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The Coronavirus and Employers' Liability for PPE

Part 4: Liability Under EU Directives

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1. Employers who meet the definition of being an 'emanation of the state'[1] may be liable to employees for breach of EU Directives under the doctrine of 'direct effect'.

2. The United Kingdom left the European Union at 11.00 pm on 31 January 2020.[2] The European Communities Act 1972 continues to have effect during the implementation period, however.[3] That period ends on 31 December 2020 – subject any potential extension, which the UK Government is currently insisting will not happen.

3. In the context of health and safety duties, interest in this species of liability has been revived since 1 October 2013, following the removal of civil liability for breach of the domestic regulations.[4] Prior to that, there was simply no need to consider direct effect of the relevant directives because the domestic regulations were actionable; they invariably gave a greater level of protection that their respective sister directives (which set out 'minimum requirements'); and any issues with the wording of the domestic regulations would be resolved by the Court's interpretative duty to read them in line with the EU Directives.

4. The question of direct effect is not straightforward in this context, where the Directives have been duly implemented in domestic legislation (i.e. properly transposed), and the principal criticism made of the Member State's effort at implementation is simply that there is no civil remedy in private law for breach. The doctrine of direct effect normally only applies where domestic law cannot be 'interpreted' to provide the same level of protection as the Directives require.

5. In *Redgrave's Health and Safety*, it is suggested that where domestic legislation imposes a criminal sanction, it is "*unclear why a claimant should be able to obtain a civil remedy by reliance on direct effect where such a remedy may not be required by the Directives in the first place*".[5] This is because, amongst other things, the EU law principle of effectiveness would be satisfied by the real deterrent of prosecution.[6]

6. In *R(United Road Transport Union) -v- Secretary of State for Transport* [2013] EWCA Civ 962, it was said that where no enforcement mechanism is set out in the Directive, it is left to the Member State.[7] The Court of Appeal (Davis LJ) found that EU law did not oblige the Secretary of State for Transport to provide commercial

[1] See the definition of that term in *Foster v British Gas plc* [1990] ECR I-3313
[2] Section 1 European Union (Withdrawal) Act 2018. See Section 20 for the definition of 'exit day'.
[3] Section 1A European Union (Withdrawal) Act 2018.
[4] Section 69 of the Enterprise and Regulatory Reform Act 2013
[5] (9th Edition), [2.51], citing the case of *R(United Road Transport Union) -v- Secretary of State for Transport* [2013] EWCA Civ 962
[6] Ibid, [2.55]
[7] EWCA Civ 962, as per Davis LJ at 11

road transport workers with a right to apply to the employment tribunal to seek recourse against an employer in relation to breaks and rest periods. The paragraphs of most general application appear to be as follows:

> *45. The principle [of effectiveness] is as set out above. In Oyarce, Buxton LJ (in dealing with the principle of effectiveness) noted, at paragraph 56, that the requirement is that domestic rules should not render the assertion of the community right 'impossible or excessively difficult': see also case C-432/05 Unibet (London) Ltd v Justitiekanslern, [2007] ECR I-2271 at paragraph 43 ('practically impossible or excessively difficult'). As Mr Eicke submitted, the bar is set very high.*
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> …
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> *47.All this tells strongly against the principle of effectiveness being infringed. The solution devised by Parliament was a proper one. That others may (entirely understandably) think – as apparently the previous government did think and as the claimant does think – that the position could be improved upon by bringing it more in line with the position relating to general workers is, ultimately, nothing to the point. As Sir Richard Buxton said on the application for permission, that an enforcement regime is not ideal does not in itself mean that enforcement is practically impossible or excessively difficult. All of this is strongly reinforced, moreover, by the telling finding of fact by the judge in paragraph 84(viii) of his judgment that there was simply no evidence that the current system of enforcement of the provisions relating to breaks, work periods etc provided under the 2005 Regulations had been found not effective.*
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> …
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> *57…In my view, these passages from the decision in Muñoz do not lend any real assistance to the claimant's case. That Community law may, in some contexts, require the availability of civil proceedings in private law to uphold rights against a competitor does not mean that, in other contexts, and under different regulatory schemes, enforcement may not properly be limited to other means outside the private law. As Advocate General Sharpston observed in Unibet at paragraph 53 of her Opinion, it appeared that in the absence of such a right of action in Muñoz there would have been no possibility for the assertion of the right to enforce the obligation.*

7. Section 33(1)(a) of the Health and Safety at Work etc. Act 1974 makes it a criminal offence to contravene any 'health and safety regulations', which are regulations made under Section 15 of the same Act for the general purpose of Part 1 of the Act. The Introductory Text to both the PPE Regulations and COSHH state

they are made under Section 15; the relevant regulations could therefore be enforced by way of criminal sanction.

8. The 1974 Act also establishes the Health and Safety Executive (HSE)[8], which expressly lists COSHH 2002 as secondary legislation either it or a local authority 'owns' and enforces.[9]

9. Nevertheless, *Redgrave* goes on to say that "*if common law actions in negligence are also one of the domestic means for giving effect to the obligations in health and safety Directives (supplementary to criminal sanctions), an action based on direct effect should be permissible. In other words, if the duty in negligence cannot be moulded to provide the same level of protection as the Directives require, the gap can and should be filled by a civil claim based on direct effect.*"[10]

10. It is also worth pointing out that there seems to be no clear authority dealing with the situation where a Member State originally provided for a civil remedy as a means of enforcing a Directive, which it then subsequently abolished. It is possible it may be argued that the United Kingdom considered a civil remedy was needed in the first instance, and it is unclear what changed to lead to the change of the law on 1 October 2013.

11. In light of those principles, it is necessary to consider whether the relevant Directives would, if directly effective, give greater protection than the common law (if they do not, the point about direct effect is academic).

12. COSHH 2002 implemented, amongst other EU legislation, Directive 2000/54/EC on the protection of workers from risks related to exposure to biological agents at work (seventh individual directive within the meaning of Article 16(1) of the Directive 89/391/EEC).

13. Directive 2000/54/EC created the classification system which lists four risk groups of biological agents, which is replicated in Schedule 3 of COSHH 2002. Coronavirus would seem to meet the definition of either a group three[11] or four agent (the most dangerous) on the basis that it causes COVID-19, *prima facie* a severe human disease (though this is a matter for medical evidence), for which there is currently no vaccine or effective treatment:

[8] Section 10, and see Section 18 et seq
[9] https://www.hse.gov.uk/legislation/statinstruments.htm
[10] Ibid
[11] See Part 3, where the classification of SARS 2003 was discussed

1. group 1 biological agent means one that is unlikely to cause human disease:

2. group 2 biological agent means one that can cause human disease and might be a hazard to workers; it is unlikely to spread to the community; there is usually effective prophylaxis or treatment available;

3. group 3 biological agent means one that can cause severe human disease and present a serious hazard to workers; it may present a risk of spreading to the community, but there is usually effective prophylaxis or treatment available;

4. group 4 biological agent means one that causes severe human disease and is a serious hazard to workers; it may present a high risk of spreading to the community; there is usually no effective prophylaxis or treatment available.

14. Articles 6 and 8 of Directive 2000/54/EC impose the key obligations and warrant close attention:

Article 6

Reduction of risks

1. Where the results of the assessment referred to in Article 3 reveal a risk to workers' health or safety, workers' exposure must be prevented.

2. Where this is not technically practicable, having regard to the activity and the risk assessment referred to in Article 3, the risk of exposure must be reduced to as low a level as necessary in order to protect adequately the health and safety of the workers concerned, in particular by the following measures which are to be applied in the light of the results of the assessment referred to in Article 3:

(a) keeping as low as possible the number of workers exposed or likely to be exposed;

(b) design of work processes and engineering control measures so as to avoid or minimise the release of biological agents into the place of work;

(c) collective protection measures and/or, where exposure cannot be avoided by other means, individual protection measures;

(d) hygiene measures compatible with the aim of the prevention or reduction of the accidental transfer or release of a biological agent from the workplace;

(e) use of the biohazard sign depicted in Annex II and other relevant warning signs;

(f) drawing up plans to deal with accidents involving biological agents;

(g) testing, where it is necessary and technically possible, for the presence, outside the primary physical confinement, of biological agents used at work;

(h) means for safe collection, storage and disposal of waste by workers including the use of secure and identifiable containers, after suitable treatment where appropriate;

(i) arrangements for the safe handling and transport of biological agents within the workplace.

15. In respect of Article 6, one will note the key concepts of 'prevention' and 'control' of exposure, which appear in Regulation 7(1) COSHH 2002. But, one might note the differences in the wording of Article 6(2) of Directive 2000/54/EC, and Regulations 7(1) of COSHH 2002. Particularly the use of the phrase 'technically practicable' in respect of prevention of exposure, and 'lowest level necessary to protect adequately the health and safety of workers' in respect of control. Article 8 provides:

Article 8

Hygiene and individual protection

1. Employers shall be obliged, in the case of all activities for which there is a risk to the health or safety of workers due to work with biological agents, to take appropriate measures to ensure that:

(a) workers do not eat or drink in working areas where there is a risk of contamination by biological agents;

(b) workers are provided with appropriate protective clothing or other appropriate special clothing;

(c) workers are provided with appropriate and adequate washing and toilet facilities, which may include eye washes and/or skin antiseptics;

(d) any necessary protective equipment is:

- properly stored in a well-defined place,

- checked and cleaned if possible before, and in any case after, each use,

- is repaired, where defective, or is replaced before further use;

(e) procedures are specified for taking, handling and processing samples of human or animal origin.

2. Working clothes and protective equipment, including protective clothing referred to in paragraph 1, which may be contaminated by biological agents, must be removed on leaving the working area and, before taking the measures referred to in the second subparagraph, kept separately from other clothing.

The employer must ensure that such clothing and protective equipment is decontaminated and cleaned or, if necessary, destroyed.

3. Workers may not be charged for the cost of the measures referred to in paragraphs 1 and 2.

16. These Articles therefore seem to impose requirements on employers which, by reason of their specificity, are arguably more onerous for employers than their duty under the common law. So, what of direct effect?

17. In Part 3, we considered the case of *Dugmore -v- Swansea NHS Trust* [2002] EWCA Civ 1689. Whilst the question of direct effect of any particular directive was not in issue in that case, because Regulation 7(1) COSHH (1988 and 1994) was actionable, there is nonetheless some important commentary on the interplay of the domestic and EU legislation:

26. These regulations implement European Directives, in particular Council Directive 80/1107/EEC and 88/364/EEC . Neither of these directives has anything to say about the civil liability of employers towards their employees, nor do they impose obligations directly comparable to regulation 7 . Their purpose is expressly preventive. According to the 1980 preamble, the measures taken by Member States to protect workers from the risks related to exposure to chemical, physical and biological agents at work were to be approximated and improved; that protection 'should so far as possible be ensured by measures to prevent exposure or keep it at as low a level as is reasonably practicable'; the sorts of measures involved are limiting or even banning the use of certain agents, suitable working procedures

> *and methods, hygiene, information and warnings for workers, surveillance of their health, keeping updated records of exposure and medical records.*
>
> *27. This all reinforces the view taken by Lord Nimmo Smith that the purpose of the regulations is protective and preventive: they do not rely simply on criminal sanctions or civil liability after the event to induce good practice. They involve positive obligations to seek out the risks and take precautions against them. It is by no means incompatible with their purpose that an employer who fails to discover a risk or rates it so low that he takes no precautions against it should nevertheless be liable to the employee who suffers as a result.*

18. On one reading, that passage of Dugmore suggests that because Directives 80/1107/EEC and 88/364/EEC, implemented by COSHH 1988 and 1994, made no provision for a civil remedy for breach, in providing criminal and civil remedies for breach of COSHH 1988 and 1994, the domestic regulations went *further* than required by EU law. Arguably, that might point against those Directives requiring a private law remedy to be effective.

19. Might that passage in Dugmore still hold good for Directive 2000/54/EC, which was not considered in that case, and which was implemented by COSHH 2002? There are some obvious similarities between that and the two earlier directives. The stated objective of Directive 2000/54/EC in Article 1 is the "*protection of workers against risks to their health and safety, including the prevention of such risks, arising or likely to arise from exposure to biological agents at work*", which is very similar to Article 1 of Directive 80/1107/EEC. Further, there is no mention of either criminal or civil liability in Directive 2000/54/EC.

20. On the other hand, by Article 6 Directive 2000/54/EC does impose obligations directly comparable to those in Regulation 7 COSHH in respect of the duties of prevention and control, albeit with the different wording identified above. Further, compare the wording of the Preamble to Directive 80/1107/EEC which includes the phrases 'so far as possible' and 'reasonably practicable' (cited by Hale LJ in Dugmore), to this paragraph from the Preamble to Directive 2000/54/EC, which suggests a high level of protection is the principal goal of the Directive:

> *(2) Compliance with the minimum requirements designed to guarantee a better standard of safety and health as regards the protection of workers from the risks related to exposure to biological agents at work is essential to ensure the safety and health of workers.*

21. These latter issues may point towards the need for Member States to put in place a more potent system of enforcement to ensure the effectiveness of Directive 2000/54/EC, than might have been the case for the earlier Directives.

22. Ultimately, as with the related issue of Section 69 of the Enterprise and Regulatory Reform Act 2013, the question of whether any relevant Directives are capable are having direct effect is likely to be a key battleground in any future coronavirus related claims.

23. The current system of domestic enforcement, which includes potential criminal sanctions and enforcement by the HSE/local authorities, will need to be scrutinised by reference to the EU principle of effectiveness. Bearing in mind the 'bar is set very high', this looks set to be another highly contentious issue with no obvious answer in the currently decided case law.

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6 May 2020

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