At Amazon, safety and wellbeing do not come first, Nanterre Tribunal rules

Wednesday 22 April 2020, by DREW Sandhya (Date first published: 21 April 2020).

Contents

On 13 March 2020, in what now seems another world, and following reports of mass infection in Eastern France by a gathering of 2500 people, the French Prime Minister Edouard Philippe banned by decree gatherings of more than 100 people except on public transport.
On 16 March 2020, President Macron ordered limitations from 17 March on movement, to halt the Covid-19 pandemic.
The law of 23 March declared a health emergency (état d'urgence sanitaire) for two months from 23 March (L 2020-290 inserting Art L313& 12-20 into the Code de la Santé Publique).
https://www.legifrance.gouv.fr/affichCode.do;jsessionid=CBDAB374C3D86875AF5F062543A106B0.tplgfr27s_2?idSectionTA=LEGISCTA000041747458&cidTexte=LEGITEXT000006072665&dateTexte=20200416
As in the UK, working from home was to be the default option. Where home working was not possible, work was to be organised in order to ensure health and safety. Social distancing was to be observed at work as elsewhere.

Across six sites in France, Amazon France Logistique ('Amazon') employs 6459 employees on permanent and fixed term contracts and 3612 casual staff to deal with its direct orders. Work is done across shifts.

Article L4121-1 of the French Code du Travail requires an employer to take the necessary steps to ensure the safety and protect the physical and mental health of its workers.
https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006072050
In early April, formal notices were issued to Amazon by regional authorities to take such steps, in particular the implementation of barriers and social distancing. Following an inspection at one depot on **8 April**, a labour inspector made observations on the risks of contamination presented by revolving doors on entry and water and coffee machines.
At another of the depots, an inspector noted a failure to ensure social distancing and pointed to the need for complementary measures such as disinfection and regular hand washing.

The trade union alliance l'**Union syndicale Solidaires** https://solidaires.org/ sued Amazon in the Tribunal de Nanterre. It sought closure of the depots on the grounds that, in breach of the early decree – on 13 March – more than 100 people were gathered at Amazon depots.

Alternatively, it sought an order prohibiting sale and delivery of non-essential goods. It defined this as goods which were not food or toiletries or medicine so as to reduce the number of staff to below

100.
Further, it sought a risk assessment by Amazon in relation to the risk presented by Covid-19. It also sought details of workers who had been contaminated and what measures had been taken as well as the taking of measures for psychological health.

Tribunal of Nanterre judgment

In a judgment handed down on 14 April, The Tribunal of Nanterre concluded that the measure limiting gatherings of 100 does not affect the right to conduct business. It therefore rejected the first part of the Union's claim.

However, it found that Amazon was in breach of L4121-1 in a number of ways:

1. It had failed to take preventive steps;

2. It had failed to involve in any meaningful way employee representatives and failed to provide any evidence of discussions;

3. It had failed to assess risk with any precision or systematically or in the context of particular work;

4. It had failed to monitor sickness from Covid 19 or to put in place tracing and containment plans if staff were to become infected;

5. The revolving door for staff presented a gross risk of contamination. The inspector on his visit of 8 April at one of the depots recommended removing the revolving door or opening the door next to it. The inspector commented that the door was often touched and was impossible to clean without queues building up and lack of social distancing;

6. Amazon had closed lockers to all but those who came on public transport or motorbikes. As a result, the inspector noted that coats were left by workstations and posed a risk of contamination;

7. The Tribunal commented on the risk of contamination posed by parcels passing from hand to hand and the risk had not been assessed. Amazon's response had been to assert that protective measures were in place;

8. The Tribunal accepted the observations of the labour inspectors that social distancing was not enforced in the depots;

9. Amazon had failed to carry out adequate training of its staff in light of the heightened risk presented by Covid-19;

10. It had failed to consider harm to psychological health.

Notably, the Tribunal went on to stress the importance of the employer's duty in this time of high contagion and in the context of health services which are overwhelmed.
It ordered Amazon to limit, within 24 hours, its activities of receipt, preparation and delivery of goods to orders of food, toiletries and medicine until it has carried out, in association with employee representatives, an assessment of the work risks in all its depots presented by Covid-19.
Amazon was required to comply with its duty under Art L 4121.

The Tribunal put in place a penalty in the event of default of its order. With turnover in 2018 of €431

263 800, **the Tribunal concluded that a daily fine of €1 million was necessary to ensure respect for its judgment.**

The judgment is notable for the willingness of the Tribunal to grant an injunction to enforce the employer's duty.
It is also notable for the emphasis the Tribunal places on the importance of working with employee representatives, which is not set out specifically in Articles L4111- L4122 but is nevertheless an underpinning principle to the Code du Travail.
Thirdly, Amazon's business model built on technology will enable monitoring of compliance. Finally, this does not cover Amazon marketplace dealings.

Amazon UK

As for Amazon UK, far from furloughing staff, its business is booming and it is recruiting warehouse operatives and proclaiming that '*As well as great rates of pay, as a Temporary Associate at Amazon, your safety and wellbeing come first*'.
https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme
https://www.amazon.jobs/en/landing_pages/warehouse-operative

Sadly, the findings made by the Nanterre Tribunal are representative of reports emerging across Amazon's worldwide operations, including in the UK.
A recent report found dismissive high level comments about a sacked whistleblower who had complained about health and safety.
https://www.bbc.co.uk/news/technology-52151161
Casual workers in the US and UK complain about a lack of regard for health and safety.
https://www.theguardian.com/technology/2020/mar/18/amazon-whole-foods-workers-stores-warehouses-coronavirus
This is not new: in November 2018, the GMB Union reported a refusal by Amazon to carry out a health and safety review in light of the number of ambulances called to its depots.
https://www.gmb.org.uk/news/amazon-turn-down-health-safety-review
The GMB raised this issue again in September 2019 following differences between the Health and Safety Executive and Amazon.
https://www.gmb.org.uk/news/amazon-health-safety-lies-exposed-gmb-labour-conference
On 17 February 2020, the GMB called for a Parliamentary enquiry. This was even before the widespread impact of Covid-19 in the UK.
https://www.gmb.org.uk/news/gmb-calls-parliamentary-inquiry-amazon-conditions-workers-worsen

The UK Parliament Health and Social Committee has not so far taken steps to enquire into duties of health and safety, which if breached, help spread the Coronavirus.
https://www.parliament.uk/business/committees/committees-a-z/commons-select/health-committee/

The law offers protection for employees or workers who raise health and safety concerns or who refuse to work in dangerous conditions.
Under UK law, the Employment Rights Act 1996 ('ERA') protects from detriment an employee who in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work – on which see this earlier post. In a time of health emergency, a court may be very willing to accept that the test for seriousness and detriment is fulfilled.
http://www.legislation.gov.uk/ukpga/1996/18/contents

https://uklabourlawblog.com/2020/03/27/the-coronavirus-rights-to-leave-the-workplace-and-strikes-by-stuart-brittenden/

Whistleblower workers are equally protected from detriment and dismissal. Here, where the complaint is of dismissal, interim relief may be sought from the Employment Tribunal under section 128 ERA.

These remedies are, however, after the event and loss of the work.

Since 1 October 2013, section 47 of the Health and Safety at Work Act 1974 no longer permits a civil claim for breach of health and safety regulations.
http://www.legislation.gov.uk/ukpga/2013/24/section/69/enacted
http://www.legislation.gov.uk/ukpga/1974/37/contents
This means that, by contrast to the position in France, no civil action can be brought to enforce the duty to conduct risk assessments in the Management of Health and Safety at Work Regulations 1999 or the duty to consult worker under the Safety Representatives and Safety Committee Regulations 1977 or the Health and Safety (Consultation with Employees) Regulations 1996. At best the statutory duties may inform the standard of the common law duty of care; but that duty will not stretch to include requirements of consultation.

Prevention is key, both to contraction of Covid-19 and loss of work. The action in France was effective precisely because an injunction was sought and obtained.

Since Wilson & Clyde Coal Company v English [1938] AC 57 the employer has a non-delegable common law duty to ensure a safe system of work and safe work equipment.
https://www.bailii.org/uk/cases/UKHL/1937/2.html
An interim injunction could be sought in such a claim. Injunctions are used to great effect to enforce contractual employment rights.
https://files.essexcourt.com/wp-content/uploads/2018/08/08152805/Jahangiri-v-St-Georges-NHS-Trust-2018-EWHC-2278-QB-final-judgment-for-hand-down.pdf
https://www.bailii.org/ew/cases/EWHC/QB/2019/1973.html
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1146838

It is well established that they are available in harassment claims.
They are, however, less frequently sought in tort claims against employers, and especially in negligence claims.
https://www.bailii.org/ew/cases/EWCA/Civ/1993/18.html
https://academic.oup.com/ojls/article-abstract/27/3/509/1579675

Miller v Jackson [1977] 1QB 966, a case involving cricket balls, is cited as authority against the grant of injunctions in negligence, when all Lord Denning actually said in that judgment was that he was unaware of any such case.
The answer may be that a claim in negligence is not suitable for the grant of an injunction, involving uncertainty as to risk and damage, and based on negligent rather than intentional behaviour.
The Court would, as ever, be required to carry out a balancing exercise, whether under American Cyanamid [1975] AC 396 or to the slightly higher standard where a mandatory injunction is sought.
https://www.bailii.org/uk/cases/UKHL/1975/1.html
These are all considerations when seeking an injunction, but do not explain the under-use of this remedy where employers fail to maintain a safe system of work.
Where there is good evidence of a breach of the duty to provide a safe system of work, and in the context of a pandemic, the balance may fall in favour of grant of the injunction.

As we have seen, the French action was able to be brought by l'Union syndicale Solidaires who (unlike Amis de la Terre) had standing to urgently enforce the statutory duty, using the findings of the labour inspector.
https://solidaires.org/

State inspection also has a preventive function. To ensure workplace safety, under the 1974 Act, the Health and Safety Executive may serve both improvement and prohibition notices (ss21-23).
http://www.legislation.gov.uk/ukpga/1974/37/contents
The HSE has called for reports from workers. Unions could collate and send such reports. A decision not to issue an improvement or prohibition notice would be subject to judicial review.
https://press.hse.gov.uk/2020/04/03/coronavirus-a-joint-statement-between-hse-the-tuc-and-the-cbi/?_ga=2.122205838.483251265.1587123759-156479654.1587123759#utm_source=hse.gov.uk&utm_medium=refferal&utm_campaign=coronavirus&utm_term=news-page&utm_content=press-channels-push-joint-statement

Underlying the logic of the French case, and similar cases from Bologna and Florence Labour Tribunals which ordered adequate PPE to be provided for delivery drivers, is that safety for these workers is consistent with an effective public health programme to prevent the spread of Covid-19. That is another difference with the UK Government's approach, although the legislative tool exists: Schedule 22 of the Coronavirus Act 2020 allows directions to be issued in relation to premises but is itself silent on safety at work.
http://www.legislation.gov.uk/ukpga/2020/7/schedule/22
A depot in which social distancing is not occurring would come within the meaning of 'premises' and an executive direction could be issued 'for the purpose of—(a) preventing, protecting against, delaying or otherwise controlling the incidence or transmission of coronavirus'.

The effectiveness of the current safety at work measures in the UK is being challenged by the Independent Workers Union of Great Britain.
https://iwgb.org.uk/en/post/iwgb-to-sue-uk-government-over-its-failure-to-protect-precarious-workers
The Union is seeking stronger public health measures from the UK Government, including that 'All businesses should be compelled to introduced social distancing measures to the extent possible' and if not, to shut down where their business is non-essential and send workers home on full pay.
The letter before judicial review was sent on 23 March and proceedings may, therefore, be launched soon.
https://www.leighday.co.uk/News/Press-releases-2020/March-2020/%E2%80%8BUnion-to-take-legal-action-on-behalf-of-gig-econo
The grant of an injunction is a final and interim remedy available under CPR 54.3 in judicial review, which may include interested parties.
https://www.bailii.org/ew/cases/EWHC/Admin/2010/1925.html
https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part54

Amazon France appeal

Turning back to France, Amazon France has indicated that it intends to appeal the Nanterre Judgment. It closed its depots from 16-20 April but continues not to involve unions in its decisions. If its chosen course is an appeal rather than to work with unions to ensure the health and safety of its staff, that course can only turn out to be a reputational own goal for Amazon.
The Tribunal judgment still allows Amazon to turn a profit in the current boom areas of food, toiletries and medicine.
Milton Friedman's 1970 dictum that the only social responsibility of a company is to increase its

profits may be Amazon’s guiding principle, but it sits ill with the actions of other companies who are contributing to the community effort against Covid-19 by donations or repurposing.

Sandhya Drew is a Barrister, Lecturer at City Law School, and Professeure Inviteé at the Université Paris Nanterre.

Other articles about Amazon on ESSF site :

http://www.europe-solidaire.org/spip.php?page=mot&id_mot=9615

P.S.

https://uklabourlawblog.com/2020/04/21/at-amazon-safety-and-wellbeing-do-not-come-first-nanterre-tribunal-rules-by-sandhya-drew/