in England' BMJ 2022; 376 doi: https://doi.org/10.1136/bmj.o469 (22 February 2022).

[14] See the special issue of the (2020) 13(1S) *Italian Labour Law E-Journal* available at: https://illej.unibo.it/issue/view/868; and the special issue (2020) 11(3) *European Labour Law Journal* available at: https://journals.sagepub.com/toc/ella/11/3.

We suspect that the similarities and differences that we identify reveal also underlying societal norms, such as the risks which are considered tolerable and how we accept this being decided.[15] In particular, the ways in which risks are framed in the Swedish system as needing to be avoided, as opposed to managed, seems to have made a difference in the context of the coronavirus crisis. What may also have played a part in more effective management of risk is the collective representation of workers through Swedish processes.

2. What do we mean by 'risk' and its 'assessment'?

Terms like hazard, risk and risk assessment need to be discussed and analysed in the field of what is described in England as 'occupational health and safety' and in Sweden as 'work environment law'. This is often regarded as a practical, rather than a legal issue, although the two systems have a common legal heritage. The first Swedish law on work environment – the Work Hazards Act of 1889 - was inspired by the old English Factory Acts of the 19th century,[16] and both state the fundamental principle that the employer has an obligation to prevent the employee from being exposed to illness or accidents, taking into account the nature of the work. However, it is notable that the scope of that duty differs in England and Sweden. In England, the Health and Safety at Work etc. Act 1974, section 2(1) states that: It shall be the duty of every employer to ensure, *so far as is reasonably practicable*, the health, safety and welfare at work of all his employees'. (Our emphasis). In Sweden, Chapter 3, section 2 of the Swedish Work Environment Act states that the employer must take *all necessary measures* to prevent the employee from being exposed to illness or accidents.[17] This may lead to cultural differences in terms of what is descrived as a risk. The English approach may lead to more risks being identified, not all of which may reasonably be practicable to address, while the identification of risk under Swedish law is at least apparently a more serious matter. This section of our paper considers the concept of risk and the role of risk deterrence in English and Swedish legislation. This section then goes on to consider in greater depth this issue of what risks are regarded as 'tolerable' at work, and the mechanisms by which such an evaluative exercise has been carried out in England and Sweden in relation to pre-emptive action concerned with the COVID -19 crisis.

[15] Cf. Frank M. Snowden, *Epidemics and Society: From the Black Death to the Present* (Yale University Press, 2019). See also for a contrast between UK and Swedish approaches, Daniel Blackburn, 'Impacts of Covid-19 on Work and Challenge for Union Rights' (2020) 27(3) *International Union Rights* 2, citing mutual trust in Sweden as an explanation of why a different path was possible there to that taken in the UK.

[16] Hjalmar Sellberg, *Staten och arbetarskyddet 1850-1919* (Almqvist & Wiksell, 1950), 14.

[17] In Sweden, the older versions of the law (the Worker Protection Acts 1912 and 1949 as well as the original Work Hazards Act 1889) were expressed in the same way as the current English requirement – to take all *reasonable* measures. When the current Work Environment Act came into force in 1978 the wording was changed. The motive was that the older, more restrictive, wording led to too much consideration for the employers' economic situation, see prop. 1976/77:149, at252.

A reflexive approach to risk

The concept of '*risk'* can be described in different ways. One basic definition is that we are faced with a situation of 'risk' when circumstances may, or may not, turn out in a way that we do not wish for.[18] Often, the term risk is connected to when there is a probability that is calculable, although such calculation may not always be straightforward or even possible.[19] Usually, we talk about risk not only as a probability but also in terms of the severity of the negative outcome.[20] According to the Swedish Work Environment Authority's (the SWEA) website a 'risk is the probability of a dangerous event or exposure occurring and the consequences if it occurs, in the form of injury or ill health'.[21] The English counterpart, the Health and Safety Executive (the HSE), has a similar definition, stating on its website that under the relevant rules employers must identify hazards and 'decide how likely it is that someone could be harmed and how seriously (the risk)'.[22] From the perspective of law it is most interesting to view risk not simply as a problem to be solved, but as encapsulating a way of approaching problems, and a step on the way to resolving them. The association between risk and decision making is important in the legal context.[23]

Risk in law is closely connected to responsibility of different kinds. The concept of responsibility in occupational health and safety law is to a large extent based primarily on its *ex ante* aspects, on prevention. Risks are to be managed; preferably removed. Responsibility *ex post* for compensation or criminal prosecution can arise, but above all occupational health and safety law aims to be proactive not reactive.[24]

The concept of *risk assessment* often is defined as the overall process of risk analysis and risk evaluation. *Risk analysis* in this context is a systematic use of available information to identify hazards and to estimate the risk to individuals, property and the environment. A risk analysis is proactive, dealing with potential accidents and injuries, and contains three main steps: hazard identification, frequency analysis and consequence analysis. *Risk evaluation* according to this terminology is a process in which judgements are made on the tolerability of the risk on the basis of a risk analysis and taking into account factors such as socioeconomic and environmental aspects.[25]

During the 1980s, risk came into focus on in the fields of sociology and law and the term *risk society* was introduced,[26] describing a society where we increasingly live on a high technological frontier which no one completely understands and which generates a diversity of possible futures, which are to be managed in different ways.[27] This links to risk as a complex and incalculable concept. Connected to these theories were the idea of *reflexive law*, which is characterized by that

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[18] Jenny Steele, *Risks and Legal Theory* (Hart Publishing, 2004), 6.
[19] Ibid., and Sven Ove Hansson, *The Ethics of Risk* (Palgrave Macmillan, 2013), 9.
[20] Hansson (2013), 9.
[21] https://www.av.se/arbetsmiljoarbete-och-inspektioner/arbeta-med-arbetsmiljon/systematiskt-arbetsmiljoarbete-sam/riskbedomning/
[22] https://www.hse.gov.uk/simple-health-safety/risk/index.htm
[23] Steele (2004), 7.
[24] Peter Andersson, *Vidta alla åtgärder som behövs* (Jure, 2013).
[25] Marvin Rausand, Marvin, *Risk assessment; theory, methods, and applications* (Wiley, 2011), 7ff.
[26] Ulrich Beck, *Ecological Policies in an Age of Risk* (Polity Press, 1995).
[27] Anthony Giddens, *Modernity and Self Identity* (Polity Press, 1999), 3 and ch 4.

it restricts itself to the installation, correction, and redefinition of democratic self-regulatory mechanisms – not the outcome of social processes.[28] One reason for introducing reflexive law is uncertainty connected to new risks. If there is a lack of knowledge concerning how to prevent a new type of hazard it is not possible to make substantive rules; instead, the law can focus on good procedures. The question is of course what are good procedures – their timing and those which participate in an evaluative process, as well as the scope for their review dependent on new information. Procedures must be timely and of course who participates in such procedures will also matter.

Legal frameworks promoting assessment of risks

'Systematic work environment management' as it was introduced in Sweden in 1991, or 'management of health and safety at work' as it is known in England, has sought to detect risks before something has happened by investigating to make risk assessments, take relevant measures and follow up on the measures taken.[29] This process is also promoted by the ILO Occupational Safety and Health Convention, 2006 (No. 187).[30] According to Article 2(1) of the Convention, members shall promote continuous improvement of occupational health and safety to prevent occupational injuries, diseases and deaths by the development of a national policy, national system and national programme. Article 3(3) states that in formulating its national policy, each member, in light of conditions and practice and in consultation with the most representative organizations of employers and workers, shall promote basic principles such as assessing occupational risks or hazards. Such measures are also obligations in England and Sweden by virtue of Article 3 of the Council of Europe's European Social Charter.[31]

Risk assessments are also required by the EU Framework Directive on Safety and Health at Work (Directive 89/391 EEC). Article 6 lays out the general obligations on employers, stating the employer shall take the measures necessary for the safety and health protection of workers (paragraph 1). The employer shall implement health and safety measures on the basis of general principles of prevention including avoiding risks and evaluating risks that cannot be avoided (paragraph 2). Furthermore, the employer shall, taking into account the nature of the activities of the enterprise and/or establishment, evaluate the risks to the safety and health of the workers. Subsequent to this evaluation and as necessary, the preventative measures and the working and production methods implemented by the employer must assure an improvement in the level of protection and be integrated into all activities at work. Also, according to Article 9, the employer shall be in possession of an assessment of the risks to safety and health at work, including those facing groups of workers exposed to particular risks.

In England, Article 3(1) of the Management of Health and Safety at Work Regulations 1999 requires that every employer shall make a suitable and sufficient assessment of the risks to the health and safety of his employees to which they are exposed whilst they are at work for the purpose

[28] Gunther Teubner, 'Autopoiesis in Law and Society' (1984) 18 *Law and Society Review* 291; Ralf Rogowski, *Reflexive Labour Law in the World Society* (Edward Elgar, 2013).
[29] HSE (https://www.hse.gov.uk/pubns/hsc13.pdf). Swedish Work Environment Authority, https://www.av.se/globalassets/filer/publikationer/broschyrer/english/guide-to-improving-the-work-environment-adi683eng.pdf
[30] Ratified by the UK in May 2008 and by Sweden in June the same year.
[31] Ratified by both England and Sweden, although Sweden is additionally party to the enhanced Article 3 of the Revised European Social Charter 1996.

of identifying the measures that need to be taken to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions. The framework set out in the Swedish Work Environment Act is complemented by more detailed rules in the SWEA's Provision (AFS 2001:1), which provides that under section 8, the employer shall regularly investigate working conditions and assess the risks of any person being affected by ill-health or accidents at work. When changes to the activity are being planned, the employer shall assess whether the changes entail risks of ill-health or accidents which may require measurements. The risk assessment shall be documented in writing. The risk assessment shall indicate which risks are present and whether or not they are serious. The guidance on section 8 says the word 'risk' refers to the likelihood of ill-health or accidents at work occurring and the consequences of such occurrences. Risks at work can lead to injury in both the short and long term. The gravity of the risk has to be decided in each particular instance.There is currently in 2022 a proposal for further reforms regarding general obligations to make risk assessments in Sweden.[32]

Tolerability of risk

Deciding which risks that are tolerable is an intrinsic part of making a risk assessment. It involves ethical problems that are difficult due to the uncertainty usually present, complex causation and the forward-looking nature of risk assessment.[33] To what extent does everyone have a moral right not to be exposed to risk of negative impact, such as damage to health, through the actions of others? How can this right, if we accept it, be limited in ways so that social practices such as work are possible, but at the same time seeking a fair distribution of risks? To what extent does consent matter, for example when given by an employee in a certain work setting?[34] Is there such a thing as acceptable risks?[35]

The English legal system of occupational health and safety is quite open and detailed about the fact that risk assessments lead to decisions about accepting certain levels and types of risks for workers. According to the HSE, risks must be as low as reasonably possible (the 'ALARP' principle) which means risks are to be weighed against the trouble, time and money needed to control it.[36] The HSE has adopted a framework for deciding 'the tolerability of risk' (TOR).[37] According to this framework risks can be broadly acceptable, tolerable or unacceptable. This approach was consolidated post the financial crisis, when in the context of public spending cuts, 'the coalition Government in the UK took a series of Ministerial-level decisions that created a new

[32] https://www.av.se/om-oss/regel-och-foreskriftsarbete/regelfornyelse/arbetsmiljoverkets-nya-regelstruktur/

[33] Hansson (2013), 21 et seq. has shown how utilitarianism, deontological theories, rights-based theories and contract theories all fail to cope with assessing risk ethically.

[34] See Hansson (2013), 99 and 108: 'Exposure of a person to a risk is acceptable if (i) this exposure is part of a persistently justice-seeking social practice of risk-taking that works to her advantage and which she e facto accepts by making use of its advantages, and (ii) she has as much influence over her risk-exposure as every similarly risk-exposed person can have without loss of the social benefits that justify the risk-exposure.' On Hansson concerning consent, see 117.

[35] Steele (2004), 172.

[36] https://www.hse.gov.uk/managing/theory/alarpglance.htm. Also, see Steele (2004), 169.

[37] Established formally under the 1974 Act and see for the historical evolution of its statutory powers, https://www.hse.gov.uk/aboutus/timeline/index.htm.

category of "low-risk" workplace which effectively removed the majority of UK workplaces… from routine, unannounced inspections'.[38] Within the group of tolerable risks, the risks must be reduced to be as low as reasonably possible, but some risks must be tolerated.[39]

In the Swedish system, the rules categorically demand that the employer must *take all necessary measures* to prevent hazards (with regard to the nature of the work) and the SWEA states on the website that the purpose or risk assessments is to make sure that *no one* becomes ill, injured or dies from the job.[40] Risks are to be classified in terms of how serious they are,[41] and the underlying idea is that this classification will decide how the employer must prioritise when taking action regarding the risks. There is no expressed room for 'tolerable' risks in Swedish work environment law.

Pre-emptive and defensive roles of risk assessments

Risk assessments are increasingly being emphasized as *the* main legal tool to prevent injuries and illness at work. Demanding employers to contiguously assess risks is a reflexive way of obtaining a forward-looking responsibility *ex ante* for protecting workers. This is the pre-emptive role of risk assessment which we identified in the introduction to this paper. Risk assessments also have a more defensive, backwards-looking role of limiting employers' responsibility *ex post.* The trade off is the defensive role that a risk assessment and its implementation may play, limiting employer's liability *ex post facto*. According to Luhmann, risk assessment is akin to an 'advance confessional', which implies that its proper conduct leads to absolution.[42] Both these functions or roles shall be investigated in this paper, with focus on risk assessments in the COVID-19 pandemic. Both entail possible problems.

The pre-emptive role of risk assessment is compromised if there is too much focus on the formal requirements to document a risk assessment, instead of taking action to remove risks. Also, if a risk assessment is being carried out poorly, this can lead to injury for the employee without responsibility for the employer. Beck has argued that the institutions of industrial society have historically weakened the idea of responsibility by adhering to the assurances of risk assessment.[43]

In the UK, the Government guidance in all types of work relating to the coronavirus pandemic stated that employers 'must share the results of your risk assessment with your employees'. This guidance added: 'If possible, you should consider publishing it on your website (and we would expect all businesses with over 50 employees to do so).' To demonstrate that this risk assessment had been completed, they stated that employers and businesses should display 'a notification in a prominent place in your business and on your website' stating that they were staying 'COVID-

[38] Andrew Moretta and David Whyte, *International health and safety standards and Brexit* (Liverpool: Institute of Employment Rights, 2020), 29 who noted that 53% of sudden injury deaths in the workplace occurred in what the Government had defined as low risk working activities.
[39] https://www.hse.gov.uk/managing/theory/r2p2.pdf. See at 42 et seq.
[40] https://www.av.se/arbetsmiljoarbete-och-inspektioner/arbeta-med-arbetsmiljon/systematiskt-arbetsmiljoarbete-sam/riskbedomning/
[41] Ibid.
[42] As cited in Steele (2004), 8.
[43] Beck (1995).

secure'.[44] One problem was with the nomenclature 'COVID-secure'. Coined by Public Health England and translated by Government guidance and the HSE into risk assessments (and their notification to the public),[45] this arguably created a false sense of confidence in the formalistic measures taken, regarding hand sanitizers or use of screens. As of 8 August 2020, only 8666 COVID-19 notifications had been made to the UK HSE (including 125 deaths by employers in compliance with the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013. As at 3 February 2022, 93,000 workers were recorded as having suffered from COVID-19 in 2020/21 which they believed was due toexposure to coronavirus at work. A further 645,000 workers had reported that they were suffering from a work-related illness caused or made worse by the effects of the coronavirus pandemic. However, only 32,110 cases had been reported to the UK Enforcing Authorities by employers believing that the virus had been contracted at work.[46] It seems from the low numbers notified that, if there was compliance with PHE and Government guidelines by an employer, then employers took the view that there could not have been infection at work.

In Sweden, many more notifications have been issued. As of February 2022 the SWEA had received more than 60,000 notification of serious Corona incidents, which is a significant difference to the UK given the respective population sizes of the two countries.[47] In Sweden, criticism has been raised that the system still is a way of limiting responsibility since sending a notification can lead to a false sense of having acted to protect workers against the virus, while in reality having done nothing.[48]

Various concerns have arisen in Sweden and the UK regarding risk assessment. The first is coverage. Employers have to conduct risk assessments, but in respect of whom should they do so? This has been a live issue in litigation in the UK context, with respect to more precarious workers represented by the UK Independent Workers Union of Great Britain (the IWGB) and is arguably an unstated issue with respect to informal workers in Sweden. The second is, which risks matter and why. The peculiarities of the COVID-19 pandemic, namely risks associated with mental as well as physical health require attention. Also important is that a Government prescribed risk assessment is not sufficient to show that a workplace is fully 'COVID-secure' – the potential that infections can still occur onsite needs to be accepted and investigated. The third issue we consider is that of actors and agency, including how collective worker voice is represented within the risk assessment process and how employers can be held to account in our respective jurisdictions.

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[44] For the form of the notice, see: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/951736/staying-covid-19-secure-notice.pdf.

[45] See HSE Business Plan 2020/21 (Updated November 2020) available at: https://www.hse.gov.uk/aboutus/strategiesandplans/businessplans/plan2021.pdf, p.22.

[46] See https://www.hse.gov.uk/statistics/coronavirus/index.htm.

[47] https://www.av.se/om-oss/press/jobbrelaterade-coronaanmalningar/tillbudsanmalningar/. The Swedish population is 10.3 million and the working population is approximately 5 million. The UK population is 67.22 million and the working population is estimated at 32 million. See the statustuica website: https://www.statista.com/.

[48] Confederation of Swedish Enterprise: https://www.svensktnaringsliv.se/sakomraden/arbetsmiljo/arbetsmiljoverkets-tvara-kast-anmarkningsvarda_1168048.html.

3. Coverage of risk assessments: employees, workers and those deemed self-employed

A crucial issue in both England and Sweden is who is covered by risk assessments, in the context of an increasing incidence in precarious and outsourced work, which has become much more common, as 'management control of both commercial risk and management of workplace health and safety are passed down the supply chain…'[49] The SWEA's vision is: 'No one shall get ill, be injured or killed at work'.[50] The idea of a holistic approach to work environment protection is strong.[51] The UK HSE has been more reluctant to embrace such a universal principle, supporting the government's attempts to distinguish between employees, workers and independent contractors in terms of maintaining legal technicalities which would disadvantage the more vulnerable in the English labour market, although the English courts have now corrected that approach in response to litigation brought by the IWGB (discussed below), albeit to a limited extent. Those judgments still retain technical distinctions between 'employees' and 'workers' under UK labour law and between 'workers' and independent contractors under EU law.

In Sweden and the UK, risk assessments cover (at a minimum) risks to whoever is defined under EU law as a 'worker'. This can be taken to be defined with reference to EU Court of Justice case law as 'a person who, for a certain period of time, performs services for an under the direction of another person in return for which he receives remuneration'.[52] However, both English and Swedish law identifies as particular to an 'employee' the entitlement to be protected from dismissal. Sweden also makes specific provision for 'workers equivalent to employees', while UK legislation identifies the need for protection also of other types of 'worker' (than an employee).[53] In the UK, the term 'worker' encompasses all those who are regarded as 'employees' hired under a contract of employment, but also those 'limb (b)' workers hired under a contract to provide personal services to someone who is not their client or customer'.[54] Workers may not be able to claim rights to protection from dismissal, but can claim the national minimum wage, working time protections, rights as trade union members and, in a limited way as we shall see below, certain health and safety entitlements. Notably, in the context of increasing hire of casual labour through platforms and related digital means, especially during the pandemic when home delivery of goods

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[49] Moretta and Whyte (2020), 9.

[50] WEA: https://www.av.se/om-oss/.

[51] The Swedish Work Environment Act also covers categories such as persons undergoing education or training, with the exception for small children in pre-school are to be treated as employees, which means most rules of the Act – including the rules about risk assessments – are applicable for their protection. The same goes for persons in institutional care performing work that they have been assigned. See Chapter 1 section 3 in the Work Environment Act.

[52] Case C-256/01 *Allonby v Accrington and Rossendale College* [2004] ECR I-873, para. 67. Although note the controversial aspects of this definition, as discussed in Nicola Kountouris, 'The concept of "Worker" in European Labour Law: Fragmentation, autonomy and scope' (2018) 47(2) *Industrial Law Journal* 192.

[53] E.g. Employment Rights Act 1996, s.230.

[54] For a full outline of this distinction and its relevance, see Ian Smith et al, Smith and Wood's *Employment Law,* 14th ed. (OUP, 2020), ch 2 and also the judgment of the UK Supreme Court, which is the most authoritative recent statement on application of 'limb (b) worker' status in *Uber BV v Aslam* [2021] UKSC 5, 19 February 2021.

and services has flourished, this limited approach to protection of the most precarious workers has been troubling.

Recent UK case law on protection of 'workers' who are not 'employees'

In the UK, controversy regarding employment status has been exposed by the coronavirus pandemic. For example, issues have been raised regarding statutory exclusion of certain types of worker from statutory sick pay and Coronavirus Job Retention Scheme (CJRS). Uber drivers represented by the Independent Workers of Great Britain (IWGB) argued the measures taken by the government were indirectly discriminatory on grounds of sex and race under EU law, also in breach of Article 14 of the European Convention on Human Rights and the Equality Act 2010 public sector equality duty, but failed in those judicial review proceedings.[55] This was also arguably troubling for broader health-related reasons, since failure to access sick pay can mean those who are infectious feel obliged to continue working to support themselves and their families, having significant public health implications.[56]

More relevant for our purposes was a later judicial review case regarding the entitlement of those engaged in low-paid and precarious work in the 'gig economy' to health and safety protections under European Union (EU) law, with reference to the 'Framework Directive' on measures to encourage improvement and the health and safety of workers at work[57] and the 'daughter' Directive relating to Personal Protective Equipment (PPE).[58] It was alleged by the IWGB that neither Directive had been correctly transposed into UK domestic legislation. A judgment of the Queen's Bench Division of the High Court corrected certain anomalies,[59] notably shortly before the British exit of the EU (Brexit), with the legal effects that entails.[60]

This second IWGB case was directly concerned with the health risks to which couriers for delivery services and drivers of private hire vehicles were exposed in the absence of PPE. There was reliance (notably not on HSE guidance) but rather on an independent report from the Fairwork Project of April 2020 which had recommended, among other social distancing measures, access to PPE.[61]

The High Court made reference to EU social policy competence relating to health and safety under Articles 151 and 153 of the Treaty on the Functioning of the EU and Article 31 of the EU Charter of Fundamental Rights, noting the statement that this was a right of 'every worker'. The aim of the Framework Directive, set out in Article 1 is 'to encourage improvements in the safety and health of workers at work' and to that extent sets out 'general principles concerning the prevention of occupational risks' as well as 'the elimination of risk and accident factors'. It is not

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[55] *R (Adiatu) v HM Treasury* [2020] EWHC 1554, 15 June 2020.
[56] Tonia Novitz 'The potential for international regulation of gig economy issues' (2020) 31(2) *King's Law Journal* 275 at 284; Ewing and Hendy (2020), pp 509 – 510.
[57] Council Directive 89/391/EC.
[58] Council Directive 89/656/EC.
[59] *R (IWGB) v The Secretary of State for Law and Pensions* [2020] EWHC 3039, 13 November 2020.
[60] See the European Union (Withdrawal) Act 2018; also the European Union (Future Relationship) Act 2020.
[61] Available at : https://fair.work/wp-content/uploads/sites/97/2020/06/COVID19-Report-Final.pdf.

applicable to 'certain public service activities, such as the armed forces or the police' (under Article 2). Article 5 of the Framework Directive sets out the employer's duty 'to ensure the safety and health of workers in every aspect related to the work', while Article 6 links this duty to 'measures necessary… including prevention of occupational risks'. Article 8 of the Framework Directive further makes provision for workers to take appropriate steps to avoid the consequences of any serious and imminent danger to their health, an entitlement to which we will return later in this article. The PPE Directive refers, in Article 4, to conditions for the use of PPE, which are to 'be determined on the basis of the seriousness of the risk, the frequency of exposure to the risk, the characteristics of the workstation of each worker and the performance of the personal protective equipment', which is to be provided free of charge by the employer.

Chamberlain J considered that the reference to 'worker' in each case had to have a single meaning across EU Member States. If that were not the case, 'individual Member States would be free to cut down the category of persons benefitting from the Directive's protections, thereby resulting in "different levels of safety and health protection"… and "competition at the expense of safety and health" – precisely the unsatisfactory situation… the Directive was intended to address.'[62] Moreover, a broad reading of 'worker' was 'supported by Article 31 of the Charter'.[63]

Notably, in the UK the obligations under Articles 5 and 6 are transposed into domestic legislation, namely section 2(1) of the Health and Safety at Work Act 1974, which only applied to 'employees' and not limb (b) workers.[64] However, there is provision for the employer, under section 3(1) of the 1974 Act, to 'conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment are not thereby exposed to risks to their health and safety, although a similar duty is imposed under section 3(2) on 'self-employed persons'. Regulation 3 of the Management of Health and Safety at Work Regulations only required an assessment of '(a) the risks to the health and safety of his employees to which they are exposed at work; and (b) the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking'. These provisions seem to confer protections on limb (b) workers working alongside employees in the employer's workplace, and were accepted by the High Court as satisfactory implementation of the Framework Directive.

Nevertheless, it was found that the right not to be subjected to detriment for refusing to work where there is serious or imminent danger under section 44 of the Employment Rights Act (ERA) 1996 did not adequately respect entitlements under Article 8 of the Framework Directive. Limb (b) workers insofar as they should be able to exercise that entitlement, although they logically (under UK law) cannot claim the protection from dismissal applicable under s.100 of the ERA 1996 applicable only to employees.[65] Finally, there was a gap in UK law regarding access of limb (b) workers to PPE, which indicated a failure properly to implement Article 3 of the PPE Directive.[66]

The date of this High Court judgment indicates that, in UK risk assessment during the COVID -19 pandemic, there was a legal obligation regarding risk assessment for limb (b) workers on the part of an employer, as there was for self-employed persons affected by the employer's undertaking more generally. So, gig workers should have been attended to by an employer when calculating 'tolerable' risks (under the TOR principles). However, it has only been since 13 November 2020 (namely the date of this High Court judgment) that limb (b) workers have been entitled to assert

[62] [2020] EWHC 3039, para. 82(i).
[63] Ibid., para. 82(n).
[64] [2020] EWHC 3039, paras 45-7.
[65] Ibid, paras 123 – 128.
[66] Ibid., paras. 129 – 140.

their concern regarding the severity of risk by stopping work without detriment where this is an appropriate response. Moreover, their entitlement to provision of PPE from an employer as a risk aversion measure has only been operable from this date.

This judgment arguably speaks of a growing acceptance of new modes of working and the need for protection of those facing exploitation in platform and other forms of precarious work; but it also indicates the paucity of protections prior to this litigation initiated by the IWGB which the Government opposed. Notably, the UK Health and Safety Executive (HSE) were not assisting the claimants, but sided with the Government as respondents in this case.

It should also be noted that this case does nothing to ameliorate a long-standing concern regarding risk assessment relating to self-employed persons, raised in 2015 by the Council of Europe's European Committee of Social Rights. On 1 October 2015, there was a legislative amendment in the UK (section 1 of the Deregulation Act 2015) to the effect that section 3(2) of the Health and Safety at Work Act etc. 1974 would not apply to the self-employed if their work activity posed no risk to the health and safety of others, unless they conducted an 'undertaking'.[67] The Committee recalled that for the purposes of Article 3(2) of the European Social Charter 1961 (which the UK has ratified), 'all workers, including the self-employed must be covered by health and safety at work regulations as long as employed and self-employed workers are normally exposed to the same risks'. Therefore, the Committee considered that the situation was not in conformity with the Charter as regards self-employed workers and the long-standing exclusion of domestic workers was also indefensible.[68] No legislative action has been taken on these exclusions of coverage,[69] nor that identified in the IWGB judgment at the present time.

Swedish treatment of precarious workers

In Sweden, as in England, working people can be divided into different categories, such as employees, agency workers, workers equated to employees (similar to English 'limb (b)' workers), and self-employed contractors etc. The starting point in Swedish work environment law is that the Work Environment Act and related provisions give rights to the category 'employees'. The basic rule is found in Chapter 1 section 2, which states that the Act as a whole applies to every activity in which employees perform work on behalf of an employer. The employment contract is basis for the work environment rules - concerning for example risk assessments - being applicable. Although employees are included in the protection that comes from the Work Environment Act, the practical scope of protection in different situations of course is varied, which we will return to later in this article.

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[67] Implementing the Löfstedt Report, criticised in Philip James, The Dangers of 'risk-based policy': Lessons from Löfstedt (Liverpool: Institute of Employment Rights, 2013).

[68] European Committee of Social Rights, Conclusions XXI-2 - United Kingdom on Article 3, 8 December 2017, available at: https://hudoc.esc.coe.int/eng#{%22fulltext%22:[%22UK%22],%22sort%22:[%22ESCPublicationDate%20Descending%22],%22ESCDateDec%22:[%222016-02-28T00:00:00.0Z%22,%222021-02-28T00:00:00.0Z%22],%22ESCDcIdentifier%22:[%22XXI-2/def/GBR/3/1/EN%22]}

[69] Despite being highlighted by the TUC in January 2018, see https://www.tuc.org.uk/blogs/uk-health-and-safety-regulations-break-international-law.

The category agency workers is also covered by the Swedish work environment rules. Agency workers shall be protected by both their employer, the agency, and by their 'hirer'.[70] When it comes to risk assessments the agency worker has a kind of 'double protection'. Not only must the employer, the agency, carry out risk assessments, but also the 'hirer', since the 'hirer' has employer responsibility according to the SWEA's Provisions on Systematic Work Environment Management. Basically, the 'hirer' must make risk assessments regarding the specific work site whereas the agency must assess more overall work environment matters such as the total workload and long term situation of their employee.[71]

A third category can be identified: workers without an employment contract that are *equated to* employees. According to the Swedish Co-Determination in the Workplace Act 1976, Section 1, the term 'employee' shall also include any person who performs work for another and is not thereby employed by that other person but who occupies a position of essentially the same nature as that of an employee. In such circumstances, the person for whose benefit the work is performed shall be deemed to be an employer. This principle is applicable also in work environment law.[72] Workers that are not employees can be equated to employees under certain circumstances, for example that the worker has to perform the work in person, that the relationship between the parties is of a more lasting nature, that the worker is in fact prevented from simultaneously performing similar work of any significance to anyone else, he or she is subject to specific directives or closer scrutiny in the performance of the work and uses machines, tools or raw materials provided by the other party in the work and, basically, is economically and socially equal to an employee.[73] This category has similarities to the English 'limb (b)' workers, but is perhaps more generous in the inclusion within the scope of legal protection. Workers equated to employees are treated just as employees when it comes to work environment and also, in theory at least, employment protection. This means that work environment risk assessments shall be carried out and also that there is protection of an employment when such workers exercise a right to walk out when there is serious and immediate danger to their health.[74]

The category that is most vulnerable, when it comes to coverage of protection by the Swedish Work Environment Act, is the self-employed. To some extent, they must take action to protect their own health and safety under the Act,[75] but in practice their protection is limited since they lack an employer or other actor to take responsibility for them. According to Chapter 3 section 12 first paragraph, the person in control of a workplace must ensure that permanent and other equipment at the workplace can be used by persons who work there without being engaged by her or him as an employee are not exposed to risk of illness or accidents. This rule offers some protection to self-

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[70] According to Chapter 3 section 2 the empoyer must take all necessary *measures* to prevent the employee from being exposed to illness or accidents. According to Chapter 3 section 12 second paragraph of the Work Environment Act, any person who engages agency workers to perform work in her or his business must take the safety measures required by this work.

[71] 1 § AFS 2001:1 and the guidelines to this paragraph.

[72] Prop. 1976/77:149 p. 195.

[73] SOU 1975:1 p. 722.

[74] Hans Gullberg & Karl-Ingvar Rundqvist, *Arbetsmiljölagen* (Norstedts Juridik, 2018), 57.

[75] For example, according to Chapter 3 Section 5 the Work Environment Act, persons engaging in professional activities without employees, alone or with members of their families, are obliged to comply with what is prescribed in this Act and pursuant to this Act concerning technical equipment and substances capable of causing illness or accidents, and also concerning shared workplaces.

employed people who work at a specific work site, controlled by someone else. However, when it comes to risk assessments in the context of the coronavirus pandemic, this rule has not been topic of discussions in Sweden and is perhaps not of much practical importance. Self-employed in many branches are at risk of being infected: cleaners, carpenters and painters who work in their customers' homes, taxi drivers and couriers etcetera. They are protected by social security when sick and in some cases when their business is made impossible due to the pandemic, but to a large extent lack protection when it comes to prevention of illness according to the work environment rules.

One special part of self-employed is those who work via self-employment companies or digital platforms. In Sweden, this group has been targeted by a project commissioned by the Swedish Government and carried out by the SWEA.[76] In the Swedish context, a *self-employed company* mediates temporary assignments. The self-employed performs work for her or his own client. The self-employed company invoices the client, for a certain commission, and is responsible for accounting, VAT reporting, administration, payment of employer contributions and pension provisions etcetera. The company pays out a net amount as salary to the self-employed. This allows a person to invoice without having his or her own company. Examples of assignments that the self-employed perform in visa self-employment companies are food deliveries, craft assignments, education and cultural work. The scope of working hours can range from a few hours per month to more than full time. A *digital platform* is a forum for meetings between those who need a service and those who can perform the service. The self-employed person uses the platform to obtain a certain assignment, which is usually limited in time. Payment of wages is sometimes made via the platform company and sometimes by another company that is linked to the platform company. This is a growing form of work that employs many young people in Sweden, like in other countries. The SWEA has carried out 48 inspections on self-employment and digital platform companies. Two cases have reached the administrative courts. Both concerned risk assessments (although not related to COVID-19). In both cases, the companies successfully claimed not to have employer responsibility and the SWEA's demands were dismissed by the court.[77] The project was completed in February 2022 and the SWEA concluded that the it lacks capacity under the current Swedish Work Environment Act to decide on measures in relation to digital platform companies whose general conditions are similar to the conditions in the two decided cases.[78]

A representative for the Swedish Government called this conclusion 'deeply concerning', calling for legal action to protect platform workers.[79] Labour law researcher Selberg has pointed out that the administrative court's legal reasoning is 'not entirely persuasive' and claims that it is still unclear to what extent platform workers and self-employed are in fact covered by protection of the Work Environment Act.[80] There remains the possibility that, if the Commission's proposals

[76] Arbetsmiljöverket, Återrapportering - regeringsuppdrag om tillsynsinsats med inriktning på nya sätt att organisera arbete, 2022-02-16, dnr 2018/035377 and https://www.av.se/globalassets/filer/publikationer/rapporter/delrapport-regeringsuppdraget-om-tillsynsinsats-med-inriktning-pa-nya-satt-att-organisera-arbete.pdf

[77] Kammarrätten i Göteborg 2021-11-19, case no 4120-21 and 2021-12-09, case no 6394-21.

[78] Arbetsmiljöverket, Återrapportering - regeringsuppdrag om tillsynsinsats med inriktning på nya sätt att organisera arbete, 2022-02-16, dnr 2018/035377, p. 22.

[79] SVD 2022-02-21: Minister till angrepp mot gig-bolagen.

[80] Niklas Selberg, Arbetsmiljöansvar för arbete förmedlat via digitala plattformar – analys, www.jpinfonet.se 22-02-22.

for a draft Directive on Platform Work[81] is adopted, this situation may be addressed in Sweden. Health and safety protections for platform workers in the UK will, following Brexit, not be guided by that instrument and remain uncertain. It seems that the extent of such protection will be decided on a case by case basis, depending on the terms and conditions inserted by the platform in any contract which may affect employment status.[82]

4. Which risks matter and why?

The scale of the risks associated with COVID-19 and its appropriate classification as a biological agent remain controversial, as we saw in litigation at EU level.[83] As stated earlier, according to the Swedish WEA website, a 'risk is the probability of a dangerous event or exposure occurring and the consequences if it occurs, in the form of injury or ill health'.[84] In England, the HSE, has a similar definition, stating on its website that under the relevant rules employers must identify hazards and 'decide how likely it is that someone could be harmed and how seriously (the risk)'.[85] After an initial attempt to underplay coronavirus-related risks, the HSE 2020-21 report has recognised that: 'Industries and sectors that were previously considered low risk from a worker protection or public safety perspective, are now considered high risk.'[86] Both Swedish unions[87] and the WEA[88] saw performing risk assessments as vital to prevent COVID-19 at work. What is less certain is the extent to which such risk assessments will remain a feature of workplace measures relating to COVID-19 now that public health measures are being removed, and whether the remaining risks (after mass vaccination) to the extremely clinically vulnerable and in light of the known risks of 'Long Covid'[89] will be factored into risk calculations.

Both in England and Sweden, to date, there has been a tendency to focus on physical risks to health at work rather than the consequences for the worker's family members and issues relating to mental health and work-related stress. The difficulty with such an approach is that the risk of being infected with COVID-19 in the workplace is a *physical* risk in the obvious sense that a worker can become ill by a virus contracted at work, and a *psychosocial* risk because the risk can lead to fear and anxiety for being infected (which would continue to be relevant for those who are clinically

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[81] COM(2021) 762 final.
[82] See *IWGB v CAC and Roo Foods Ltd* [2021] EWCA Civ 952, cf. the *Uber* litigation discussed above at n.54.
[83] See Case T-484/20 *SATSE v Commission* (2021/C 206/32)
[84] WEA: https://www.av.se/arbetsmiljoarbete-och-inspektioner/arbeta-med-arbetsmiljon/systematiskt-arbetsmiljoarbete-sam/riskbedomning/
[85] https://www.hse.gov.uk/simple-health-safety/risk/index.htm
[86] HSE Business Plan 2020/21 available at: https://www.hse.gov.uk/aboutus/strategiesandplans/businessplans/plan2021.pdf, p.21.
[87] https://www.arbetarskydd.se/arbetsmiljo/stor-oro-hos-vardpersonal-efter-coronadodsfall-6993941?source=carma&utm_custom[cm]=302753248,33270&=.
[88] Arbetarskydd: https://www.arbetarskydd.se/arbetsmiljo/har-ar-arbetsmiljoverkets-rad-om-corona-6989415?source=carma&utm_custom[cm]=302753248,33270&=.
[89] See n.2 above.

vulnerable after February 2022) and, at least in branches of work like health care, stress due to a high workload (which again seems to be continuing post February 2022).[90]

Infection at work as a physical risk

In England, HSE guidance on risk assessments relating to COVID-19 invited UK employers to identify what work activity or situations might cause transmission of the virus, think about who could be at risk, decide how likely it is that someone could be exposed, and act to remove the activity or situation, or if this is not possible, control the risk.[91] This guidance has to be read in tandem with more detailed Government advice. For example, in January 2020, COVID-19 was initially recognised by the Government as a 'high consequence infectious disease', an assessment which was later downgraded in March 2020, affecting the requirements for PPE.[92] Also relevant to assessment of risk, applicable in England was the 'Guidance' given regarding what is safe in different types of workplace, on which there was consultation with Public Health England (PHE).[93] Indeed, the PHE[94] frequently revised health-related guidance on tolerability of COVID-related risks,[95] but did not always responded with more stringent standards, retaining questionable advice on PPE, such as that:[96] 'Workplaces should not encourage the precautionary use of extra PPE to protect against COVID-19 outside clinical settings or when responding to a suspected or confirmed case of COVID-19'.[97] Notably, this does not seem to have been sensitive to the determination of the HSE to set up a PPE taskforce and provide further detailed assistance and advice.[98] Moreover,

[90] 'Record numbers of NHS staff quit as frontline medics battle Covid pandemic trauma' i-News, 7 January 2022 available at: https://inews.co.uk/news/health/nhs-staff-quit-record-numbers-ptsd-covid-pandemic-trauma-1387115.
[91] https://www.hse.gov.uk/coronavirus/working-safely/index.htm#risk_assessment and https://www.hse.gov.uk/coronavirus/assets/docs/risk-assessment.pdf
[92] See https://www.gov.uk/guidance/high-consequence-infectious-diseases-hcid.
[93] Public Health England has since October 2021 been replaced by two bodies, the UK Health Security Agency (UKHSA) and the Office for Health Improvement and Disparities. This change places coronavirus relates issues more clearly under the overarching control of the Department of Health & Social Care and thereby under UK Government ministerial control.
[94] Andrew Watterson, 'COVID-19 in the UK and occupational health and safety: predictable not inevitable failures by government, and trade union and nongovernmental organization responses' (2020) 30(2) *New Solutions: A Journal of Environmental and Occupational Health Policy* 86, at 89.
[95] Ibid., 90.
[96] See https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19/construction-and-other-outdoor-work.
[97] As reported by Ewing and Hendy (2020), at 529. This remains the Government guidance, despite revision in January 2021, see https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19/construction-and-other-outdoor-work.
[98] HSE Business Plan 2020/21 (Updated November 2020) available at: https://www.hse.gov.uk/aboutus/strategiesandplans/businessplans/plan2021.pdf, p.23.

'Guidance' focused on reducing physical risks at work through handwashing and social distancing, not psychological harms such as work-related stress.[99]

Reports under the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013 should be made both 'where an incident at work has led to someone's exposure or possible exposure to coronavirus' or 'when a worker has been diagnosed with COVID-19 and there is reasonable evidence that it was caused by exposure at work and where a worker dies as a result of occupational exposure to coronavirus'.[100] It seems from the low numbers notified that if there was compliance with PHE and Government guidelines by an employer then the HSE has taken the view (as have employers) that there could not have been infection at work. In particular, HSE has discounted the possibility that there could be transmission in aerosol form without adequate PPE and that exposure to members of the public at work could be relevant (rather than infectious workmates or in hospital/care situations). There has been a call on the HSE to more actively encourage notifications and commence investigations,[101] but this has yet to be heeded and seems increasingly unlikely in the wake of downgrading of public health measures following widespread vaccination.

In Sweden, the SWEA's Provisions on Risk of Infection 2018[102] complete the general rules in the Work Environment Act 1977 and in the SWEA's Provisions on Systematic Work Environment Management 2001.[103] The Provisions on Risk of Infection 2018 are directed towards employers, but also persons who engage contract labour. According to section (a) in the Provisions on Risk of Infection 2018, the employer must regularly assess risk of infection. When an employee has work that contains risk of infection, the employer must take into account especially: Which work steps that can contain infection risks, how the infectious matter could cause infection, which and how serious the consequences may be for the employee to be subjected to the infectious matter and for how long employees are at risk to be exposed to infection agents. In 2020, the SWEA quickly acknowledged the virus as a work environment hazard and took steps to regulate it, addressing primarily its physical effects, but also acknowledging psychological harms. It was part of the risk assessment to take into account the available information about risk class according to the appendix, in which SARS-CoV-19 has been classified as risk class 3, which means it is an infectious agent that can cause serious diseases in humans and can pose a serious danger to workers. The Government has suggested the from April 1, COVID-19 will no longer be classified as 'dangerous to society' according to the Swedish Commucable Diseases Act. For the time being, SARS-CoV-19 does however remain classified as risk class 3 in the work environment rules.

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[99] See the risks for example identified by the Government guidance in shops, for which see https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19/shops-and-branches. The stresses associated with, for example, covering for missing colleagues or managing breaches of face covering protocols are not identified..

[100] Watterson (2020), 90.

[101] Raymond Agius, 'Disease and death from work: RIDDOR and covid-19' (2020) 70 *Occupational Medicine* 470, 471-2.

[102] AFS 2018:4.

[103] AFS 2001:1.

In the general debate in Sweden generated both by unions[104] and the SWEA[105] has focussed on performing risk assessments as the most important task for preventing COVID-19 at work. The rules make clear that risk assessments must be done for most types of work, although precisely how to make risk assessments is to a large extent left to the employer to decide, subject to the interventions of worker representatives elaborated below.

Fear and stress at work as psychosocial risk

In England, the Government guidance was focused (in sections on 'identifying risks') on reducing physical risks at work through handwashing and social distancing, not the psychological harms arising from potential exposure, or increased workloads and considering how work-related stress could be averted.[106]

By way of contrast, the SWEA addressed psychological harms on its website as an important question.[107] When it comes to stress and heavy workload, the general Work Environment Authority Provisions on Organizational and Social Work Environment apply.[108] These require the employer to regularly investigate and assess what risks may arise at work,[109] keeping in mind the responsibility to see to that the tasks and authority assigned to the employees do not give rise to unhealthy workloads. This means that the resources shall be adapted to the demands of the job.[110] Heavy workloads in the health care sector during the pandemic, in combination with limited possibilities to recuperate, have numerous times in the Swedish debate been describe as a 'ticking time bomb'.[111] The long term effects of the pandemic on health care workers when it comes to stress are yet to be revealed but there are no doubts about that these factors, according to Swedish work environment law, must be regarded when conducting a risk assessment.

Risks of remote working

Notably, the new emphasis on working from home in the coronavirus pandemic, following from lockdowns and more general advice, did not lead to specific UK Government guidance on risk

[104] https://www.arbetarskydd.se/arbetsmiljo/stor-oro-hos-vardpersonal-efter-coronadodsfall-6993941?source=carma&utm_custom[cm]=302753248,33270&=.
[105] https://www.arbetarskydd.se/arbetsmiljo/har-ar-arbetsmiljoverkets-rad-om-corona-6989415?source=carma&utm_custom[cm]=302753248,33270&=
[106] See the risks for example identified by the Government guidance in terms of 'thinking about risks' in shops, for which see https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19/shops-and-branches. The stresses associated with runs on essential items in supermarkets or covering for missing colleagues or managing breaches of face covering protocols are not identified. For the translation of this approach into instructions for businesses, see Martin Williams, *Covid-19 Business Restart Risk Assessments & Checklists* (2020).
[107] https://www.av.se/halsa-och-sakerhet/psykisk-ohalsa-stress-hot-och-vald/oro/
[108] AFS 2015:4.
[109] 5 § AFS 2015:4 and 8 § AFS 2001:1
[110] 9 § AFS 2015:4.
[111] https://sverigesradio.se/artikel/7607016, etc…

assessments. The rather lax implementation of the EU Telework Framework Agreement of 2002 through consultative practices and the guidance offered by the HSE continues in this respect.[112]

In Sweden, during large parts of the pandemic there has been a request (although never an obligation) to work from home.[113] In Sweden, basic rules of employer responsibility still apply to remote working: risk assessments must be carried out and the employer still has full work environment responsibility. An old rule excluding 'uncontrollable work' from home from the scope of the Work Environment Act was abolished in 2005.[114] To a very large extent however, in practice a shift of responsibility takes place where a lot more tasks are laid upon the employee when working from home. The employee must cooperate and communicate closely with the employer, if work environment issues are to be discovered and managed.[115] Working from home can lead to both physical and psychosocial risks and they are to be assessed by the employer, but how these assessments in practice are to be carried out remains an issue that has not yet been cleared out by legal practice. The main legal issue here is to what extent the employer can be considered to be able to exercise power in the worker's home.[116]

Protecting workers' families and dependents

The section in the UK Government guidance on 'who should go to work' made provision for those who were symptomatic or were otherwise required to self-isolate or shield to be enabled not to attend the workplace.[117] There was also acknowledgement of Public Health England's identification of those more prone to serious illness if exposed to COVID-19, alongside a recommendation of sensitivity relating to 'protected characteristics'. However, concrete issues arising relating to likely disability or sex discrimination was not addressed. For example, due to the law on 'associative' disability,[118] the need to protect a vulnerable family member could have featured as a risk in the assessment guidance or forms in terms of steering workers away from close contact with fellow employees or customers and providing grounds for furlough. There was no

[112] See https://resourcecentre.etuc.org/sites/default/files/2020-09/Telework%202002_Framework%20Agreement%20-%20EN.pdf; there seems to have been no meaningful HSE activity on this issue since 2007: https://www.hse.gov.uk/research/rrpdf/rr600.pdf. Cf. Tony Prosser, 'Europeanization through 'procedures and practices'? The implementation of the telework and work-related stress agreements in the UK and Denmark' (2012) 18(4) *Transfer* 447.

[113] The Public Health Agency states: "Ultimately, it is the employer who decides if and when homework can be allowed." https://www.folkhalsomyndigheten.se/smittskydd-beredskap/utbrott/aktuella-utbrott/covid-19/skydda-dig-och-andra/arbete-hemma/

[114] See Chapter 3 section 4 and Chapter 6 WEA; also https://www.av.se/halsa-och-sakerhet/sjukdomar-smitta-och-mikrobiologiska-risker/smittrisker-i-arbetsmiljon/coronaviruset/arbetsmiljon-vid-hemarbete/

[115] Basic rules in Chapter 3 section 4 and Chapter 6 WEA. See also https://www.av.se/halsa-och-sakerhet/sjukdomar-smitta-och-mikrobiologiska-risker/smittrisker-i-arbetsmiljon/coronaviruset/arbetsmiljon-vid-hemarbete/

[116] Swedish Agency for Work Environment Expertise: https://mynak.se/individuella-forutsattningar-spelar-stor-roll-for-arbetsmiljon-nar-vi-arbetar-hemifran/

[117] See again, for example, https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19/shops-and-branches#shops-3-1.

[118] C-303/06 *Coleman v Attridge* [2008] ECR I-5603.

explicit recognition of this issue. The closure of schools posed significant problems for female workers who then predominantly stayed home with their children to provide home schooling. Recognition of the indirect discrimination experienced by women in this situation, which went on through English lockdowns was also not acknowledged by the guidance.[119]

In Sweden, the protection of a vulnerable family member, falls outside the scope of the concept of work environment. However, the risk for illness of the worker is the employer's responsibility and thus by extension this offers protection for family member that is in a risk group when it comes to corona. It is possible to get compensation from social security for staying home from work to protect family member that is vulnerable to corona, but only under very special circumstances, such as that you are paid by the government to care for the family member. [120] Usually there is no way to get compensated. This risk is not covered very well in the Swedish work environment system either.

In summary, the risk assessment process in England has failed to deal with crucial issues relating to the coronavirus pandemic, concerned with psychological risks, risks associated with home work and risks to vulnerable dependants. The Swedish system, while imperfect regarding the latter, has offered more effective intervention. In both systems, there will now need to be further reflection on the role of testing and vaccination, given recent developments. In Sweden, especially in the public sector, employees have strong protection against employer's demands to get vaccinated.[121] The right for the employee to refuse to take a COVID test is somewhat weaker.[122] In England the requirement of compulsory COVID-19 vaccination in social care and the NHS is now being repealed.[123] In both systems, risk-responsive measures can only be taken that are regarded otherwise as lawful and human rights compliant. We have yet to see what guidance is given to employers regarding the gravity of the risks that remain to the clinically vulnerable after vaccination, or the ongoing issue of Long Covid and its likelihood following any exposure. It seems in February 2022 that there will be little Government guidance on these issues in either country.

5. Actors and issues of agency

We might expect the chief health and safety actors in both England and Sweden to be the two statutory bodies responsible for inspection, namely the HSE and the WEA, respectively. Both have

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[119]Richard J Petts, Daniel L. Carlson, and Joanna R. Pepin, 'A gendered pandemic: Childcare, homeschooling, and parents' employment during COVID-19' (2021) 28 *Gender, Work & Organization* 515; Kate Power, 'The COVID-19 pandemic has increased the care burden of women and families' (2020) 16(1) Sustainability: Science, Practice and Policy 67.

[120] The Swedish Social Insurance Agency: https://www.forsakringskassan.se/privatpers/coronaviruset-det-har-galler.

[121] Petra Herzfeld-Olsson in Lag och Avtal: https://www.lag-avtal.se/arbetsratt/chefen-kan-inte-tvinga-dig-att-ta-vaccin-7006696.

[122] Swedish Trade Union Unionen: https://www.unionen.se/story/aktuellt/kan-jobbet-krava-corona-test

[123] The Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021 and he Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) (No. 2) Regulations 2022. Note repeal of this legislation announced on 31 January 2022, see https://www.channel4.com/news/government-set-to-scrap-mandatory-vaccines-for-nhs-and-social-care-workers-in-england.

significant sanctions at their disposal. However, the HSE has suffered in comparison with its Swedish counterpart, to the extent that the Government and PHE disrupted exercise of its statutory role, prompting concern that the HSE had 'gone missing'.[124] Also significant was the 40% reduction in Government funding of the HSE between 2010 – 2020,[125] which could not be remedied by a quick injection into its budget at the start of the pandemic.[126] Few improvement notices or prosecutions were issued,[127] while in Sweden, the Director General of the WEA stressed the need for thorough inspection of whether an employer made and implemented a risk assessment.[128] Further, the relative efficacy of the HSE and WEA may be attributed not only to funding, but to the respective roles of safety representatives in the English and Swedish systems, the scope of the right to stop work in response to risks. This may be more significant as an operative deterrent to risks at work than potential criminal liability, or indeed the scope in England to insist on the civil liability of recalcitrant employers.

The role of statutory bodies

In the UK, under the Health and Safety at Work Act, the HSE can take action where an employer has failed to assess the risk to their employers or has failed to take sufficient adequate measures to prevent injury to its employees. Under Regulation 8 of the Management of Health and Safety at Work Regulations 1999, Reg. 8, an employer should further establish and where necessary give effect to procedures to be followed 'in the event of serious and imminent danger to persons' at work. Breach can lead to a fine of up to £20,000; with deliberate or serious negligent conduct (leading to lives being endangered) can lead to unlimited fines and/or imprisonment. Powers regarding enforcement are divided between the HSE and local authorities, as allocated by the Health and Safety (Enforcing Authority) Regulations 1998, depending on the main activity carried on at the relevant premises. Local authorities lead in enforcement in 'retail, wholesale distribution, warehousing, hotel and catering premises, offices, and the consumer/leisure industries'.[129] As Moretta and Whyte noted in 2020, the number of health and safety offences in the UK has more than halved in 20 years.[130] A decline in inspections, notices and prosecutions was explained in a

[124] Watterson (2020), 89.
[125] Cf. https://www.hse.gov.uk/aboutus/strategiesandplans/businessplans/plan0910.pdf with https://www.hse.gov.uk/aboutus/strategiesandplans/businessplans/plan1920.pdf.
[126] P. James (ed.), *HSE and Covid at Work: A case of regulatory failure* (Institute of Employment Rights, 2021), 29.
[127] Work and Pensions Committee report, *Department of Work and Pensions' Response to the Coronavirus Outbreak*, published on 5 February 2021 HC 178 (2019–21), discussed by Ewing and Hendy (2020), 525 - 526.
[128] https://www.arbetarskydd.se/arbetsskador/det-finns-mer-att-gora-pa-arbetsplatserna-7011496
[129] https://www.hse.gov.uk/lau/enforcement-allocation.htm.
[130] Moretta and Whyte (2020), 9. They reported 991 prosecutions in the UK 1999/2000 and 394 in 2018/19. For 2019/20 on the most recent statistics, the number of successful prosecutions fell to 325 (out of 342 prosecutions brought). See https://www.hse.gov.uk/statistics/enforcement.htm. The number of enforcement notices has also fallen significantly - https://www.hse.gov.uk/statistics/enforcement.pdf. Note that in England the HSE and local authorities can pursue prosecutions, but in Scotland HSE and local authorities investigate potential offences but cannot institute legal proceedings. Instead, they send a report to the Crown Office and Procurator Fiscal Service (COPFS).

report on European Social Charter compliance by the UK Government as being linked to the targeting of 'key risks', such that 'inspection is concentrated on the higher risk industrial sectors'.[131]

However, it may be more sensibly attributed to the underfunding of UK health and safety inspection and provision post-austerity measures taken after the global financial crisis.[132] HSE funding from UK central government has declined from £235 million in 2009/10 to £129.2 million in 2019/20, amounting to a decline of over 40% and more if this is assessed in real terms sensitive to inflation.[133] In the 2020/21 plan, post the Coronavirus pandemic (as revised in November 2020) the budget was raised slightly to taxpayer (government) funding of £147.7 million due to the need for greater activity during the COVID pandemic.[134]

Despite an intention stated to carry out 110,000 spot checks on workplaces to check that suitable 'COVID-secure' measures had been taken,[135] spot checks were outsourced and carried out by telephone calls,[136] so that by December 2020, not a single prosecution had been made of an employer for failure to provide PPE under the UK Personal Protective Equipment at Work Regulations 1992, although it was common knowledge that PPE shortages had occurred in many workplaces and had been regarded as a key reason for infection in care homes.[137] A Work and Pensions Committee report, considering the *Department of Work and Pensions' Response to the Coronavirus Outbreak*,[138] found that the HSE had ultimately issued only two improvement notices (as report that it had closed down a workplace having turned out to be untrue) and had not inspected any care homes since March 2020.

In Sweden, the supervision authority was more active. There were several inspections concerning COVID-19. Many of these were carried out via telephone or videocall, but covered 2000 workplaces. The Director General of the Authority said that inspection would focus, as usual, on whether the employer has made risk assessments and has an appropriate systematic work environment work.[139]

The legal enforcement of work environment rules in Sweden is largely based on the SWEA, often with input from union safety representatives and sometimes by criminal prosecutors. According to Chapter 7 section 7 of the Work Environment Act, the SWEA may issue to employers and others withs safety responsibility such orders or prohibitions as are needed to secure

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[131] Ibid., 14.
[132] Ibid., 10 – 11.
[133] Cf. https://www.hse.gov.uk/aboutus/strategiesandplans/businessplans/plan0910.pdf with https://www.hse.gov.uk/aboutus/strategiesandplans/businessplans/plan1920.pdf. These reports reveal a decline in annual gross expenditure from £331 million to £226 million.
[134] Amounting to overall annual gross expenditure of £267 million – an additional £14 million was provided by the Government to assist with COVID. See https://www.hse.gov.uk/aboutus/strategiesandplans/businessplans/plan2021.pdf
[135] HSE Business Plan 2020/21 (Updated November 2020) available at: https://www.hse.gov.uk/aboutus/strategiesandplans/businessplans/plan2021.pdf, p.21.
[136] James (2021), 30 – 31.
[137] Ewing and Hendy (2020), 525.
[138] HC 178 (2019–21), discussed by Ewing and Hendy (2020) at 526. See https://committees.parliament.uk/committee/164/work-and-pensions-committee/ and https://committees.parliament.uk/work/130/dwps-response-to-the-coronavirus-outbreak/.
[139] https://www.arbetarskydd.se/arbetsskador/det-finns-mer-att-gora-pa-arbetsplatserna-7011496

compliance with the Work Environment Act or regulations issued pursuant to the Act. A decision to issue an order or prohibition is most often accompanied by a conditional financial penalty. When it comes to supervision of the work environment, it is common that the SWEA inspects whether the employer has made risk assessments and, if not, issues an order to do so. The sanction if an employer does not obey an order or prohibition is an administrative conditional financial penalty. Unlike in England, the Swedish enforcement system is no longer based on criminal sanctions. In a reform of 2013 most remaining criminal sanctions in the Work Environment Act were abolished in favour of 'more effective' administrative sanctions which are easier to award with no need to prove personal culpability.[140]

Safety representatives

Under the UK Safety Representatives and Safety Committees Regulations 1977, safety representatives are provided for where there is a trade union formally recognised by the employer.[141] Where there is no recognised trade union, the employer can choose whether to consult employees directly or through elected representatives under the Health and Safety (Consultation with Employees) Regulations 1996.[142] Under the 1977 Regulations, the employer must share information with and consult those safety representatives on matters affecting the group or groups of employees that they represent. This may include non-TU members. These trade union appointed safety representatives are to be consulted by the employer in compliance with obligations arising under section 2 of the Health and Safety Act 1974, 'which requires every employer to consult safety representatives with a view to the making and maintenance of arrangements which will enable him and his employees to cooperate effectively in promoting and developing measures to ensure the health and safety at work of the employees and in checking the effectiveness of such measures'.[143] These representatives can also be instrumental in setting up a health and safety committee, investigate possible dangers at work and make representations to employers. They can also represent employees in discussions with HSE inspectors and receive information from them.[144] They are trained by the TUC or the trade union concerned and are protected by law from dismissal or other action.

The 1996 Regulations stemmed from the necessity to provide a system of information and consultation in compliance with the EU Directive in the absence of trade union representation. Again, the functions of elected representatives include 'to make representations to the employer on potential hazards and dangerous occurrences at the workplace' as well as 'general matters affecting the health and safety at work' which affect, or could affect, the group of employees they represents.[145] In this statutory context, a lack of mention of elected representatives by the HSE seems strange in relation to COVID-risk assessments. While collective representation of workers in mere 'consultation' (as opposed to bargaining) may not have great influence on an employer's risk assessment, it is curious to see it minimised in HSE instructions.

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[140] Prop. 2012/13:143 and SOU 2011:57.
[141] See section 2 of the Health and Safety Act 1974; and the Safety Representatives and Safety Committees Regulations 1977.
[142] Health and Safety (Consultation with Employees) Regulations 1996, Regs 3 and 4.
[143] The Safety Representatives and Safety Committees Regulations 1977, Reg. 4.
[144] The Safety Representatives and Safety Committees Regulations 1977, Regs 4 - 7.
[145] Health and Safety (Consultation with Employees) Regulations 1996, Reg. 6.

The HSE brochure issued in 2013 on 'Consulting employees on health and safety: A brief guide to the law' sets out these legal obligations,[146] but has not been updated and was downplayed by the HSE in relation to coronavirus risk assessments. The HSE recommended merely that employers 'talk to workers', since 'they will usually have good ideas',[147] seemingly suggesting that it is lawful to bypass established safety representatives. In another pamphlet, 'Talking with your workers about preventing coronavirus', consulting health and safety representatives was presented as an option only once (on page 2) and then was not mentioned again.[148] In this way, English employers neglected the energetic representations made by trade unions regarding checklists, PPE guidance and other matters. [149] Given the far-reaching powers of health and safety committees that can be established on request by recognised trade union representatives in the UK, the lack of any explicit recommendation from the HSE that they be consulted in relation to COVID-19 related risk assessment is troubling.

In Sweden, safety representatives have played a more important role. The right of workers to appoint local safety representatives goes back to 1912 in Sweden. A tripartite system of work environment law based partly on cooperation between the social partners have deep historical roots. The largest trade union in Sweden LO (blue-collar) and the confederation of Swedish employers (private sector) in 1942 agreed on cooperation to promote workplace safety, which to a large extent dominated Swedish work environment policies until the early 1990s.[150] Since then, no large collective agreements on work environment have been made and the legal system have been more and more oriented towards a public law system based on government supervision.[151]

Swedish safety representatives are commonly appointed by a trade union which has concluded a collective agreement to which the employer is party.[152] Although the number of appointed safety representatives and the total time they spend on their task may be decreasing,[153] they still devote an equivalent to more than 5000 full time jobs,[154] compared to less than 300 WEA inspectors.[155] A safety representative 'is responsible, within her or his safety area, for monitoring the safeguards against illness and accidents and compliance by the employer with the requirements' of risk assessments.[156] In the context of the coronavirus pandemic, the WEA has called upon employers to 'get help from safety representatives and have good dialogue with the staff' when making risk assessments. Also, 'safety representatives and employees participating in the various tasks must be

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[146] See https://www.hse.gov.uk/pubns/indg232.pdf, at p.2.
[147] See https://www.hse.gov.uk/simple-health-safety/risk/steps-needed-to-manage-risk.htm.
[148] See https://www.hse.gov.uk/coronavirus/assets/docs/talking-with-your-workers.pdf, 2.
[149] See for example https://www.tuc.org.uk/tuc-covid-19-risk-assessment; https://unitetheunion.org/campaigns/coronavirus-covid-19-advice/; and https://www.unison.org.uk/coronavirus-rights-work/. Discussed by Watterson (2020), 90.
[150] John Sjöström and Kaj Frick, *Worker participation in the management of occupational safety and health – qualitive evidence from ESENER*, Country report Sweden (European Agency for Safety and Health at Work, 2017), 19. https://osha.europa.eu/en/publications/country-report-sweden-worker-participation-management-occupational-safety-and-health
[151] See Andersson. Lagom krav på arbetsmiljön (2019).
[152] Chapter 6 section 2 the Work Environment Act.
[153] Sjöström and Frick (2017), 21.
[154] In 2012: https://arbetet.se/2012/10/19/saknas-100-000-skyddsombud/.
[155] Arbetet: https://arbetet.se/2018/01/15/svart-na-malet-om-300-arbetsmiljoinspektorer/
[156] Chapter 6, section 4 the Work Environment Act.

involved'.[157] Further, under Swedish law, safety representatives can call upon employers to comply with risk assessments without delay, and if not satisfied with the response can seek intervention from the WEA.[158] For example, in November 2020, the WEA approved the request of a safety representative for a specific risk assessment in a preschool regarding prevention of coronavirus infection.[159] As of February 2022, safety representatives have used the legislative provisions to make demands against employers concerning COVID-19 on 328 occations.[160] The power to inform the WEA may sound weak, but in practice this usually carries considerable weight prompting employer compliance.

The right to stop work

Swedish safety representatives gain greater influence from their ability to suspend work temporarily pending a decision by the WEA.[161] Before doing so, the safety representative must make a kind of risk assessment concerning the work that he or she is stopping, considering whether the work involves a *serious* and *immediate* danger to the life or health of an employee. That the danger must be *immediate* means the injury can occur after being exposed to a hazard for a short period of time. By February 2022, there had been 136 stops of this nature concerning coronavirus, which is a significant number, although the number has not increased for the last months.[162] For example, in the Serafen-case,[163] work was stopped to ensure that PPE included face coverings as well as visors, and the WEA in due course agreed, prohibiting work proceeding until this was done. However, this was not always a successful approach, in a case concerning handling of cash on buses, in March 2020,[164] the WEA argued that work should resume on the basis that COVID-19 would not spread through handling of objects.

Notably, this right to stop work which involves immediate and serious danger to life or health is also available to all kinds of workers in Sweden without detriment or dismissal,[165] although not the self-employed. This is consistent with entitlements recognised under Article 13 of ILO Convention No. 155 (ratified by Sweden although not the UK) and arising by virtue of Articles 8(4) and 8(5) of the Framework Directive 89/391/EC. Such a stoppage is permitted in Sweden where the aim is to consult urgently with a supervisor or safety representative.[166] Before exercising the right to refuse work, the worker in question must have assessed the danger. If that assessment subsequently turns out to be incorrect, there will still be protection from liability if at the time of the stoppage that assessment seemed reasonable and therefore justifiable. However, there might

[157] WEA: https://www.av.se/halsa-och-sakerhet/sjukdomar-smitta-och-mikrobiologiska-risker/smittrisker-i-arbetsmiljon/coronaviruset/systematiskt-arbetsmiljoarbete-och-riskbedomning/.
[158] Chapter 6, section 6 the Work Environment Act.
[159] Arbetsmiljöverket enheten för region nord, decision 2020-11-05, 2020/040441.
[160] WEA: https://www.av.se/om-oss/press/jobbrelaterade-coronaanmalningar/begaran-om-atgarder/.
[161] Chapter 6, section 7 Work Environment Act.
[162] WEA: https://www.av.se/om-oss/press/jobbrelaterade-coronaanmalningar/skyddsombudsstopp/
[163] Förvaltningsrätten i Stockholm, 2020-04-30, case 8036-20.
[164] Förvaltningsrätten i Falun, 2020-04-03, case 1301-20.
[165] Chapter 3, section 4 Work Environment Act.
[166] Prop. 1976/77:149, 395.

be a right to dismiss where the assessment is clearly unreasonable or where a stoppage is called despite a finding by the WEA that there is no immediate and serious danger.[167]

In the UK, 'in circumstances of danger' which 'are reasonably believed to be serious and imminent', it is possible to leave the workplace (and refuse to return) or to take appropriate steps to avert that danger. Workers can now claim protection from detriment,[168] while employees have a superior claim to protection from dismissal.[169] At the time of writing, there has been only one English employment tribunal case where a claimant relied on these provisions to assert that potential coronavirus infection constituted such a danger. On the facts, the tribunal found that the employee was stopping work due to general concerns regarding the vulnerability of his children during the lockdown, rather than any specific risk of infection at work.[170] Other case law indicates that this is only an option *in extremis*, where there is no safety representative to take up the concerns.[171] Notably, one cannot seek protection from dismissal when taking strike action in response to a potentially dangerous situation.[172] These rights are not easy to exercise.

Instead, English trade unions sought to exercise influence in other ways. The Trades Union Congress (TUC) argued for a 'national council for reconstruction and recovery' to plan for the adjustment of lockdown and a return for work. [173] However, the Government has not been willing to act collaboratively, offering only minimal consultation on matters such as a return to schools from 1 June 2020 and again from 8 March 2021.[174] By way of contrast, in different parts of the UK, local councils have liaised constructively with schools and teachers' unions around the appropriate mode of re-opening. [175] On matters such as PPE and return to work, trade union representation has been prominent, with extensive advice and support being offered to members.[176] GMB, Unite and the Fire Brigade's Union all produced extensive checklists and guidance for members in evaluating work-related risks, which were largely regarded as 'unhelpful' by employers.[177] There has been little industrial action, although there were occasional instances of spontaneous walkouts, for example at ASOS in response to alleged violation of social distancing rules at work. [178] Workers' more general reluctance to take action may be attributed to a sense of

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[167] See AD 2001:10.

[168] Following the *IWGB* case above *R (IWGB) v The Secretary of State for Law and Pensions* [2020] EWHC 3039, 13 November 2020; by virtue of the s.44 of the Employment Rights Act 1996.

[169] Under the Employment Rights Act 1996, s.100.

[170] *Rodgers v Leeds Laser Cutting Limited*, Employment Tribunal, per Judge Anderson, 1 March 2021.

[171] See *Castano v London General Transport Services Ltd* [2020] IRLR 417.

[172] *Balfour Kilpatrick Ltd v Acheson* [2003] IRLR 683.

[173] https://twitter.com/FrancesOGrady/status/1254683150158114817.

[174] https://www.theguardian.com/education/2020/may/08/not-yet-safe-for-schools-to-reopen-in-uk-coronavirus-crisis-unions-warn; https://www.theguardian.com/education/2021/jan/28/phased-return-to-english-schools-from-8-march-being-planned-say-insiders.

[175] See https://www.thetimes.co.uk/article/coronavirus-unions-say-schools-must-stick-to-2m-distancing-rule-w6b39xkcx; and https://www.bbc.co.uk/news/education-52733452.

[176] See for example https://unitetheunion.org/campaigns/coronavirus-covid-19-advice/ and https://www.unison.org.uk/coronavirus-rights-work/.

[177] Watterson (2020), 90.

[178] https://morningstaronline.co.uk/article/b/500-workers-walk-out-of-asos-factory-after-company-fails-to-enforce-social-distancing, accessed 8 June 2020.

civic responsibility during the crisis, or a fear of losing jobs at a time when they are likely to be scarce. It may also be due to the UK's restrictive trade union laws, including the stringent requirements regarding balloting before a strike can be lawfully called, which are difficult to fulfil at the present time.[179] The TUC has issued its own guidance on return to work risk assessments for its own workers and is in compliance with HSE requirements, publishing this on its website.[180]

Criminal liability

In terms of other options for enforcement, in England and Sweden, there remain residual criminal penalties.[181] According to the English Corporate Manslaughter and Corporate Homicide Act 2007, section 1, an organisation is guilty of an offence if the way in which its activities are managed or organised causes a person's death and amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased. A relevant duty of care can, according to section 2 of the Act, a duty owed to the organisation's employees. Occupational health and safety law provided such a relevant duty of care. Not conducting a risk assessment – or conducting it poorly – can constitute a gross breach of the duty of care and lead to a corporate manslaughter sentence. One example of this is the *Linley Development* case. A worker was crushed when a structurally unsound retaining wall collapsed. The company had among other things failed to carry out a risk assessment.[182]

In Sweden, causing another's death and causing illness at work can be a work environment offence. The term work environment offence is used regarding cases where an injury has occurred, not like in England for a responsibility *ex ante* for lack of preventive measures. The rules are set out in Chapter 3, section 7 of the Swedish Criminal Code, which states that: 'A person who through carelessness causes the death of another shall be sentenced for causing another's death to imprisonment for almost two years or, if the crime is petty, to a fine.' Note also section 8 which provides that: 'A person who through carelessness causes another to suffer bodily injury or illness not of a petty nature, shall be sentenced for causing bodily injury or illness to a fine or imprisonment for at most six months.' Section 10 provides that: 'Where a crime referred to in sections 7 - 9 has been committed by a person with intent or by carelessly neglecting his duty under the Work Environment Act (1977:1160) to prevent sickness or accidents, the punishment shall be for an environmental offence and as provided for in the said provisions…' Although Swedish work environment law is mainly focused on preventing injuries and ill-health, the work environment offence rules is a final mechanism of responsibility if prevention fails.

Making good risk assessments usually keeps an employer free from criminal responsibility, even if a worker is later injured. Here, risk assessments have a defensive role for employers. If a good risk assessment has been carried out and no cause for measure could be found, a subsequent accident is not likely to lead to employer responsibility according to common knowledge; however, this statement is difficult to test legally. There is case law establishing that the *absence* of risk

[179] See the Trade Union and Labour Relations (Consolidation) Act 1992, sections 226 – 234.
[180] See https://www.tuc.org.uk/tuc-covid-19-risk-assessment; and
[181] Breach of Management of Health and Safety at Work Regulations 1999, Reg. 8 can lead to a fine of up to £20,000; deliberate or serious negligent conduct can lead to unlimited fines and/or imprisonment under the Corporate Manslaughter and Corporate Homicide Act 2007, ss 1-2. See regarding the small numbers of prosecutions, Moretta and Whyte (2020), 9.
[182] https://resources.hse.gov.uk/convictions-history/breach/breach_details.asp?SF=BID&SV=4391513001 and https://cqms-ltd.co.uk/landmark-corporate-manslaughter-case/

assessment can be considered to have caused an injury. Although the causal link between an employer not making a risk assessment and a subsequent injury logically always is thin, and despite the high evidentiary requirements in criminal cases, quite a few criminal cases have led to convictions.[183] Up to this point however, no cases concerning work environment offence for causing illness or death by bad or lacking risk assessments of coronavirus has been tried by the Swedish courts. As by December 2020, the work environment prosecutors in Sweden (Rema: Riksenheten för miljö- och arbetsmiljömål) has worked with a total of nine cases where workers have become ill (six cases) or died (three cases) due to COVID-19. All three preliminary investigations into deaths (one nurse, on bus driver and one interpreter) have now been closed. The prosecutors have explained that this was due to not being able to prove where the worker has become infected, at work or in private life.[184] This may also caus difficulties in establishing criminal liability in England.

Civil litigation

In England, a more notable option for enforcement is the prospect of civil litigation[185] as a deterrent to mitigate risk, which could arise in relation to COVID infection at work. However, the fact of risk assessment (whatever its paucity) may indicate that liability would be inappropriate, given the tendency for the statutory provisions regarding health and safety to inform the content of any duty of care owed by an employer to employees.[186] Civil litigation in the UK is possible, but there have not been any civil COVID-related cases reported to date. Instead, our likely reference is the long-standing common law duty which an employer owes to employees to care for their health and safety.[187] This duty can extend to an obligation to provide a safe system of work.[188] Drawing on principles established in work-related stress cases, the overall test would seem to remain 'the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know…'.[189] Despite the reference to 'workers' here, the application of these principles has tended to be to 'employees' on common law principles relating to implied terms under a contract of service rather than the tort of negligence, although this is untested. Recovery for psychiatric injury seems to be subjected to more scrutiny than physical harms suffered at work, but both raise difficult issues relating to causation.[190]

Smith and Woods have noted that the tribunals and courts have tended to construe this common law obligation in line with statutory entitlements under the Health and Safety at Work etc. Act 1974

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[183] For example: Svea hovrätts dom 2009-01-09 i mål B 5411-07, Hovrättens över Skåne och Blekinge dom 2008-12-01 i mål B 1782-07, RH 2004:39. Hovrättens för Nedre Norrland dom 2005-11-15 i mål B 1154-04.

[184] https://arbetet.se/2020/12/16/ingen-arbetsgivare-atalad-for-coviddod/

[185] See *Wilsons & Clyde Coal Co Ltd v English* [1938] AC 57, HL; and *Barber v Somerset County Council* [2004] IRLR 475 HL. Discussed in Smith and Wood's Employment Law, 14th ed. (OUP, 2020), 163 et seq.

[186] Smith and Wood (2019), 176-7.

[187] Smith and Wood (2019), 163.

[188] *Wilsons & Clyde Coal Co Ltd v English* [1938] AC 57, HL.

[189] *Barber v Somerset County Council* [2004] IRLR 475 HL, per Lord Walker of Gestingthorpe at para. 65 citing Swanwick J in *Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd* [1968] IRLR 1 WLR 1776, 1783.

[190] See *Sutherland v Hatton* [2002] ICR 613 CA; and *Barber v Somerset CC* [2004] ICR 457 HL.

and the Management of Health and Safety at Work Regulations 1999, but also observe that, while the implied term is potentially 'very wide', there has been little recent development of its parameters.[191] The difficulty is that enforcement of these statutory provisions through a statutory tort is no longer available under legislation introduced in 2013.[192]

However, failure to respond reasonably to a complaint regarding health and safety can constitute fundamental breach of the contract of employment, leading to a successful complaint for unfair dismissal.[193] There also remains potential statutory protection for 'whistleblowers' on health and safety standards in terms of protection from dismissal and detriment, although this is tightly circumscribed.[194]

In short, the vagaries of civil litigation and the sheer length of time that any action might take (an average of three years, if not longer) mean that this is a cause of action of limited utility. It seems to be available only for employees, rather than workers and others 'at work', strict liability for breach of statutory duty has been abolished, so that a litigant is reliant on establishing reasonable foreseeability of harm and causation independently. While seemingly promoting more individual 'freedom', this seems inadequate compensation for an effective supervisory system, when contrasted with the Swedish model.

In Sweden individual employees and workers cannot make legal claims in courts against employers for breach of their statutory obligations. The safety representatives, usually appointed by the trade unions, can inform the SWEA, which can take legal action against the employer.[195] The 'Swedish model' of labour law does not apply in the work environment law field, which has a more 'paternalistic' structure, treating employees as subjects for Government protection without agency except through collective worker representation (through trade union engagement).

In Sweden compensation for work-related injuries are covered by social security law and collective insurance.[196] An incentive for employers to agree on collective insurance is that once they do, employees are not able to make any claims again the employer for occupational injuries.[197] This means that tort or contract cases about work injuries in Sweden are very rare in general and do not exist concerning COVID-19. This system is is in many instances advantageous for employers, at least when it comes to compensation for sudden accidents. It is however very difficult to get compensated for work injuries caused by illness (not by a sudden accident) and from a preventive perspective it is a problem that there are no costs for employers who cause injuries.

6. Final remarks

COVID-19 exposed the tendency of severe risks to be tolerated under UK health and safety law. Pressure from trade unions led to some extension in coverage for those in the most precarious occupations who are 'workers'. This was significant because it coincided with a tendency for those

[191] Smith and Wood (2019), 176-7.
[192] See the Enterprise and Regulatory Reform Act 2013, s.69.
[193] *British Aircraft Corpn v Austin* [1978] IRLR 332, EAT.
[194] See the Public Interest Disclosure Act 1998, as incorporated into the Employment Rights Act 1996, see for e.g. s.43B et seq.
[195] Chapter 6, section 6 of the Work Environment Act.
[196] Chapters 39-41 the Swedish Social Insurance Code 2010. Trygghetsförskring vid arbetsskada.
[197] Trygghetsförskring vid arbetsskada.

ethnic minorities most vulnerable to coronavirus to be over-represented in these occupations.[198] However, otherwise the HSE did not make clear recommendations for the active involvement of trade union and other collective worker representatives in the handling of COVID-19 risk assessments. While risk assessments were encouraged these focussed on making workplaces appear 'COVID-Secure', rather than addressing the various remaining risks regarding infection or mental health related concerns. Few occupational cases of COVID-19 transmission were reported, but it is improbable that these did not occur. One suspects that measures were taken to avert responsibility rather than genuinely avert risk. The HSE emerges in this process as an underfunded body with relatively minor influence when compared to its Swedish counterpart the SWEA. While a right to stop work remains available to English employees (without fear of dismissal) and to 'workers' (without fear of 'detriment'), this is for various reasons a poor substitute for an effective risk assessment and public inspection system. We will have to wait to see whether civil litigation in the UK can offer employees an adequate remedy against recalcitrant employers over this period. The idea that pre-empting risk is achievable has been challenged in the English context, and its chief role seems to have been to avert responsibility on the part of employers and the state.

The Swedish work environment is based on the idea that employers must take all measures necessary to prevent injuries, illness and death. This is a more ambitious pro-active aim reflected by a wider embrace of those who should be protected under Swedish law and practice generated by the WEA. However, in Sweden too, COVID-19 has highlighted the ambiguous and perhaps unrealistic legal construction concering risk assessments. Since the Swedish system of work environment law does not give individual employees or unions the right to take action against employers to obtain a safe work environment, Government actors such as prosecutors and more importantly the WEA have to take action against employers who do not make risk assessments or act on them. Much has depended on safety representatives (a feature of collective worker representation) to make the system more effective. Worker agency enters only in this way.

We appreciate that no system is perfect, but we do acknowledge that if we return to *ex ante* objective of effective risk assessment, the Swedish system has been shown to be operative and active in response to COVID-19 while we are still waiting for litigation in England. However, as we have shown, there remains scope for improvement and reform in both jurisdictions. The wild card thrown into the pack now is the removal of public health restrictions in both England and Sweden, such that the 'risks' associated with COVID-19 have been tacitly downgraded. We have yet to see, in practice, in either jurisdiction how this will affect risk assessments and, in turn, working conditions. Recent history suggests that Swedish union and safety representatives will continue to be proactive in seeking to secure well-being in the workplace environment. The English experience of risk assessment under HSE auspices suggests that the lesson to be learnt from the last two years is that collective representation in the workplace needs to be strengthened to adequately protect health and safety, in relation to COVID-19 and future infectious diseases. The bare bones of the legal mechanisms are there, but they now need to be bolstered and revitalized, since public health guidance and inspections have not provided the safeguarding for risks that might have been hoped.

[198] See the Public Health England Report (2020) on COVID-19: review of disparities in risks and outcomes - GOV.UK (www.gov.uk) - https://www.gov.uk/government/publications/covid-19-review-of-disparities-in-risks-and-outcomes.