RETURNING TO WORK IN THE TIME OF CORONAVIRUS

THE CLOISTERS TOOLKIT - LEGAL DUTIES & SOLUTIONS

Tenth Edition

Updated on 5 March 2021

CLOISTERS

1. INTRODUCTION

1.1. Edition 10

With the pandemic and lockdown No 3 dragging on, and the vaccination programme underway, it is a time to avoid cliché. The government's roadmap out of lockdown says it is based on data not on dates. However, most of us will be focused on the dates for each of the four steps in the route: 8 March 2021, 12 April, 17 May and 21 June. Why worry about the caveat of 'not before'? Others, employers and workers alike are more afraid of other dates – 30 September 2021, the last day in which some support from the coronavirus job retention scheme is available. That date determines the first day of the 90 day consultation period where an employer is proposing to dismiss 20 or more employees – 2 July 2021.

For the detail of the roadmap out of lockdown, see: https://www.gov.uk/government/publications/covid-19-response-spring-2021/covid-19-response-spring-2021-summary

As always, our aim is to produce in effect a compendium that users (be they employees, employers, workers, HR, or legal professionals) find answers to the majority of their queries, or at least a very useful starting point. With this in mind, please feel free to copy, paste or otherwise use this free guidance – but kindly acknowledge Cloisters Chambers. And, if you think of something else – please let us know. If we include your suggestion in the next edition of Cloisters' Toolkit, we'll give you a credit.

To make things easier for both the online and offline user, all external links will have the address footnoted and internal cross-references will have the paragraph number in light blue which allows one to click through to the paragraph.

As is always the case, specific advice should be commissioned for specific situations. This document cannot constitute legal advice which should be sought to address your own individual circumstances. This represents a collaborative view of the law but liability for reliance on the views expressed is excluded.

If you do need tailored legal advice or representation to help you or your business then please contact the skilled clerking team at Cloisters on 02078274000 or clerks@cloisters.com and they will be able to put you in touch with one of the team with the skills that you need.

Thank you, good luck, and stay safe.

Sally Robertson and **Nathaniel Caiden**

5 March 2021

1.2. Edition 9

The pandemic continues. Coronavirus cases increase. Local lockdowns do not seem to have been successful in abating the increase. With the threat of further covid restrictions in the north of England, a further help for business was announced as we were about to go to press – for initial details see https://www.gov.uk/government/news/job-support-scheme-expanded-to-firms-required-to-close-due-to-covid-restrictions. A fact sheet about the 'Job Support Scheme Expansion for Closed Business Premises is here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/925672/20201009_JSSC_Factsheet_FINAL_EG_1516_002_.pdf.

It is called the Job Support Scheme Expansion but looks much like a CJRS V3 lite, with government paying 67% of an employee's wages, up to a maximum of £2,100 a month. It is restricted to businesses required to close temporarily during a local lockdown because of coronavirus restrictions.

Keeping up with the spate of changes is not easy. To date there have been 211 statutory instruments with 'coronavirus' in the title, including amendments to amending regulations, which cover the whole UK UK; another 75 statutory instruments cover Scotland; 76 cover Wales; and there are a further 86 Northern Ireland Statutory Rules. To round off the picture are the coronavirus notices which

have legal force. These include directions and designations. So far there have been 112 notices published in The Gazette.

In this Ninth Edition we have re-ordered a number of sections to make the information easier to access; parts have been re-written. A new section anticipates the increase in individual redundancies. Contributors to this edition are Nathaniel Caiden, Rachel Crasnow QC, Charlotte Goodman, and Declan O'Dempsey. and Sally Robertson.

As always, our aim is to produce in effect a compendium that users (be they employees, employers, workers, HR, or legal professionals) find answers to the majority of their queries, or at least a very useful starting point. With this in mind, please feel free to copy, paste or otherwise use this free guidance – but kindly acknowledge Cloisters Chambers.

To make things easier for both the online and offline user, all external links will have the address footnoted and internal cross-references will have the paragraph number in light blue which allows one to click through to the paragraph.

As is always the case, specific advice should be commissioned for specific situations. This document cannot constitute legal advice which should be sought to address your own individual circumstances. This represents a collaborative view of the law but liability for reliance on the views expressed is excluded.

If you do need tailored legal advice or representation to help you or your business then please contact the skilled clerking team at Cloisters on 02078274000 or clerks@cloisters.com and they will be able to put you in touch with one of the team with the skills that you need.

Thank you, good luck, and stay safe.

Sally Robertson and **Nathaniel Caiden**

9 October 2020

1.3. Edition 8

As we write this 8th edition, the COVID Symptom Study data shows that in the two weeks before 12 August 2020, the reproduction rate of the virus ranged from 0.6 in the East of England, up to 1.1 in London. Local lockdowns have been imposed in Leicester and in the north of England: for the current list of affected areas see https://www.gov.uk/guidance/north-west-of-england-local-restrictions-what-you-can-and-cannot-do

Further national easing of the lockdown, which had been planned from 1 August and was stopped the day before, resumed from 15 August 2020.

Against this setting of continuing uncertainty, comes the end of the Job Retention Scheme at the end of October 2020. The CJRS has protected 9.5 million jobs across the UK. Employers who retain previously furloughed employees continuously up to 31 January 2021 will be eligible for a Job Retention Bonus of a one-off payment of £1,000 per employee. Full guidance is planned by the end of September.

Government information documents on and relating to covid-19 are updated fairly regularly. The hyperlinks remain the same and you can only see the most recent iteration on gov.uk. The document should always tell you the last day it was updated. Some also have a link 'see all updates' with a brief summary of the changes made at each date – see, eg https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19 –whilst others do not.

If carrying out, or advising on a risk assessment, we suggest it is sensible to have as a default position reading the relevant guidance afresh.

We have left unchanged the introductions to each version of this Toolkit: so, the link to what looks like the Covid-19 recovery plan as updated on 12 June 2020 gets you through to the current version, updated on 24 July 2020.

Catherine Casserley, Sarah Fraser-Butlin, Charlotte Goodman and Laurene Veale all contributed to this edition. For Charlotte and Laurene we are also pleased to announce that they have each accepted an offer of a tenancy at Cloisters on completion of their pupillages. Thanks also to Sally Cowan, Rachel Crasnow, Claire McCann, and Caroline Musgrave for reviewing their sections.

As always, our aim is to produce in effect a compendium that users (be they employees, employers, workers, HR, or legal professionals) find answers to the majority of their queries, or at least a very useful starting point. With this in mind, please feel free to copy, paste or otherwise use this free guidance – but kindly acknowledge Cloisters Chambers.

To make things easier for both the online and offline user, all external links will have the address footnoted and internal cross-references will have the paragraph number in light blue which allows one to click through to the paragraph.

As is always the case, specific advice should be commissioned for specific situations. This document cannot constitute legal advice which should be sought to address your own individual circumstances. This represents a collaborative view of the law but liability for reliance on the views expressed is excluded.

If you do need tailored legal advice or representation to help you or your business then please contact the skilled clerking team at Cloisters on 02078274000 or clerks@cloisters.com and they will be able to put you in touch with one of the team with the skills that you need.

Thank you, good luck, and stay safe.

Sally Robertson and **Nathaniel Caiden**

18 August 2020

1.4. Edition 7

When this Toolkit started none of us at Cloisters envisaged it would reach 7 editions. However, week by week there is at the very least guidance which affects the world of work. The latest being: the retail sector will soon be having to wear masks and the Coronavirus Job Retention Scheme was updated today to confirm the grant can cover periods of contractual notice and not simply a shorter statutory notice period (https://www.gov.uk/guidance/check-which-employees-you-can-put-on-furlough-to-use-the-coronavirus-job-retention-scheme). Additionally, the Government today has presented its plan which critically for the workplace has stated that from 1 August 2020 it intends to "*Give employers more discretion on how they ensure employees can work safely. Working from home is one way to do this, but workplaces can also be made safe by following COVID-19 Secure guidelines*" (https://www.gov.uk/government/publications/our-plan-to-rebuild-the-uk-governments-covid-19-recovery-strategy/the-next-chapter-in-our-plan-to-rebuild-the-uk-governments-covid-19-recovery-strategy--2)

As always, our aim is to produce in effect a compendium that users (be they employees, employers, workers, HR, or legal professionals) find answers to the majority of their queries, or at least a very useful starting point. With this in mind, please feel free to copy, paste or otherwise use this free guidance – but kindly acknowledge Cloisters Chambers.

To make things easier for both the online and offline user, all external links will have the address footnoted and internal cross-references will have the paragraph number in bold which allows one to click through to the paragraph (when pressing the Ctrl button down at the same time).

As is always the case, specific advice should be commissioned for specific situations. This document cannot constitute legal advice which should be sought to address your own individual circumstances. This represents a collaborative view of the law but liability for reliance on the views expressed is excluded.

If you do need tailored legal advice or representation to help you or your business then please contact the skilled clerking team at Cloisters on 02078274000 or

clerks@cloisters.com and they will be able to put you in touch with one of the team with the skills that you need.

Thank you, good luck, and stay safe.

Sally Robertson and **Nathaniel Caiden**
17 July 2020

1.5. Edition 6

As the lockdown eases further, with most non-essential retail businesses allowed to re-open, some years in primary and secondary schools given the go-ahead to begin returning, and pubs opening in a limited socially-distanced way from 4 July 2020, we have updated our toolkit to reflect the updated government guidance. The guidance and requirements vary as between England, Wales, Scotland, and Northern Ireland. This 6th edition includes changes announced up to 24 June 2020.

Shielding for the 2.2 million people who have been self-isolating will 'be paused' from 1 August 2020. Automatic deeming of coronavirus-related incapacity for SSP purposes for shielders will end from that date. As yet, unlike the position with maternity leave returners, if they had not been furloughed by 10 June 2020, it is not possible to include them in the flexible furlough scheme.

Additionally, with the risk of redundancies increasing as furlough is wound down, we review the extra legislative protection against redundancy for women employees who are pregnant or in their ordinary or additional maternity leave periods. This protection, we suggest, on analysis continues to the end of the AML period itself, rather than to an earlier return to furlough, or to work.

For ease of access, we include links to the relevant law and current guidance in this introduction. Overall links may be found through the gov.uk coronavirus home page (https://www.gov.uk/coronavirus).

Links to all primary and secondary coronavirus legislation and the changes to related legislation is available here http://www.legislation.gov.uk/coronavirus. In each case, one can access the latest available version of regulations, as amended. For example, the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 as revised up to 15 June 2020 is available here: http://www.legislation.gov.uk/uksi/2020/350

The Covid-19 recovery plan as updated on 12 June 2020 is here https://www.gov.uk/government/publications/our-plan-to-rebuild-the-uk-governments-covid-19-recovery-strategy/our-plan-to-rebuild-the-uk-governments-covid-19-recovery-strategy

Guidance on the easing of restrictions on businesses and venues was updated on 15 June 2020: https://www.gov.uk/government/publications/further-businesses-and-premises-to-close/further-businesses-and-premises-to-close-guidance

Links to the guidance available on working safely during coronavirus in England, Wales, Scotland and Northern Ireland are available as updated to 24 June 2020: https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19

Links to the time line showing the changes, with links to the latest guidance covering England aimed at each of the initial eight sectors or workplaces, as well as the new guidance on hotels and other guest accommodation, heritage locations, close contact services, and the visitor economy as last updated to 24 June 2020 are here: https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19/updates

There is separate guidance for public transport operators, outlining measures to assess and address the risks of coronavirus. This has been updated to 14 June 2020: https://www.gov.uk/government/publications/coronavirus-covid-19-safer-transport-guidance-for-operators/coronavirus-covid-19-safer-transport-guidance-for-operators

There is also separate guidance for education and childcare settings, updated to 16 June 2020: https://www.gov.uk/government/publications/actions-for-educational-and-childcare-settings-to-prepare-for-wider-opening-from-1-june-2020

Since 18 May 2020, any individual who experiences a new, continuous cough; high temperature; or a loss of or change in their normal sense of smell or taste can book a test on www.nhs.uk/coronavirus

As those of us in England enter the uncharted territory of the meaning of 'one metre plus', take heart from the clarity of the latest definition of a 'metre': http://www.legislation.gov.uk/uksi/2020/586/article/2/made

As is always the case, specific advice should be commissioned for specific situations. This document cannot constitute legal advice which should be sought to address your own individual circumstances. This represents a collaborative view of the law but liability for reliance on the views expressed is excluded.

If you do need tailored legal advice or representation to help you or your business then please contact the skilled clerking team at Cloisters on 02078274000 or clerks@cloisters.com and they will be able to put you in touch with one of the team with the skills that you need.

Many of you have asked if you can copy, paste or otherwise use this guidance. Please do, it is a free resource, but do acknowledge Cloisters Chambers.

Thank you, good luck, and stay safe.

Sally Robertson and **Nathaniel Caiden**
25 June 2020

1.6. Edition 5

A Friday evening is a busy time for employment lawyers and so we cover, in detail, the further Guidance released on 12 June as to the Coronavirus Job Retention Scheme at para 3 in relation to part-time furlough below including the extension to maternity returners who join the scheme after 10 June.

We update the sections on Sick Pay to include the change in the law which extends coverage to those isolating as a result of track and trace at para 6.1 and the repayment scheme for SSP dealt with at para 6.11.

Finally, we have added to an expanded Section 12 covering updated guidance and advice for remote hearings which includes the engagement of disabled people in hearings, that which will need to be considered for extended length remote hearings and a link to the practical guide.

As is always the case, specific advice should be commissioned for specific situations. This document cannot constitute legal advice which should be sought to address your own individual circumstances. This represents a collaborative view of the law but liability for reliance on the views expressed is excluded.

If you do need tailored legal advice or representation to help you or your business then please contact the skilled clerking team at Cloisters on 02078274000 or clerks@cloisters.com and they will be able to put you in touch with one of the team with the skills that you need.

Many of you have asked if you can copy, paste or otherwise use this guidance. Please do, it is a free resource, but do acknowledge Cloisters Chambers.

Thank you, good luck, and stay safe.

Caroline Musgrave, Ruaraidh Fitzpatrick, Sally Cowen & Sally Robertson
14 June 2020

1.7. Edition 4

The Coronavirus Job Retention Scheme was largely outside the scope of our tool-kit as it only concerned those who were not working. The Government announced changes to the CJRS on 29 May 2020. It now will apply to those who work part time and, therefore we have added coverage of the part-time elements of the CJRS.

In this 4th Edition we have inserted new sections 3.1-3.10 in order to reflect the updated CJRS.

We value feedback and one area which we were asked to cover was reporting of Covid-19 and the obligations under RIDDOR. This is a difficult area and have added a new section at 2.11.

As is always the case, specific advice should be commissioned for specific situations. This document cannot constitute legal advice which should be sought to address your own individual circumstances. This represents a collaborative view of the law but liability for reliance on the views expressed is excluded.

If you do need tailored legal advice or representation to help you or your business then please contact the skilled clerking team at Cloisters on 02078274000 or clerks@cloisters.com and they will be able to put you in touch with one of the team with the skills that you need.

Many of you have asked if you can copy, paste or otherwise use this guidance. Please do, it is a free resource, but do acknowledge Cloisters Chambers.

Thank you, good luck, and stay safe.

Ruaraidh Fitzpatrick
4 June 2020

1.8. Edition 3

The Government advice is still to work from home if possible but, where that is not possible, then the Government is encouraging workers to return to work if they can do so safely. However, the tenor of government messaging has changed with a definite shift towards encouraging people back into work. Accordingly, readers will recall that,

on 11 May 2020, the Government issued eight separate guides[1] aimed at specific sectors or workplaces. On 19 May 2020, the Department for Business, Energy & Industrial Strategy also issued "5 Steps to Working Safely"[2] which consists of practical actions for business to take based on 5 main steps, whatever the workplace or sector.

These are:

(1) Carry out a COVID-19 risk assessment
(2) Develop cleaning, handwashing and hygiene procedures
(3) Help people to work from home
(4) Maintain 2m social distancing, where possible
(5) Where people cannot be 2m apart, manage transmission risk.

Most recently, on 25 May 2020, it updated its "5 Steps to Working Safely" guide for shops and branches[3] in order to reflect industry feedback and include non-essential retail categories ahead of their planned opening. Presumably, this is in line with the announcement on 25 May 2020 by the Prime Minister that non-essential retail stores could re-open on 15 June 2020, so long as they are "Covid-secure".

The key changes in the updated "shops and branches" guide is:

- It is now expressly stated to apply both to those retail stores which are currently open and to "help" those that are currently closed to consider what their operations need to look like when they are allowed to open.
- Stores are reminded to consider the particular needs of those with protected characteristics, such as those who are visually impaired (particularly in relation to communicating guidance inside and outside the store).

[1] https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19

[2] https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19/5-steps-to-working-safely

[3] https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19/shops-and-branches

- There is a specific reminder to review incident and emergency procedures to reflect social distancing principles as far as possible.

- A number of additional steps that will "usually be needed" have been added to section 4.1 (*Manage Contacts*) including:

    - Encouraging customers to use hand sanitiser or handwashing facilities as they enter the premises; and to avoid handling products whilst browsing;
    - Working with others in the local vicinity (including local authorities) to control the number of people arriving throughout the day; and to provide additional parking or facilities such as bike-racks to discourage use of public transport;
    - Managing outside queues to ensure they do not cause a risk to others;
    - Emphasising that shopping centres must take the responsibility for managing numbers in the centre and the queuing processes in communal areas on behalf of their retail tenants.

- A presumption is now included that fitting rooms should be closed wherever possible given the challenges in operating them safely.

- A number of additional necessary steps have been added to section 5.5 (*Handling goods, merchandise and other materials*), including:

    - Storing items that have been returned, donated, brought in for repair or extensively handled in a container or separate room for 72 hours and/or cleaning such items before displaying them on the shop floor.
    - Considering placing protective coverings on large items that may require customer testing or use, such as furniture; and ensuring frequent cleaning of these coverings between uses.
    - Cleaning "touchpoints" (eg, interior and exterior touchpoints in rental vehicles and/or test drive vehicles)

As with other guidance, the updated guide for shops and branches is intended to provide an overview of the sorts of questions operational managers ought to be asking themselves when assessing risk and implementing measures to mitigate those risks, both for their workers and their customers/clients.

In this 3rd Edition we have updated sections 2.2 and 2.8 in order to reflect the updated guidance from 25 May 2020 concerning shops and branches.

As is always the case, specific advice should be commissioned for specific situations. This document cannot constitute legal advice which should be sought to address your own individual circumstances. This represents a collaborative view of the law but liability for reliance on the views expressed is excluded.

If you do need tailored legal advice or representation to help you or your business then please contact the skilled clerking team at Cloisters on 02078274000 or clerks@cloisters.com and they will be able to put you in touch with one of the team with the skills that you need.

Many of you have asked if you can copy, paste or otherwise use this guidance. Please do, it is a free resource, but do acknowledge Cloisters Chambers.

Thank you, good luck, and stay safe.

Claire McCann and **Dee Masters**

26 May 2020

1.9. Edition 2

In England, the Government advice is still to work from home if possible but, where that is not possible, then the Government is encouraging workers to return to work if they can do so safely. The position of employers, employees,

advisors and Unions is difficult and involves a fine balance – so too the position of Government which needs to protect public health and safeguard the economy. The position in Scotland, Wales and Northern Ireland remains, at the time of publication, as it was before.

In this 2nd Edition we have amended Sections 2.2 (Government Guidance), 2.6-2.10 (Workplace Guidance) & 2.13 (Travel to Work) to summarise the new guidance and to help both businesses, employees and their representatives and advisors to chart the way through these difficult waters. We have also updated the return to work in the light of the furlough scheme announcement today at 3.1 and child-care at 7.2.

As is always the case, specific advice should be commissioned for specific situations. This document cannot constitute legal advice which should be sought to address your own individual circumstances. This represents a collaborative view of the law but liability for reliance on the views expressed is excluded.

If you do need tailored legal advice or representation to help you or your business then please contact the skilled clerking team at Cloisters on 02078274000 or clerks@cloisters.com and they will be able to put you in touch with one of the team with the skills that you need.

Many of you have asked if you can copy, paste or otherwise use this guidance. Please do, it is a free resource, but do acknowledge Cloisters Chambers.

Thank you, good luck, and stay safe.

Caspar Glyn QC, **Rachel Crasnow QC** & **Claire McCann**

12 May 2020

1.10. Edition 1

The Government instruction remains clear: Stay at home, protect the NHS and save lives – this instruction includes the shutting of certain businesses and the instruction to work at home if possible.

We know that that position will change, probably quite soon.

Businesses will want to plan how to open safely. Employees need to work, but only if they can do so safely. Advisers will want to be able to help businesses and employees navigate these difficult questions. Employers' obligations and employees' rights have never been so important.

Cloisters' expert employment barristers aim to consider the wide range of issues raised and give practical advice on work in the time of Coronavirus. In this paper we set out how one may wish to approach the critical workplace issues from both the perspective of employees and businesses such as

- How to deal with health and safety on returning to work?
- How to deal with the financial consequences of the pandemic such as redundancy, reducing pay and or hours? How to face those issues as an employee?
- How to approach the duties on consultation from redundancy to health and safety including ICE and TICE?
- How work and new procedures may affect discrimination or workers who may need to care for their children?
- What is the workplace position of the extremely vulnerable, the vulnerable or the pregnant?
- How to deal with sickness and isolation?
- What of data protection?
- How to deal with whistleblowing how to claim the protections of whistleblowing legislation?
- What might be the impact of insolvency?
- How Directors' duties may be affected?
- What is the impact of remote Tribunal litigation over the next few months?

We hope that the guidance is a useful starting point for employees, for businesses and for our colleagues in the HR and legal sectors.

As is always the case, specific advice should be commissioned for specific situations. This document cannot constitute legal advice which should be sought to address your own individual circumstances. This represents a collaborative view of the law but liability for reliance on the views expressed is excluded.

If you do need tailored legal advice or representation to help you or your business then please contact the skilled clerking team at Cloisters on 02078274000 or clerks@cloisters.com and they will be able to put you in touch with one of the team with the skills that you need.

Good luck, and stay safe.

Caspar Glyn QC, **Claire McCann**, **Nathaniel Caiden** & **Laurene Veale** (2nd 6 Pupil)

With Specialist Chapters by: **Rachel Crasnow QC**, **Schona Jolly QC**, **Declan O'Dempsey**, **Catherine Casserley**, **Sally Cowen**, **Sally Robertson**, **Tom Brown**, **Dee Masters**, **Sarah Fraser Butlin**, **Daniel Dyal** & **Charlotte Goodman** (2nd 6 Pupil).

5 May 2020

2. HEALTH AND SAFETY (Caspar Glyn QC, Catherine Casserley, Schona Jolly QC, Claire McCann, Rachel Crasnow QC, Ruaraidh Fitzpatrick & Sally Robertson)

Law and Guidance on coronavirus and work

2.1. Where can I find the law relating to coronavirus and work?

Short Answer

Links to the law in England, Wales, Scotland and Northern Ireland underpinning the guidance can be found at the Coronavirus Legislation page on https://www.legislation.gov.uk/coronavirus. Although there are specific Acts of Parliament dealing with coronavirus, most of the powers to make secondary legislation derive from the *Public Health (Control of Disease) Act 1984*

Explanation

Since the pandemic began, over 200 statutory instruments, whether regulations or rules, have been made with 'coronavirus' in the title. Amendments have been made to amending regulations. Legislative scatter seems to have increased significantly. Finding the law that applies to a particular situation today is not always easy.

With assistance from Westlaw, legislation.gov.uk provides electronically updated regulations. Always look for the 'Latest available (Revised)' version. Then select under 'Opening Options' in the left-hand column, 'open whole instrument'. That gives you a graphic timeline presentation of the changes over time made to that statutory instrument. It shows the dates on which amendments had been made, with the most recent change highlighted.

Below the timeline, check what it says about 'changes to legislation'. It will note whether or not there are any outstanding changes yet to be made by the editorial team. Changes already made will be shown under

each individual part of the statutory instrument. Links to each of the individual amending regulations are given. To find what remains outstanding requires detective work: ascertain the date of the most recent amendment incorporated, then check the effect of what if any amending regulations had been made after that date.

As well as finding the law in regulations and rules, temporary changes may also be made through a direction, designation or notice. By February 2021, 211 notices had been made which have legal effect. The list can be found in The Gazette, the Official Public Record: https://www.thegazette.co.uk/coronavirus-notices/notice?text=&categorycode-all=all&noticetypes=&location-postcode-1=&location-distance-1=1&location-local-authority-1=&numberOfLocationSearches=1&start-publish-date=&end-publish-date=&edition=&london-issue=&edinburgh-issue=&belfast-issue=&sort-by=&results-page-size=100

2.2. Is there any guidance that can help give an overview?

Short Answer

This Cloisters Toolkit aims to do just that, but the text covers the position in England only, with links to the positions in the other nations comprising the UK. If your business covers more than one of the devolved nations, you will need to address the law and guidance for each specific nation.

The Government Guidance on the core guidance page at https://www.gov.uk/coronavirus has a similar approach, giving links to the guidance for the other devolved nations. Additionally, the key guidance page for the national lockdown from 4 January 2021 is at https://www.gov.uk/guidance/national-lockdown-stay-at-home

Overall, the many shifts in the messaging given the changes made in response to the pandemic mean it is not easy to feel confident one has the full and current picture, let alone the provisions applicable in respect of the time under consideration. The Lockdown No 3 core message of '*stay home – protect the NHS – save lives'* returned to the simplicity of the original message. The COVID-19 Response: Spring 2021 sets out what is described as the roadmap out of the current lockdown with the earliest end-date of 21 June 2021 tending to override the more cautious message based on the data – see https://www.gov.uk/government/publications/covid-19-response-spring-2021 The main coronavirus guidance page more cautiously refers to the roadmap as a '4-step plan to ease lockdown in England'. The 'stay home' message continues, backed up by 'hands – face – space'. Yet on the ground, on a sunny day, the caution of the data-led approach seems far away.

Explanation

Following current Government Guidance is a way in which an employer can evidence they are doing what is reasonably practicable to keep staff safe. But with at least 26 updates to the sector-specific guidance since May 2020, keeping track of things is not easy. Happily, there are other useful sources.

To get an overall view, the Institute for Government publish a set of tables showing the timeline and the position in the different devolved nations and sectors: https://www.instituteforgovernment.org.uk/explainers/coronavirus-lockdown-rules-four-nations-uk This has been updated. It outlines the rules on leaving and being outside the home, on going to work, on meeting friends and family, the rules on access to all different types of venue ranging from shops to sports facilities, and on domestic and overseas travel.

The House of Commons library is a key source of helpful concise information on particular topics - https://commonslibrary.parliament.uk/coronavirus/ See for example its briefing paper on *Coronavirus: the lockdown laws* which continues to be updated *https://commonslibrary.parliament.uk/research-briefings/cbp-8875/*

An interactive map showing which areas were subject to local lockdown restrictions has been taken off-line while the restrictions are England-wide – but the web page gives a useful shortcut to the official guidance on current restrictions in each of the four nations: https://visual.parliament.uk/research/visualisations/coronavirus-restrictions-map/

Additionally, Adam Wagner produces a colour-coded table for England only which gives links to the regulations and amending regulations along with the dates each came into force: https://docs.google.com/document/d/1ne4zhPYAZK8G867D1Iz0Gg2ZJFLGmF2K/edit This is particularly helpful when trying to work out what amendments, if any, the legislation.gov.uk editorial team have yet to incorporate.

Data protection issues also present challenges as information about vaccination status or covid-19 test results are health data which come within scope of the extra protection of 'special category data'. The Information Commissioner's data protection and coronavirus information hub is a useful starting point: https://ico.org.uk/global/data-protection-and-coronavirus-information-hub/

2.3. Where is the Government Guidance and what does it say?

Short Answer

There are two main pages for finding Government Guidance. The overall index is at https://www.gov.uk/coronavirus. This gives you links to situation-based guidance, including 'work and financial support' and 'businesses and self-employed people. Links to the sector specific guidance is at https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19

If it has been a while since you read a particular part of the guidance, it is worth starting by selecting 'see all updates'. There were twenty-six updates to the sector specific guidance from May to October 2020, with a further 22 updates during the remainder of 2020 and 4 more up to the batch of 9 guides updated on 10 February 2021.

In contrast, the home page for the situation-based guidance does not give that option. Instead, the guidance tree has been revamped, for example there is no longer a section on 'Driving and travel in the UK' (but it is part of the first listed element). This first element is for 'What you can and cannot do', first published on 4 January 2021, the day before the start of Lockdown No 3. Under that heading, there are further items listed under 'National restrictions' and under 'Social distancing and shielding'. As you open up each sub-sub item in the list, you will find each element has its own updates section. For example, selecting 'what you can and cannot do' gives two options before you reach a 'see all updates' option for the 'National Lockdown: Stay at Home' guidance. By 15 February 2021 there had been ten updates.

If you access any of the pages for situation-based guidance, you can return to sector specific guidance by going to the list of 'related content' by the contents list for the individual guidance. Click on 'working safely during coronavirus'.

As with the rest of the coronavirus guidance, the re-labelling of the sections and sub-sections mean it can be a challenge to find the

particular pages or topics you have looked at before. Even if you have downloaded or printed out copies, you will still need to find and check the current iteration when you review a risk assessment.

Explanation

Government guidance for employers and businesses remains a dynamic and fast changing area. It is also scattered and does not always have the clarity needed.

Situation-specific guidance

There is now no separate section on "*Working Safely*" in the situation-based guidance. Instead, there are two sections, one called "*Work and financial support*", the other "*Businesses and self-employed people*".

The guidance for businesses and self-employed people at https://www.gov.uk/coronavirus/business-support?priority-taxon=774cee22-d896-44c1-a611-e3109cce8eae has just one link relevant for health and safety: it takes you back to the sector-specific guidance at https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19

For workers, links to the guidance can be found at: https://www.gov.uk/coronavirus/worker-support

Sector-specific guidance

The main link for sector specific guidance on how to work safely during Covid-19 by making "your workplace Covid-secure" is at: https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19. This gives the main link to the 14 separate guides for different types of work and to the guides for educational and childcare settings and for public transport operators. The publication history of the sector-specific guides since the first batch were published on 11 May 2020 shows the

need to stay alert for changes or tweaks relevant to your business and sector.

The Introductions to the guides have been cut back to a basic message that *'this guide will help you understand how to make your workplace COVID-Secure and help tackle COVID-19'.*

In the Introductions to the sector guides in October 2020, they said clearly:

> *"It is critical that employers, employees and the self-employed take steps to keep everyone safe. This document is to help employers, employees and the self-employed in the UK understand how to work safely during this pandemic, ensuring as many people as possible comply with social distancing guidelines (2m apart, or 1m with risk mitigation where 2m is not viable). We hope it gives you a practical framework to think about what you need to do to continue, or restart, operations during the COVID-19 pandemic. We understand how important it is to work safely and support your workers' and visitors' health and wellbeing during the COVID-19 pandemic and not contribute to the spread of the virus. The government is clear that workers should not be forced into an unsafe workplace and the health and safety of workers and visitors, and public health, should not be put at risk."*

As at February 2021, that message is less prominent. It can still be found but is scattered, with the core points being included in the factors to consider when managing risk. For example, the construction and outdoor workplaces guide emphasises: *'Businesses and workplaces should make every reasonable effort to ensure their employees can work safely. Anyone who can work from home should do so. Anyone else who cannot work from home should go to their place of work, if COVID-19 Secure guidelines are followed closely. When in the workplace, everyone should make every reasonable effort to comply with the social distancing guidelines set out by the*

government (2m, or 1m with risk mitigation where 2m is not viable)'. https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19/construction-and-other-outdoor-work

The shift in prominence, or lack in clarity, seems to be part of the public message from the Government that the guidance gives employers more discretion over how employees can work safely – *"whether by continuing to work from home or attending a Covid Secure workplace*"[4].

The 14 sectors or types of workplace covered by the sector-specific guides comprise:

i) Close contact services
ii) Construction & other outdoor work
iii) Factories, plants & warehouse
iv) Heritage locations
v) Hotels and other guest accommodation
vi) Labs & research facilities
vii) Offices & contact centres
viii) Other people's homes
ix) Performing arts
x) Providers of grassroots sport and gym/leisure
xi) Restaurants, pubs, bars and takeaway services
xii) Shops and branches
xiii) Vehicles (for people working in or from vehicles)
xiv) The visitor economy

[4] https://www.gov.uk/government/speeches/prime-ministers-statement-on-coronavirus-covid-19-31-july-2020

Additionally, there is separate guidance for educational and childcare settings, for public transport operators and for wedding and civil partnership receptions and celebrations [5].

The overall message

On 19 May 2020, the Department for Business, Energy & Industrial Strategy issued "5 Steps to Working Safely"[6]– practical actions for business to take based on 5 main steps, whatever the workplace or sector. This was withdrawn on 9 September 2020 and the link now takes you to the main sector guidance page.

The start of each sector's guidance gives the *priority actions* with the continuing message of the standard list of *'steps to protect yourself, your staff and your customers during coronavirus'*.

The seven steps common to all sectors or type of workplace are:

- Complete a COVID-19 risk assessment
- Clean more often
- Ask your customers to wear face coverings
- Make sure everyone is social distancing
- Increase ventilation
- Take part in NHS Test and Trace
- Turn people with coronavirus away

Additionally, each sector's guidance gives a list of '*more things to be aware of ….'* These vary depending on the type of business. Instead of going for the simplicity of *'five more things'* for each sector, the message to businesses in

[5] https://www.gov.uk/government/publications/covid-19-guidance-for-small-marriages-and-civil-partnerships/covid-19-guidance-for-wedding-and-civil-partnership-receptions-and-celebrations

[6] https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19/5-steps-to-working-safely

the four sectors which broadly comprise the visitor economy ranges from '*three more things'* for hotels and other guest accommodation, to *'eight more things'* for restaurants, pubs and bars, while Heritage locations and the specific Visitor Economy guide do not give a number.

The *'five more things'* for ten of the 14 sectors vary. For example, for people who work in or run offices, contact centres and similar indoor environments, the five specific factors include '*work from home if possible'; 'reduce face-to-face meetings'* and *'communicate and train'.* For shops and branches, the five factors have now become four with the *'clean more often'* guidance already covered as one of the main eight priorities. The first five factors specific for factories give a different range, including '*work with the same team every day'* and *'keep music and other background noise to a minimum'.* However, the current version includes *'communicate and train'* as a sixth factor, oddly omitted in earlier versions.

Transport, education and childcare settings

The Guidance on safer transport for operators in England covers how to provide safer workplaces and services for transport organisations, their workers and passengers. It outlines measures to assess and address the risks of coronavirus (COVID-19): https://www.gov.uk/government/publications/coronavirus-covid-19-safer-transport-guidance-for-operators/coronavirus-covid-19-safer-transport-guidance-for-operators

The Government also issued Guidance on implementing protective measures in education and childcare settings during the Summer 2020

term[7]. The webpage with links to later guidance is here: https://www.gov.uk/government/publications/actions-for-schools-during-the-coronavirus-outbreak

Initial guidance was very high level and left many practical questions unanswered. It advised a hierarchy of controls:

- Minimising contact with individuals who are unwell by ensuring that those who have coronavirus symptoms (or who have someone in their household with symptoms) do not attend
- Cleaning hands more often than usual
- Ensuring good respiratory hygiene ("catch it, bin it")
- Cleaning frequently touched surfaces
- Adhering wherever possible to social distancing measures (including by minimising contact and mixing by alternating the environment – such as classroom layout – and timetables, such as staggered breaktimes)

This system of controls has been developed with a mix of prescription and flexibility to enable better implementation depending on the particular school environment. For example, earlier iterations of the guidance had suggested that children, young people and staff stay in consistent small groups, with each group including no more than 15 pupils and socially distancing if possible. The current guidance does not prescribe the size, saying instead: '*Assess your circumstances and try to implement 'bubbles' of an appropriate size to achieve the greatest reduction in*

[7] https://www.gov.uk/government/publications/coronavirus-covid-19-implementing-protective-measures-in-education-and-childcare-settings/coronavirus-covid-19-implementing-protective-measures-in-education-and-childcare-settings

contact and mixing. Make sure this will not affect the quality and breadth of teaching or access for support and specialist staff and therapists.'

For the guidance covering the period during lockdown No 3 to 8 March 2021, the anticipated date for the return to schools, see: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/958906/Restricting_attendance_during_the_national_lockdown_schools_guidance.pdf

The guidance for schools from 8 March 2021 is here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/964351/Schools_coronavirus_operational_guidance.pdf

Separate guidance for early years and childcare settings is here: https://www.gov.uk/government/publications/coronavirus-covid-19-early-years-and-childcare-closures

There is additional guidance for special schools and other specialist education settings: https://www.gov.uk/government/publications/guidance-for-full-opening-special-schools-and-other-specialist-settings

Guidance for further education colleges is here: https://www.gov.uk/government/publications/coronavirus-covid-19-maintaining-further-education-provision

The general approach

In general, complying with health and safety obligations will involve the following as a minimum:

- If employees can work from home and the business can function properly, then they should do so;

- If employees cannot work from home and they can still travel to work then they can do so but employers must ensure a safe system of work (with particular emphasis on risk assessment, hygiene/cleaning arrangements and social distancing measures).

The general Government guidance does not set out that working will necessarily be safe. However, with the 14 sector-specific guides, it is apparent they have recognised that employers and employees alike need a practical framework to establish the safest ways of working, providing people with the confidence and reassurance they need to return to work. The practical steps included in the guides are covered in more detail below.

The sector-specific guides make clear that any return to work must be informed by a Covid-19 Risk Assessment which should be undertaken by employers in consultation with Unions and workers. The TUC has gone further in its *"proposals on ensuring a safe return to work"* by stating that employers should be mandated to publish their risks assessment (in a process comparable with that implemented for mandatory gender pay gap reporting). The TUC also proposes the establishment of a National Enforcement Forum to oversee the operation of safe working practices nationally.

The Health and Safety Executive produces a short guide with practical checklists of matters for employers to think about when addressing how best to protect people from coronavirus in the workplace: https://www.hse.gov.uk/coronavirus/assets/docs/working-safely-guide.pdf

Running a safe workplace: risk assessments

2.4. What do I have to do to keep my staff safe during coronavirus?

Short Answer

The employer has to do all that it reasonably can to set up a system of safe work and then to ensure that it is implemented.

Explanation

There are two streams that flow into the duty – firstly, the judge made law that an employer has to take reasonable care for the safety of those people its operations might reasonably effect and secondly, the statutory duties, many of which come from European law that flow from the central duty at Section 2(1) Health and Safety At work Act 1974 which sets out 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.*

A breach of that duty is a criminal offence and can be relied upon in civil claims. There are tens of detailed regulations that cover businesses from construction to mines and offices and workplaces.

The first way in which an employer can evidence that what they are doing is reasonably practicable and evidence that they are acting with reasonable care is by following Government Guidance[8] on 'Working safely during coronavirus'. Given the regular changes in the guidance and the law related to it, the safest way to do that is to review both the relevant sector guidance and the business risk assessment regularly.

The nature of the pandemic and the varying Government response to it underscore the need for individual decision-making by employers. Earlier editions of the Cloisters Toolkit suggested that the Government's drawing back from the comparative clarity of its initial guidance to give more

[8] https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19

discretion to employers should not be seen as absolving employers from decision-making. Government Guidance does not mean a particular workplace or a particular journey to work for a particular employee, is safe. Nor does it mean that the particular risks have been reduced to the minimum that is reasonably practicable. There is always a distinction between the science, the politics and the reality underlying each particular situation. Each employer should follow the risk assessment process carefully. Past guidance in our view remains part of the factual matrix an employer should consider. There is a continuum: the more political and less science-based the guidance, the less reasonable it is likely to be to rely on it. Discretion needs to be exercised carefully and in a rounded manner. In all cases it is suggested a co-operative and transparent approach, engaging the workforce, is likely to be more productive than otherwise.

The Government Guidance is good evidence of what is reasonably practicable. It may be very good evidence of what is a safe system of work. Importantly, it is not "the law" on health and safety at work and it does not change the statutory and common law duties that rests on employers themselves to assess the risks in their business, to set up a safe system of work and to implement that system. The duty is not necessarily discharged by following guidance. The duty cannot be delegated by the employer merely to Government Guidance.

For example, the 'rule of six' was a legal requirement in force from 14 September to 14 October 2020. It was found in reg 5 of the *Health Protection (Coronavirus, Restrictions) (No 2) (England) Regulations 2020.* Although reg 5(3)(c)(i) exempted a larger gathering where that was *'reasonably necessary' 'for work purposes',* an employer should address the necessity and reasonableness of their work practices in light of the

guidance and law[9]. It would be sensible to review the current risk assessments whenever there is a relevant change of circumstances, including any change in the law or guidance.

It may be that areas of Government Guidance for the workplace prove controversial. One way of removing the controversy is for employers to agree the safe system of work with their staff or with staff representatives such as trades unions or for employee organisations in sectors to agree safe systems of work with staff representatives such as trades unions. See the duties on health and safety consultation (at 6.13 onwards below).

It is important for employers to remember that their responsibility is not just to set up the safe system for employees but also to implement it. Taking a simple example: an employer issues an instruction and puts up notices instructing employees to wash their hands regularly for at least 20 seconds. If the employer does not ensure that there is adequate access to sinks and water, adequate soap, and hand-drying options that avoid cross contamination then the employer is likely to have failed to take reasonable care. Even if the employer provides all the equipment and issues the instruction but does not ensure that the instruction is being followed then, again, the employer may be in breach. The employer can't simply give an instruction to an employee and then expect them to follow it, they must also ensure that it is carried out. The duty to take care cannot be delegated.

An employer must: Assess the Risks - Set up the safe system in light of the risks - Implement the system - Review the system.

[9] The guidance is at: https://www.gov.uk/government/publications/coronavirus-covid-19-meeting-with-others-safely-social-distancing/coronavirus-covid-19-meeting-with-others-safely-social-distancing

2.5. What does an employer have to do to run a safe workplace during coronavirus?

Short Answer

The employer has to do three things: firstly, it needs to make a Covid-19 risk assessment tailored to its workplace and the dangers of coronavirus; secondly, it needs to set up a safe system of work identified by that risk assessment; and thirdly it needs to make sure that the safe system is followed. At each step the employer needs to do all that it reasonably can

2.6. What are the specific legal duties that an employer is under in respect of work and coronavirus?

Short Answer

The main duties are set out below, but they come down to taking as much care for employees and others affected by the business as is reasonably practicable.

Explanation

The most relevant regulations are likely to be

- The Management of Health and Safety at Work Regulations 1999
    - Carry out a risk assessment of the coronavirus related risks at work and keep that assessment under review; (regulation 3)
    - Set up a system of safe work informed by the coronavirus risk assessment and then make sure it is carried out – if 5 or more are employed, this must be in writing; (regulation 4)
    - Carry out health surveillance on staff so that the business knows whether or not they are symptomatic; (regulation 6)
    - Appoint staff members to assist in setting up and implementing the safe system in respect of coronavirus; (regulation 7)

- Ensure that employees and others working on their premises have information on the risks and the steps that they must take to reduce or avoid the risk of contracting or passing on coronavirus; (regulations 10 &12)

- The Workplace (Health, Safety and Welfare) Regulations 1992
  - Maintaining and cleaning the workplace to guard against transmission of coronavirus; (regulation 5)
  - Ventilating the workplace; (regulation 6)
  - Cleaning the workplace; (regulation 9)
  - Rooms shall be of sufficient space for health and safety so that adequate distancing can be observed which is currently 2 metres; (regulation 10)
  - Enable employees to circulate in the workplace safely away from each other and possibly setting up one way routes to prevent close passing; (regulation 17)
  - Providing suitable and sufficient toilets and washing facilities for regular handwashing; (regulations 20 & 21)

- The Personal Protective Equipment at Work Regulations 1992. If the employer cannot adequately control the risks of health and safety, say by maintaining 2 metres distance or other such steps then suitable personal protected equipment ("PPE") must be provided. The PPE must
  - Take account of the risks;
  - Be suitable ergonomically for the work;
  - Fit; and
  - Control the risks of infection; (regulation 4) and
  - If more than one piece of PPE is worn it must be compatible with other pieces; (regulation 5)

- Assessed as suitable; (regulation 6)
- Maintained and replaced as appropriate; (regulation 7)
- Provide training in its use; (regulation 10)

- The Control of Substance Hazardous to Health Regulations 2002 applies to biological agents such as coronavirus
  - Carry out a risk assessment; (regulation 6)
  - Prevent exposure or, where not reasonably practicable adequately control exposure to coronavirus by
    - Re-designing work systems;
    - Re-organising the workplace and ventilating it adequately by
      - Reducing to a minimum number of employees exposed
      - Reduce level and duration of exposure
      - Suitable maintenance such as cleaning;
    - If there are no other means of controlling the risk, then providing PPE;
    - If not reasonably practicable to control the risks in other ways, then provide
      - Warning signs;
      - Provide hand-washing facilities; (regulation 7)
  - Monitor exposure to coronavirus at the workplace which may simply be keeping a record of those self-isolating or who are symptomatic and or who have tested positive; (regulation 10).

2.7. What does an employer need to do to carry out a risk assessment?

Short Answer

An employer needs to apply its mind to the risks in its workplace and the way in which it operates. The Health and Safety Executive set out a guide here[10]. Set out below are the questions that an employer will want to consider in a risk assessment. The practical advice set out in the sector-specific guides will also help to provide a framework for the sorts of questions to be considered.

Explanation

An employer will need to cover the following when going through a risk assessment with respect to coronavirus:

- How can the risk at work be avoided?
    - Working from home?
    - Can systems be changed and or equipment be provided to enable working from home?
- What are the risks of people working together?
    - Infected people transmitting the virus;
    - Aerosol infection risk – breathing / coughing / sneezing / faecal flushing;
    - Hygiene infection risk – contact infection.

Once the risks have been considered and identified, including any particular risks in a business, then the risk assessment should go on to cover addressing the risk, adapting the workplace and work-processes, adapting work equipment, replacing the dangerous by the non-dangerous or the less dangerous and developing a coherent overall prevention policy which we address in the next paragraphs.

[10] https://www.hse.gov.uk/risk/controlling-risks.htm

2.8. The Government Guidance to work from home?

Short Answer

The various pieces of Government guidance make clear that an employer should '*take all reasonable steps'* to help people work from home. Guidance on working from home given on 23 July 2020 was that: "*Employers should ensure workplaces are safe whilst also enabling working from home. In order to keep the virus under control, it is important that people work safely. Working from home remains one way to do this".*

By the time of lockdown No 3, it had changed to *'You must stay at home. The single most important action we can all take is to stay at home to protect the NHS and save lives … You must not leave, or be outside of your home except where necessary. you may leave the home to ….go to work, or provide voluntary or charitable services, if you cannot reasonably do so from home.'*

Explanation

All the sector-specific guides and the advice are clear as to the fact that:

- The starting point is that businesses and workplaces should make every reasonable effort to ensure their employees can work safely;
- Since 1 August 2020, this may be working from home, or within the workplace if COVID-19 secure guidelines are followed closely;
- ALL businesses should take all reasonable steps to enable working from home;
- The risk of transmission can be substantially reduced if Covid-19 secure guidelines are followed closely;
- Employers should consult with employees to determine who can come into the workplace safely taking account of a person's journey,

caring responsibilities, protected characteristics, and other individual circumstances;

- Extra consideration should be given to people who are at higher risk.

The guidance emphasises that employers should use the guidance to inform their decisions and control measures. Employers should work through each of the steps in the guidance in order.

Working safely is the first option, whether at home or in a Covid-19 secure workplace. Between 1 August 2020 and 5 January 2021, someone who is clinically extremely vulnerable could go to a Covid-secure workplace "*but should carry on working at home wherever possible."* Since 5 January 2021, they have been advised to '*stay at home as much as possible'*

The guidance is all about mitigating risk. The last factor in the steps to address is that: *"no one is obliged to work in an unsafe work environment".*

In the workplace, every reasonable effort should be made to manage transmission risk by reinforcing hygiene and cleaning measures and complying with the social distancing guidelines – changed from 'keeping 2m from others wherever possible' to '1m with risk mitigation where 2m is not viable' .

Social distancing should not be seen as the panacea. Yes, it is a standard to minimise transmission; but the value of distancing is reduced if two people, for instance, have to work in an enclosed unventilated room where they are just 2 metres apart and more so if the separation is reduced to 1 metre. In the latter case, the risk assessment should list the specific mitigations undertaken to reduce the risk. Social distancing is the starting point for precautions. It is not the end point. Ventilation increasingly is seen as a key factor in reducing risk.

2.9. The Government Guidance if a workplace cannot maintain social distancing?

Short Answer

Government guidance is clear that, if social distancing cannot be followed in full, then those operations or activities should only be continued if they are necessary for the business to operate.

Remember, the employer must ensure the safety of its workforce so far as it is reasonably practicable. That does not mean that, if social distancing cannot be maintained and it is necessary for that work to be taken, it is safe for the business to operate.

Explanation

It is clear that, if businesses cannot maintain social distancing, then they are exposing employees to more risk. Accordingly, before any workplace mitigation measures are considered in the workplace, the business must apply its mind to the question: is it necessary that this activity continues? Only if it is necessary should the activity continue and then only after consideration of the full mitigation measures set out below.

2.10. The Government Guidance and other steps that employers should take in the workplace?

Short Answer

If working from home is not possible, and the business is not within a sector that has been ordered to close, then the employer will need to set up and implement systems falling under three headings to reduce the risk of virus transmission at work. It should address three particular strands: Risks from Infected People and to Vulnerable People, Control of Aerosol Infection and Control of Contact Infection.

Explanation

The sector specific guides (https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19) duplicate many of the same steps and are of general application to a much wider cross-section of businesses. For more information about the guidance, with links see *Law and Guidance on coronavirus above* at 2.2-2.3 above

To make the task of business, employees and advisers easier, we have put the full range of precautions that every business might consider into one composite list.

The steps set out below are taken from a wide range of sources, including but not limited to Government guidance.

As we set out above, the Government guidance may be evidence of a safe system of work but it is not the law and simply because something is in the guidance is not conclusive evidence that it will create a safe system of work. Staff organisations may differ as to the amount of risk that employees should be expected to take and/or the resources that might be devoted to mitigation measures, such as PPE. However, set out below are some concrete steps that employers can take to reduce the risk to employees and others.

Employers have a duty to carry out health and safety consultation on the measures set out and this is considered (see 6.13 onwards below).

The sector-specific guides emphasise the consultation obligation on employers and also underline the need to be mindful of the particular needs of different groups of workers, noting that specific duties are owed to disabled workers and to new or expectant mothers (that is, the duty to make reasonable adjustments under the Equality Act 2010; and the duty to carry out individual health and safety risk assessments for new or expectant mothers, which may require consideration of alternative roles

or duties – including home-working – and, if working outside the home is not safe and working from home is not possible, then maternity suspension on full pay).

The final assessment as to whether a safe system of work has been set up and implemented is a fact-specific one depending on the risks in any workplace setting.

Risks from Infected People and to Vulnerable People

- The employer must repeat, and repetitively instruct employees and visitors with the following instructions – notices can be a good way to do this as well:
    - If you have had a coronavirus test after 28 September 2020 and have been formally notified that you have tested positive, you are legally required to stay in your home for at least 10 days and can be fined if you do not[11]
    - If you have been notified formally by NHS Test and Trace (but not through the NHS App) that you must self-isolate because you have had close contact after 28 September 2020 with someone who has tested positive, you are legally required to stay in your home for at least 14 days and can be fined if you do not
    - If you are aware you are required to self-isolate, you must inform your employer of that requirement and of the start and end dates of the isolation period as soon as reasonably practicable and in any event before you are next due to start work. The same applies to agency workers.

[11] Exceptions are listed in reg 2(3)(b) The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020

- If you or a member of your household suffers from a new continuous cough or a high temperature, then
    - If you have the symptoms you need to stay at home for 7 days from when your symptoms started;
    - If a member of your household has the symptoms you need to stay at home for 14 days from when that member of your household has the symptoms;
    - If during that period of 14 days you get the symptoms you need to stay at home for 7 days from when you first started having the symptoms even if that takes you past the 14 day period.

- The employer might set up an email system or other electronic system to ensure that employees and agency workers know who to contact if they have symptoms or have been notified formally of a legal requirement to self-isolate. Once an employer is '*aware of the requirement to self-isolate, [they] must not knowingly allow the worker or self-isolating agency worker'* to come into the workplace to work[12]. Contravening a requirement without reasonable excuse is an offence. Fixed penalty notices start at £1,000, rising to £10,000 for a fourth and any subsequent offence.
- If an employer proposes adding a failure to notifiy a requirement to self-isolate to the examples of misconduct in a disciplinary policy or procedure, it would be sensible to carry out their usual consultation exercise beforehand and in any event to formally notify the workforce
- Advise staff to consider, each day before attending, whether they have symptoms and whether they should attend work.

[12] Reg 7(1) The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020

- Maintain a review of infection in your locality and your staff. If it is peaking / rising, then seek medical advice and consider a temporary closure or further measures.

Vulnerable People

- Clinically extremely vulnerable people are strongly advised not to work outside the home:
    - Can the employer reallocate tasks / provide equipment to that person to perform in the home?
- Clinically vulnerable people are at higher risk of severe illness and are advised to stay at home and, if they do go out, to minimise contact with those outside their household:
    - Can the employer reallocate tasks / provide equipment to that person to perform in the home?
    - If not, then they should be offered the safest available workplace roles observing social distancing;
    - If social distancing cannot be maintained, then consider whether working presents an unacceptable level of risk;
- Consider the impact of disability on health and safety:
    - Do any measures need to be set up and implemented to assist disabled people as a reasonable adjustment?
- Ensure that decisions do not unjustifiably impact groups of people such as new or expectant mothers, recalling that they are owed heightened statutory duties in relation to individual risk assessment, alternative duties and, possibly, maternity suspension on full pay.

We have considered the position of Clinically Extremely Vulnerable persons as potentially being disabled at 2.21.

Control of Aerosol Risk

Social distancing (Public Health England, Scotland & Wales) rules are different for the Four Nations of the UK. In England the following matters are current advised. Firstly, businesses should, where possible, maintain 2 metre distancing – that is, in every part of the workplace including corridors etc. Where that is not viable, the guidelines say that '1 metre with risk mitigation where 2 metres is not viable, is acceptable'. The mitigations that will be introduced should be set out in the risk assessments.

If social distancing cannot be maintained and the activity needs to continue, businesses need to assess, as set out above, whether the activity is necessary. Even if it is necessary, businesses need to establish whether they can make it reasonably safe.

Whether or not 2 metre, or 1 metre plus, distancing can be achieved, the following mitigation measures should be considered. If social distancing cannot be maintained, then the need for these measures is likely to be particularly high:

Workplace Density

- Can certain staff (eg admin etc) work from home –
  - If they can, then maintain contact to supervise safety / mental health;
  - Provide appropriate equipment eg computers / remote access systems;
- Only have the minimum number of staff at the workplace at any one time;
- Is 7 day working or staggered working hours possible?
- Reducing visitors and making deliveries contactless.

- Coming and leaving work
  - increase entry / exit points;
  - additional parking areas and bicycle racks;
  - leaving seats empty in company minibuses to reduce density;

- entry control;
- one-way flow at entry and exit points – floor markings;
- alternatives to keypads, such as non-touch opening;
- deactivating turnstiles and using distant presentation of security pass;
- wedging open non-fire doors (to prevent use of door handles etc);
- working with others in the local vicinity (including local authorities) to control the number of people arriving;
- managing outside queues so they do not pose a risk to others.

- Moving around
  - Restricting access to different parts of the workplace / using telephones
    - Setting up working zones and restricting workers to one part of the workplace;
  - Reducing job rotation to one task per day etc;
  - One-way systems on walkways;
  - Use signage or other objects to maintain 2m travel;
  - Reduce occupancy of mini-buses (every other seat);
  - Regulating use of traffic routes;
  - Can the journey in the workplace be made outside rather than inside?
  - Reducing use of lifts and density, including priority for those with mobility issues;
  - In shared buildings etc cooperating with landlords / other users to maintain precautions which are systematic throughout the building;
  - Regulating use of locker rooms / toilets / but encouraging storage of belongings;
- Working
  - Assigned workstations, rather than hot-desking;
  - Placing workstations at least 2m apart;

- Set up and install screens and barriers;
- Ensure good ventilation in the workplace whether a vehicle or not;
- Cohorting / fixed teams / partnering / shifts
    - maintaining a stable group of employees in separate areas / teams / shifts / locations within a building.
    - Even if the cohort cannot be socially distant from one another inside the cohort, they should maintain distance from others outside the cohort.
    - Keeping the activity duration as short as possible
- Consider face-coverings;
- Closing spaces where people congregate;
- Reduce socialising;
- Avoiding face-to-face contact for a sustained period / longer than 15 minutes and assessing whether this activity really needs to go ahead;
    - No contact working;
    - Side-by-side or back-to-back working rather than face to face;
- Protective screens for client facing / reception staff;

- Meetings
    - Reduce face-to-face meetings with external contacts and between people from different cohorts
    - Only have necessary meetings and attendees;
    - Do not share/pass equipment (eg, pens, keyboards) if possible;
    - Hold meetings outside or in well-ventilated rooms;
    - Use remote working tools.
- Common areas
    - Staggering break times;
    - Using outdoor areas for breaks;
    - Use additional space freed up by remote working;
    - Reconfiguring seating to reduce face-to-face interactions

    - Making sure toilet lids are down when they are flushed;
    - Setting up systems for those with hay-fever;
    - Encouraging workers to bring in their own food or using packaged meals;
    - Encouraging staff to stay on-site during working hours;
    - Marking of areas where queues form / toilets;
- Visitors
    - Explain rules on arrival;
    - Encourage remote contact;
    - Limit the number;
    - Maintain a record if practicable;
    - Train and establish “Covid” hosts responsible for communicating precautions and steps to any visitor;
- Face coverings
    - Remember the evidence that the protection from face coverings is weak and it is not an alternative to the other risk mitigation strategies;
    - Wash hands before applying and after removing;
    - Change when it becomes damp.
- Travel
    - Minimise the need for it;
    - Reducing density in vehicles;
    - Ensuring that social distancing is possible at any overnight accommodation;
- Deliveries
    - Making them contactless where possible;
    - If a two-person job, then using fixed paired working;
    - Ordering / delivering large quantities, less frequently;
    - Encouraging drivers to stay in their vehicles;
    - Cleaning external packaging and or unpacking and washing of hands;
    - Stopping personal deliveries to the workplace;

- Maintenance
    - To be scheduled during non-working times or when the workplace is emptier;
- Catering
    - Wipe down laminated menus between use;
    - Restrict numbers in kitchens
    - Screens for tills etc;
    - Non-contact passing over of food;
- Customer-facing businesses
    - Limiting customers in store;
    - Encourage lone shopping;
    - Reminding parents to supervise movement of children;
    - Queue management, preferably outside
    - One-way movement in premises;
    - Use barriers where possible to separate staff and customers
    - Changing customer services that can't be delivered without social distancing;
- Shops
    - Fitting rooms should be closed whenever possible;
    - Storing items that have been returned, donated, brought in for repair or extensively handled in a container or separate room for 72 hours and/or cleaning such items before displaying them on the shop floor.
    - Considering placing protective coverings on large items that may require customer testing or use, such as furniture; and ensuring frequent cleaning of these coverings between uses.
    - Cleaning "touchpoints" (eg, interior and exterior touchpoints in rental vehicles and/or test drive vehicles)
- Communicating
    - Using technology;
    - Whiteboards / posters
- Before opening
    - Cleaning the workplace

    - Checking ventilation and take advice re air conditioning systems to ensure adequate ventilation;
- Creating social distancing champions amongst the workforce to disseminate good practice;

Control of Contact Risks

- Instructing and then ensuring that all employees wash their hands as often as possible for 20 seconds, including at least washing hands:
    - on arriving and leaving the workplace – provide hand-washing or, if not possible, hand sanitiser;
    - at the beginning and end of a break;
    - before and after eating or drinking;
    - if an employee coughs or sneezes or blow their nose;
    - before entering enclosed spaces such as vehicles;
    - when changing work-stations or handling equipment that others have handled if reasonably practicable.
- There must be adequate provision of sinks and soap
    - consider pop-up wash stations
    - only where hand-washing is not possible then provide hand sanitiser and also individual hand sanitisers and ensure that it is used;
- Enhanced cleaning of the workplace with disinfectant / chlorine based solutions;
    - Particularly for busy areas;
- Workstations
    - Consideration to be given to allocating work stations to a single employee or to a fixed cohort if that is not possible so as to avoid hot-desking / shared work-stations;
    - Workstations should be regularly wiped down and cleaned;

    - Consideration should be given to ceasing production at designated times to ensure that workstations and other areas are cleaned;
- Tools / keyboards / keypads / equipment / handles / copiers etc should be wiped down regularly
    - Avoid sharing tools / keyboards or restrict their use to a fixed cohort if not possible;
    - Shared tools / keyboards should be wiped down whenever a person has finished using them;
    - Consider ways to clean expensive equipment that cannot be washed down;
    - Restrict use of photocopiers;
- Sanitation
    - Using signs / posters / instruction to remind staff to wash hands and to do so regularly including
        - Avoiding touching the face, particularly eyes, nose and mouth;
        - Coughing / sneezing into a disposable tissue or crook of the arm if not possible;
        - Enhanced cleaning;
        - Special care for portable toilets;
        - Handtowels if possible as an alternative to hand dryers;
        - Clear rules for showers / changing rooms where required;
- Cleaning vehicles regularly including those vehicles taken home;
- If an employee tests positive for Covid-19 then their workplace should be cleaned in accordance with the following guidance (https://www.gov.uk/government/publications/covid-19-decontamination-in-non-healthcare-settings/covid-19-decontamination-in-non-healthcare-settings)
    - Public areas can be cleaned as normal where an infected person has passed through

- Use detergent 1,000 parts per million chlorine or household detergent;
- Wear, as a minimum, disposable gloves and an apron (equipment should be stored in rubbish bags for 72 hours and then disposed of)
    - If the area being cleaned is a bedroom or there are bodily fluids, then a higher level of protection is necessary;
- Surfaces which an infected person has come into contact with should be cleaned with disposable cloths / paper rolls / mop heads and detergent – do not splash or spray.

2.11. What about Controversies over the Guidance and particularly, PPE in the workplace?

Short Answer

The Government Guidance may not be the complete answer and employers need to continue to assess the risks themselves.

Explanation

It is not the function of this paper to endorse any of these steps or necessarily suggest that implementing them will mean that there is a safe system of work. There is no doubt that the three strands – of management of infected people and vulnerable people; respiratory transmission control; and hygiene control – reduce virus transmission.

Controversy remains over some of the measures and whether they are supported by evidence as making a workplace safer (although there is perhaps less evidence that the steps do any harm). For instance

- The WHO[13] suggests that social distancing is the maintenance of at least 1 metre distance. Sociology Professor Robert Dingwall from the New and Emerging Respiratory Virus Threats Advisory Group suggests that 1m social distancing is supported by the medical evidence but that 2m is not. However, if 2m does not create an issue then it should be maintained. The issue arises however, if 2m prevents businesses operating then is there a proper basis for it to be maintained? The WHO suggests "at least" 1m so it would be logical to infer that a greater distance would be safer (although this may not be supported by evidence).

The controversy is particularly acute where social distancing of 2m or even 1m cannot be maintained. What are effective precautions in those circumstances?

- The advice on masks or face coverings in a community setting is not simple and is not necessarily recommended see WHO Guidance[14]. Research suggests that homemade coverings should only be used as a last resort but are more effective than nothing in suppressing transmission. There are suggestions that behaviour might be influenced by usage of face coverings. The various arguments are considered in the Lancet[15].
- It is clear that the use of high-quality PPE reduces transmission.
- The 14 sector-specific guides (as with the guidance for education, childcare settings, and for public transport) state that PPE for Covid-19 risks is only appropriate for clinical settings. That PPE involves high quality respiratory masks and shields etc.

---

[13] https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public

[14] https://www.who.int/publications/i/item/advice-on-the-use-of-masks-in-the-community-during-home-care-and-in-healthcare-settings-in-the-context-of-the-novel-coronavirus-(2019-ncov)-outbreak

[15] https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30918-1/fulltext

- Clinical PPE supply issues have been the subject of widespread reporting by media and those in the health and social care sectors have raised serious concerns about inadequate provision.
- It could be that this aspect of Government guidance, for instance, is a public health message to ensure that demand for PPE, outside of the very high risk clinical setting, in lower risk areas, does not subsume the clinical supply.
- So, the Government addresses the use of face coverings. This is particularly controversial. The Government Guidance is clear. It says that face coverings are not PPE it says (see, for example, the guide for the Construction industry) and the evidence for their use is not developed. Face coverings are no substitute for the other precautions.
- However, if an employer wants to restart their business and that business must carry out work involving, for instance, high numbers of people in a poorly ventilated enclosed space who are densely packed then it may be that only high quality PPE can adequately control that risk. In this scenario, an employer would need to consider whether the Government guidance adequately ensures the safety of employees so far as is reasonably practicable and may well need to consider the use of Covid-19 PPE.

The Employment Lawyers Association[16] has called on the Government to resolve these difficulties. The TUC[17] has called for gaps in the Guidance to be resolved and for consultation and an agreed consensus. The Government has gone some way with new sector-specific guides, but the duties still will weigh heavily on the shoulders of employers.

[16] https://www.elaweb.org.uk/content/issues-respect-which-guidance-required-assist-employers-and-employeesworkers-coming-out

[17] https://www.bbc.co.uk/news/uk-52533375

In summary, if an employer can implement the three strands above and maintain social distancing of 2m along with hygiene control and the other precautions then the duties are likely to be discharged. If at least 1m social distancing, with adequate risk mitigation, can be maintained then WHO Guidance is complied with. However, the issues become more difficult where social distancing cannot be maintained, whether it be at 1m or 2m.

This is no mathematical equation for safety. Health and safety advice counter-intuitively always acknowledges and accepts risk. The best advice is to do what is reasonably practicable. A business should inform itself on guidance as best it can and then seek to consult and agree a way forward together with its workforce or their representatives.

Running a safe workplace: putting it in to practice

2.12. Now I have set out the system how do I implement it?

Short Answer

Many safe systems fall because they are not properly implemented. The essentials of good implementation are communication, training, signage, repeated instruction, recording success and failure and finally management intervention whether that be reward or sanctions.

Explanation

Workers are busy. They have tasks to perform. It is the employer's role to communicate the new system by meetings (using technology eg videos if possible), notices and signage that can include tape and floor coverings, arrows and other physical signs to encourage compliance.

Secondly, the employer needs to ensure people are trained in virus control such as handwashing and maintaining distance such as waiting for a person to pass in a wider area of the workplace.

Records are important to show success and also to show where there might be infection. The best method of health and safety compliance is to incentivise success.

However, if reasonable precautions are not being followed by employees then the business must direct their staff to follow the precautions and pick them up on such issues. The last resort is disciplinary action to show all employees the importance of such measures.

Customer facing businesses are less able to train them so physical reminders such as arrows, notices and staff instruction are likely to be particularly important.

2.13. What are the reporting obligations on an employer if an employee contracts Covid-19?

Short Answer

An employer must report if an employee contracts Covid-19 (and further report if the employee dies) as a *result of occupational* exposure.

Explanation

The Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013, known as RIDDOR, place reporting obligations on employers in certain circumstances. For the coronavirus emergency, the obligation is to report the release of Covid-19 virus (say in a laboratory setting) or the contracting of Covid-19 and further to report any death from Covid-19.

In the case of employees, the reporting obligation is only ever triggered if the contracting of the disease or the death is because of occupational exposure. This is done on a “reasonable evidence” basis.

This is particularly difficult with Covid-19. An employee may have encountered the virus other than at work and the exposure at work may not, actually, have caused the disease.

The HSE Guidance[18] refers to the following factors such as

- whether or not the nature of the person's work activities increased the risk of them becoming exposed to coronavirus?
- whether or not there was any specific, identifiable incident that led to an increased risk of exposure?
- whether or not the person's work directly brought them into contact with a known coronavirus hazard without effective control measures, as set out in the relevant PHE guidance, in place such as personal protective equipment (PPE) or social distancing.

For example the HSE advises that if a person works with the general public and contracts Covid-19 that is unlikely to be reportable on a reasonable evidence basis, absent other factors, as being attributable to work where the virus is circulating in the population.

However, if a person works in a care home treating Covid-19 patients then there would be a reasonable basis, absent other factors, of reporting the disease.

The second part of the guidance is not controversial. Such guidance may, however, be controversial where employees / representatives suggest that care was not taken in respect of the work with the general public so as to make the exposure, on a reasonable evidence basis, occupational.

The HSE does not require, as it normally does, a registered medical practitioner's diagnosis in writing that the person is suffering from Covid-19

[18] https://www.hse.gov.uk/coronavirus/riddor/index.htm

when reporting. However, the position is different with a death certificate where the certified cause / causes of death will be relevant.

It should not be overlooked that under the Health and Safety at Work etc. Act 1974, it is a criminal offence to fail to complete a RIDDOR form in circumstances where such a form is to be completed.

2.14. Can the employee be dismissed or not be paid for not coming to work because of coronavirus?

Short Answer

Yes.

But if the employee reasonably believes that the threat is serious and imminent and that it cannot reasonably be controlled then any dismissal would be automatically unfair. The employee may be able to claim compensation for any punishment such as the non-payment of wages - the cases are highly fact dependent.

We examine the special cases of people who are Extremely Vulnerable, Vulnerable and or are pregnant (see 2.20 and 2.21-2.25 below).

Explanation

If s.44(1)(d) Employment Rights Act 1996 ("ERA") in respect of detriment and s.100(1)(d) in respect of unfair dismissal allows an employee to claim compensation from their employers in certain circumstances.

Scope of the protection

The domestic right is only for employees and does not extend to workers or the self-employed contractor. However, it is a day 1 right and there is no qualifying period of service. Further, there is an argument that, as the right derives from EU law (Framework Direction 89/391/EEC), it should

extend to all workers who are not self-employed. This is because in EU law the ECJ in cases such as *Fenoll v Centre d'aide par le travail "La Jouvene C-316/13 [2016] IRLR 67* extends the domestic definition of worker for the so that it has its own meaning in EU law that applies in the UK as follows

> *So any person who pursues real, genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a "worker". The essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration*

Accordingly, arguments may be made against Government employers that this extended definition of worker should be used and against private employers that Courts should interpret domestic legislation under their *Marleasing* (until at present 31 December 2020) duty to read UK law as conforming with EU law. Finally, because Article 31(1) of Charter of Fundamental Rights of the European Union gives workers the right to respect for health and safety there is an argument following recent extension of the doctrine of Horizontal Direct effect that the Directive can be relied upon against private employers and that domestic UK legislation should simply be struck down per *Stadt Wuppertal v Bauer/Willmeroth v Broßonn [2019] IRLR 148*. If this argument was followed, then workers may simply be able to rely on Article 8(4) of the Directive which provides that

> *Workers who, in the event of serious, imminent and unavoidable danger, leave their workstation and/or a dangerous area may not be placed at any disadvantage because of their action and must be protected against any harmful and unjustified consequences, in accordance with national laws and/or practices.*

The Protection

S.44(d) and (e) ERA materially provide respectively that

in circumstances of danger which the employee reasonably believed to be serious and imminent and which they could not reasonably have been expected to avert, they left (or proposed to leave) or (while the danger persisted) refused to return to their place of work or any dangerous part of their place of work, or

in circumstances of danger which the employee reasonably believed to be serious and imminent, they took (or proposed to take) appropriate steps to protect themself or other persons from the danger.

Each of these sets of provisions requires a 'reasonable belief" on the part of a worker and a danger which is "serious and imminent". Case law suggests these concepts will be broadly interpreted. In *Harvest Press v McCaffrey [1999] IRLR 778*, the EAT agreed with the employment tribunal who considered that the word 'danger' was used without limitation in s.100(1)(d) ERA (with identical wording but protecting against automatic unfair dismissal in health and safety cases) and that Parliament was likely to have intended those words to cover any danger however originating.

By contrast, in *Akintola v Capita Symonds Ltd [2010] EWCA 405,* the Court of Appeal found that it had been open to an employment tribunal to find that the Appellant, who was a senior structural engineer and who had been instructed to provide structural advice on a tunnel at Marble Arch tube station, did not have a reasonable belief that he was in circumstances of serious and imminent danger when he had been expected to enter a tunnel through a manhole. On the facts, the tribunal had found that he had been unable to prove that there was a serious or imminent danger, bearing in mind the existence of a method statement and that the owner council had sent in a specialist team to undertake all the necessary monitoring before anybody else had been allowed to enter the tunnel.

Coronavirus is overwhelmingly likely to amount to a serious and imminent risk in most workplaces on that which we currently know (Government regulations such as the *Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, SI 2020/35*0 declare that they were made because of "the serious and imminent threat to public health"). But is that

true where the employer is following and complying with Guidelines on safety during the pandemic? Is that fear of imminent and serious danger reasonable in circumstances where all government guidance, including on social distancing and on PPE, is being followed? For example, in the caring context the Public Health England: Interim Guidance for Primary Care guidance, dated 19 March 2020, states that:

> *Once a possible case has been transferred from the primary care premises, the room where the patient was placed should not be used, the room door should remain shut, with windows opened and the air conditioning switched off until it has been cleaned with detergent and disinfectant. Once this process has been completed, the room can be put back in use immediately.*

If that is all complied with properly, a critical work employer asking their employee to return to that room or place of work is likely to be issuing a reasonable instruction. However, that is not the end of the matter because even if the employer has followed Government Guidance there may be circumstances where a Tribunal could still find that the employee had a reasonable belief, and in those circumstances they will still qualify for protection: *Oudahar v Esporta Group Ltd [2011] IRLR 730 EAT*. If lockdown is lifted employers and employees will all be taking risks – whether it is a reasonable belief may depend on factors such as the extent to which the employer has assessed risks and followed guidance, whether any further safeguards such as PPE can be provided or other mitigation measures can be taken, whether the work means that certain safeguards cannot be taken, the vulnerability of the employee or those with whom they live from the Vulnerable to the Extremely Vulnerable. An employer may be following Government Guidance to the letter, but the employee may still have a reasonable belief that working is not safe.

There are likely to be many cases where the employer's instruction is likely to be reasonable from their perspective as they are following Government Guidance, and the employee's refusal to attend the place of work fearing serious and imminent danger may also be reasonable from their

perspective as their Union or they have assessed the risk as not adequately controlled even if all the Guidance is followed.

In employment law terms, that leaves both decent employers and fearful employees with difficult questions about what steps they take in such circumstances.

The best answer in these circumstances is for employers to follow the guidance and set up and implement all protections that they reasonably can, then they should consult, negotiate and agree the measures with the workforce. Again, this offers no immunity from suit but offers the best way forwards.

Marching down the misconduct/disciplinary route *may* result in a health and safety detriment or dismissal, pursuant to s.44 or s.100 ERA, but even if it is legitimate to do so (and there are circumstances where it may be), it is not likely to resolve the issue to allow the business and the employee to thrive together.

Equally, an employee may be able to claim for compensation for any lost wages whilst exercising rights to stay away from work under this section. However, each case is so fact specific that each broad advice is difficult to give.

This may also amount to whistleblowing see 11 below.

2.15. Does the protection apply to travelling to and from work?

Short Answer

It arguably does extend that far so that if the employee reasonably believes that a commute would place them at serious and imminent danger then they may be able to refuse to travel to and from work. But the issues has not been conclusively determined and will be fact specific.

Explanation

The Government published a document outlining its recovery strategy, "Our Plan to rebuild", on 11 May 2020 which provided that "*When travelling everybody (including critical workers) should continue to avoid public transport wherever possible".* Current guidance on travelling safely says 'you can help control coronavirus and travel safely by walking and cycling, if you can. Where this is not possible use public transport or drive.[19] It goes on to suggest avoiding the busiest routes and times.

The courts have taken a broad interpretation of 'danger' so that it is arguable that it extend to the circumstances of arrival, and potential carrying the virus to others, by virtue of having been in close contact with the public.

In *Edwards v The Secretary of State for Justice*[20], a 2014 case about prison officers refusing to make a journey to work along an icy road, the EAT accepted that travel to work came within s44(1)(d). There the prison officers suffered a loss of pay when they refusing to travel to work along an icy hill in contrast to some colleagues. The EAT criticised the Tribunal's reliance on those colleagues who were content to travel, in that just because some employees assessed the conditions as safe did not mean that other employees could not have the reasonable belief of imminent danger. The EAT concluded with the line that *"It does not follow that, because no accident had happened, on a relatively small number of journeys, there was no risk.*". This last sentence is particularly pertinent to travelling by public transport today. In *Edwards,* however, it was substantially the Respondent providing the means of transport. This may undermine it as an authority in respect of public transport.

---

[19] https://www.gov.uk/guidance/coronavirus-covid-19-safer-travel-guidance-for-passengers?priority-taxon=774cee22-d896-44c1-a611-e3109cce8eae#travel-safely-during-the-coronavirus-outbreak

[20] https://www.bailii.org/uk/cases/UKEAT/2014/0123_14_2407.html

There is uncertainty for both employers and employees and the best advice is for employers to consult and speak with their employees about safe methods by which to get to work taking into account that what may be safe for some employees would not be safe for others.

2.16. What adjustments (other than working from home) might an employer have to make for someone who has had the virus?

Short Answer

As with the duty to make reasonable adjustments under the Equality Act 2010 ("EqA") generally, the best way of ascertaining what adjustments need to be made is to talk to the employee; find out what they need in order to do their job; and to make the adjustments if it reasonable to do so. The most obvious is likely to be a phased return to work if they are still recovering; and discounting virus-related absence from the sickness absence policy; others might be allowing time off for related hospital appointments. Access to work, the government scheme which provides support for disabled people in the workplace, can help with any cost.

Explanation

Where an employee is disabled there is an obligation under the EqA to make reasonable adjustments under s.20 and an employer will be subjecting an employee to unlawful discrimination if it fails to comply with the duty to make adjustments (s.21 with s.39). Anyone who has been hospitalised with the virus, particularly if they have been in ICU, is likely to meet the definition of disability in the EqA. Initially it may take them some time to recover and they may need a phased return to work, gradually increasing hours until they can return to full capacity. They may need time off for hospital appointments and follow up at least initially. It will be important in any event to discuss their needs; make a referral to occupational health if such a service is available; and to ensure that they

can manage the workload. Access to Work, a government scheme which provides financial assistance by way of a grant to fund special equipment, adaptations or support worker services to help disabled people to do things like answer the phone or go to meetings and which can provide help in getting to and from work might also be useful. Discounting virus-related absence from any sickness related absence policy may also be a reasonable adjustment to have to take given the circumstances.

2.17. Can a disabled employee refuse to wear a mask at work because of their disability?

Short Answer

There may be situations in which a mask is considered to be an appropriate form of protection as part of ensuring the health and safety of employees. If any employee is unable to wear a mask for a reason relating to their disability, any insistence on their doing so – and subjecting them to a detriment and/or dismissal as a result – may amount to discrimination because of something arising in consequence of disability which will have to be justified in accordance with s.15 of the EqA; it will also trigger the duty to make reasonable adjustments under s.20 of the EqA – such a policy placing the disabled person at a substantial disadvantage compared to those who are not disabled; and may form the basis of a claim for indirect discrimination in addition.

Explanation

Whilst the wearing of face coverings is compulsory in England in certain settings (for example, public transport, in shops and certain public buildings, such as museums etc – see for example The Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place) (England) Regulations 2020/791) staff originally did not have to wear masks under the regulations. Since 24 September 2020, reg 3(2A) applied compulsory

mask wearing to those working in places listed in Schedule 3 to those regulations. It is also recognised in reg 4 of these regulations that those who are disabled may not be able to put on, wear or remove a face covering because of physical or mental illness or impairment or disability, or without severe distress and so they are deemed to have a "reasonable excuse" for not wearing one.

Employers in non-Schedule 3 settings who wish their staff to wear masks will need to consider this in the context of a risk assessment and where a staff member asserts that they cannot do so because of a disability/disability related reason, will need to consider alternative methods of achieving the risk amelioration sought.

An insistence that a disabled person wear a mask and imposing a detriment if someone does not do so – or a detriment if they do, such as the person becoming distressed or a condition being aggravated – is likely to amount to unfavourable treatment because of something arising in consequence of disability. An employer would have to justify this treatment as being a proportionate means of achieving a legitimate aim in order to defeat a claim of discrimination. If there are reasonable adjustments that could be made, then any justification is unlikely to succeed. For example, an employee who cannot wear a mask might be given different duties; allowed to work from home, etc.

2.18. Are immunity passports likely to be legal? Can an employer insist that someone has an immunity passport before they return to work?

Short Answer

Immunity passports – documentation which indicates that you have had the virus or that you carry the antibodies which mean that you are

therefore unlikely to contract the virus again – have been floated by a number of sources as providing a solution to a fully functioning return to society and avoiding the need for social distancing (some countries have already developed them and are using them: https://www.bbc.co.uk/news/business-53082917. There has been no indication as yet from the government that it will be producing them nor that it will be introducing legislation which gives those who hold them particular legal rights, though there is nothing to prevent anyone producing an "immunity passport". Without specific legislation, however, denying anyone employment (or indeed a service) because they cannot show that they have had the virus may be unlawful discrimination – on the basis of age, disability and potentially pregnancy.

With the development of vaccines and the roll-out of a vaccination programme, talk has shifted to vaccine 'passports', or mobile phone apps, as a means of facilitating, in particular, international travel and large scale public events. Similar issues arise. See also 'What about requiring workers to be vaccinated?' below.

Explanation

There is some indication already that an idea that was floated as long ago as April/May 2020 has now gained traction in some countries: for example, Estonia is reported to be building an "immunity passport" system; Chile is also planning what it calls a "release certificate" following such principles; and apps are being developed to display antibody status – one example, Onfido, is apparently being used by some US hotel chains in order for guests to access some of the services, such as the spa or gym, where social distancing is not an option (see https://www.bbc.co.uk/news/business-53082917).

There is nothing as yet to indicate how effective "immunity passports" would be – there is no firm evidence that having contracted the virus once,

an individual is immune to contracting it again (see for example this recent report on Covid antibodies fading rapidly https://www.bloomberg.com/news/articles/2020-07-21/covid-antibodies-fade-rapidly-raising-risk-of-lost-protection). And for the moment, there is no indication that the government is proposing to introduce legislation to provide particular rights and responsibilities in relation to such passports. If it did, it could also provide an exception to, for example, discrimination legislation for the use of such passports. But there is no such exception at present.

Those who were shielding prior to 1 August 2020 because they are at risk of suffering significantly if they contract the virus are unlikely ever to have immunity passports (unless they have been vaccinated in which case they should have antibodies). In those circumstances, a requirement by an employer that they possess an immunity passport in order to be offered employment or to continue in employment would be a provision criterion or practice ("PCP") which puts those who are of a particular age (over 70, though some over 65s may have been shielding) or with a particular disability (for example, those with COPD, cancer etc) at a particular disadvantage. It may provide the same difficulty for those who are pregnant (though the difficulty would last only for the duration of the pregnancy). An employer would have to justify the PCP as being a proportionate means of achieving a legitimate aim. In respect of justification, as Mummery LJ explained in *R (Elias) v Secretary of State for Defence [2006] IRLR 934* (CA): " … the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end." *Woodcock v Cumbria Primary Care Trust* [2012] ICR 1126 has reinforced that cost alone cannot be a legitimate aim; and so the cost of having to implement social distancing measures alone cannot be used as justification for prohibiting whole classes of people from entering/continuing in employment. The social consequences of using

such passports are significant. There are, in addition to EqA implications, also likely to be Human Rights Act 1998 implications (particularly Articles 8 and/or 14) – directly in respect of public authority employers, indirectly by means of interpretation in respect of private sector employers.

2.19. What about requiring that workers be vaccinated?

Short Answer

Compelling someone to be vaccinated without their consent would be unlawful – including cases where the requirement is a contractual one. At issue is whether, and in what circumstances, requiring a vaccination could allow a prospective employer to say 'no jab, no job'; or for existing workers, would be a reasonable management instruction, enabling an employer to impose sanctions in response to a failure to be vaccinated. Answering these questions will always depend on the immediate factual context and will usually require balancing the detriment to the individual against the actual benefit to the employer or prospective employer.

Legal risks from a compulsory approach include discrimination claims because of disability, pregnancy, or religion and belief. If side-effects later emerge, personal injury claims are possible. As with immunity or vaccine passports, in addition to the Equality Act considerations, Human Rights Act implications arise, directly for public authority employers, indirectly for others. Nevertheless, in some factual situations, refusing employment to or sanctioning a worker for not being or disclosing having been, vaccinated may be lawful.

Explanation

It is suggested that education and encouragement is a better long-term approach than relying on contract, compulsion and sanctions. Engage with the worker and try and overcome fears.

The legal issues to consider include contract, the relevance of any express or implied contractual terms, enforcement and discrimination.

Potential new recruits whose resistance to vaccination is not because of a characteristic protected by the Equality Act 2010 and where the prospective employer is not able to justify the requirement, may be the simplest. No-one is forcing them to be vaccinated.

Note that asking a question about whether an applicant has been vaccinated is likely to contravene the s60 Equality Act 2010 prohibition of asking about the health of the applicant. Although this can only be enforced through disability discrimination claims or more generally by the Equality and Human Rights Commission, the EHRC do not have to wait for a victim.

Enforcement by the courts of any requirement to be vaccinated depends on the ability to justify the requirement. That depends on evidence, not just assertions. Since 1984 and the European Commission on Human Rights' 1998 decision in *Boffa v San Marino Application No 26536/95,* a requirement to undergo medical treatment or vaccination, on pain of a penalty, may amount to interference with the right to respect for private life under Article 8 of the Convention on Human Rights.

What escapes liability for the interference is demonstrating that the facts satisfy the derogation. Protecting the health of the public has been found to be a legitimate aim and justified. However, is the interference 'necessary in a democratic society'? The interference must correspond to a pressing social need and be proportionate to the legitimate aim pursued. Part of this balancing exercise is scrutinising what the measure actually might achieve in practice and whether that could be done through less intrusive means.

In *Solomakhin v Ukraine Application No 24429/03,* the applicant had been vaccinated against his wish (see the concurring opinion) but without using force during an epidemic of diptheria in 1998. Interference with his private life was not contested. The European Court of Human Rights found it was clearly provided for by law and pursued the legitimate aim of protection of health. As to whether that interference with his physical integrity was necessary in a democratic society, the Court found it could be justified by the public health considerations and necessary to control the spreading of infectious diseases in the region. Moreover, the medical staff had checked his suitability for the vaccination prior to carrying it out, suggesting the '*necessary precautions had been taken to ensure that the medical intervention would not be to the applicant's detriment to the extent that would upset the balance of interests between the applicant's personal integrity and the public interest of protection [of] health of the population.' [36]* When considering issues in any workplace, including in the private sector, it is suggested as sensible to address both limbs in the context of that particular workplace.

In *Jehovah's Witnesses of Moscow v Russia Application No 302/02* in the context of an allegation of encouraging suicide or the refusal of medical assistance, one of the grounds for banning the community group, the Court at [136] emphasised the distinction between decisions affecting oneself only and affecting others: *'it was emphasised that free-choice and self-determination were themselves fundamental constituents of life and that, absent any indication of the need to protect third parties – for example, mandatory vaccination during an epidemic, the State must refrain from interfering with the individual freedom of choice in the sphere of health, care, for such can only lessen and not enhance the value of life …'*

The Grand Chamber of the European Court of Human Rights is considering the issues in *Vavricka & others v the Czech Republic*

Application No 47621/13. Although the context is the effect of the refusal of vaccinations for polio, hepatitis B, tetanus and MMR (fines and the exclusion of children from nursery school), it Its ruling is expected in Summer 2021.

No vaccine is yet known to be 100% effective, so vaccination cannot substitute for continuing social distancing and other methods for limiting transmission. The need to complete the rollout of the vaccination programme and then to re-vaccinate the population, means risks will continue. Moreover, a concern is that as the virus mutates, existing vaccinations may become ineffective. And of course some people will have objectively legitimate reasons for not taking the vaccine.

The reasonableness of any compulsory approach is likely to depend heavily on the immediate factual context. As an interference with bodily autonomy, rather than just being in the sphere of personal or family life, what more is required? What is the evidence-base for the decision? What does the risk-assessment show? To what extent is requiring a vaccination proportionate to the reduction in risk to other workers and/or clients or customers in this particular work setting? What is the reduction in risk? Is it measurable? Can the risks be managed as effectively though other methods?

In all cases the evidence about the effect on the general workplace risks needs to be balanced against the particular risks faced by the person refusing to take or to confirm they have taken the vaccination. Is the individual interference proportionate to what it is likely to achieve generally?

One suggestion is to link a requirement to vaccinate to the need to reduce the number of days of sickness absence. Yet as the vaccination is said to reduce (not remove) the severity of illness and so reduce the risk of

hospitalisation and death, rather than reducing the number of days of sickness per se, the data on which to base such a link seems lacking.

Part of the context for decision-making is the standard of reasonableness represented by s.45D and s.45E of the Public Health (Control of Disease) Act 1984. Section 45E specifically excludes imposing a vaccination requirement from the Secretary of State's regulation-making powers to deal with the incidence or spread of infection or contamination in England and Wales. Section 45D(2) limits the regulation-making powers so that regulations must provide that a decision-maker, at the time of taking a decision to impose a restriction or requirement, considers that restriction or requirement to be proportionate to what is sought to be achieved by imposing it.

In general, it would be safer to watch out for and follow government guidance – of course, while thinking for oneself in the context of the particular work environment. While s45E of the Public Health (Control of Disease) Act 1984 remains in force, the government is unlikely to recommend compulsion. However, there are indications, as at March 2021, that consideration is being given to making vaccination compulsory for front-line health workers.

2.20. What about pregnant workers?

Short Answer

Pregnant women are protected in law against risks to their health and safety and that of their baby, as well as against unfavourable treatment because they are pregnant. They also have the same statutory protection as all employees against detrimental treatment and dismissal on health and safety grounds under s.44 and s.100 Employment Rights Act 1996 ("ERA"), as discussed at 2.14 above.

Explanation

Covid-19 poses a threat to the health and safety of pregnant women, as has been recognised in Public Health England guidance on 'social distancing' whereby pregnant women have been advised that they (alongside other defined groups) are "clinically vulnerable" meaning that they may be at higher risk of severe illness from coronavirus. For these groups, the Government's advice is clear: "particular care" should be taken to minimise contact with others outside the person's household".[21]

It is not yet fully understood to what extent pregnant women are at greater risk from Covid-19. Occupational Health advice published by the Royal College of Obstetricians and Gynaecologists ("RCOG") (updated 22 May 2020) for employers and pregnant women during the pandemic[22] notes that there is "as yet" no robust evidence that pregnant women are more likely to contract Covid-19 than the general population; but that pregnant women in their third trimester (after 28 weeks) are more likely to become seriously unwell if they become infected. The guidance reports on interim findings published by the UK Obstetric Surveillance System (on 11 May 2020) which noted that pregnant women admitted to hospital with Covid-19 were more likely to be of BAME origin, suggesting that these women are at a particularly increased risk. The guidance (paragraph 2.2) recognises that

It is not possible to give absolute assurance to any pregnant woman that contracting COVID-19 carries no risk to her baby and no risk to her over and above that experienced by a non-pregnant healthy individual,

---

[21] https://www.gov.uk/government/publications/staying-alert-and-safe-social-distancing/staying-alert-and-safe-social-distancing-after-4-july

[22] https://www.rcog.org.uk/globalassets/documents/guidelines/2020-05-22-occupational-health-advice-for-employers-and-pregnant-women-during-the-covid-19-pandemic.pdf

whilst also stating that pregnant women in their first and second trimesters can – subject to risk assessments – continue to travel to workplaces and work there (including in health and social care settings). The guidance is, however, clear that pregnant women can only continue to work in direct patient-facing roles if they are under 28 weeks' gestation and if this follows a specific risk assessment carried out by their employer that recommends that they can continue working. If a pregnant worker cannot work safely and there are no alternative duties which she can carry out, then she can be put on maternity suspension on full pay. This is a fast-developing situation with many unknowns and employers should bear in mind that government advice continues to be that all pregnant women should take "particular care" to adhere to social distancing measures.

Running a safe workplace: disability and health needs

2.21. Are extremely clinically vulnerable people disabled within the meaning of the Equality Act 2010?

Short Answer

It is highly likely that all those on the Extremely Vulnerable list will be disabled within the meaning of the Equality Act 2010 ("EqA").

Explanation

The list of extremely clinically vulnerable people was published by the government with guidance that stated initially they should stay at home and shield. The list[23] states that expert doctors in England have identified specific medical conditions that, based on what is known about the virus

[23] https://www.gov.uk/government/publications/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19#who-is-clinically-extremely-vulnerable

so far, place some people at greatest risk of severe illness from COVID-19. The list is as below:

- *Solid organ transplant recipients.*
- *People with specific cancers:*
- *people with cancer who are undergoing active chemotherapy*
- *people with lung cancer who are undergoing radical radiotherapy*
- *people with cancers of the blood or bone marrow such as leukaemia, lymphoma or myeloma who are at any stage of treatment*
- *people having immunotherapy or other continuing antibody treatments for cancer*
- *people having other targeted cancer treatments which can affect the immune system, such as protein kinase inhibitors or PARP inhibitors*
- *people who have had bone marrow or stem cell transplants in the last 6 months, or who are still taking immunosuppression drugs*
- *People with severe respiratory conditions including all cystic fibrosis, severe asthma and severe chronic obstructive pulmonary (COPD).*
- *People with rare diseases and inborn errors of metabolism that significantly increase the risk of infections (such as Severe combined immunodeficiency (SCID), homozygous sickle cell).*
- *People on immunosuppression therapies sufficient to significantly increase risk of infection.*
- *Women who are pregnant with significant heart disease, congenital or acquired.*

The definition of disability is set out in s.6 EqA and is supplemented by Schedule 1 to the EqA and by the Equality Act 2010 (Disability) Regulations 2010 (2010 No. 2128). S.6 EqA provides that in order to be disabled a person must have a physical or mental impairment which has a substantial and long term adverse effect upon the ability to carry out normal day to day activities.

"Substantial" is defined (s.212 EqA) as being "more than minor or trivial" which means that the threshold to be met is a relatively low one. In considering the effect upon an individual of their impairment, any treatment must be disregarded (other than glasses) – see Schedule 1 paragraph 5 EqA - meaning that although an individual may appear to

have no symptoms because their condition is controlled by medication (for example, someone who has had an organ transplant but has to take immunosuppressant drugs for life) they are nevertheless likely to be covered by the definition of disability because the effects of their impairment must be considered without the effects of their medication .

Anyone who has cancer, HIV infection, or multiple sclerosis, is deemed to have a disability without having to prove that there is a substantial adverse effect on their abilities (Schedule 1 paragraph 6 EqA).

Those who have had disabilities in the past are also covered by the EqA provisions (see s.6(4) EqA). All of the people on the extremely clinically vulnerable list are likely to have impairments which impact upon their ability to carry out normal day to day activities or in the case of cancer they are deemed to be disabled.

As a result employers have obligations towards them under the EqA such as making reasonable adjustments; in addition, those who are pregnant will have maternity rights and the right not to be discriminated against on the basis of their pregnancy/maternity status (pregnancy being a protected characteristic in its own right and discrimination because of it being prohibited (s.4 and 18 EqA).

It is important to note that the list is not exhaustive (it is stated that "clinically vulnerable people *may* include) and there may be others with particular disease severity, medical history or treatment levels who will fit within this group and may have been advised that they do by their medical professionals.

2.22. Who are vulnerable people under the legislation and are they disabled under the EqA?

Short Answer

“Vulnerable” is used in a variety of legal settings but in the context of the virus, it has been most recently used in two sets of regulations relating to the virus: the Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020/684 (“the No 2 regulations”) which came into force on July 4, 2020; and the Health Protection (Coronavirus, Restrictions) (England) (No 3) Regulations 2020 2020/750 (the No 3 Regulations) which came into force on 18 July 2020 .

The No 2 regulations set out a non-exhaustive definition of who is a “vulnerable” person in Regulation 1(5) including reference to a list of underlying health conditions in Schedule 1. Anyone listed as vulnerable is likely to be disabled under the EqA, bar those persons who are simply pregnant and those over 70, who may or may not have disabilities in addition to being over 70. However, the list of underlying health conditions set out in the regulations is not exhaustive, and there may be others who might also be considered to be “vulnerable” to the virus.

The No 3 regulations define a vulnerable person as including any person aged 70 or older; any person under 70 who has a medical condition which increases vulnerability to Covid-19 and any person who is pregnant. It is likely that those who have such a medical condition as referred to are also likely to be considered to be disabled under the EqA

Explanation

Both the No 2 and the No 3 Regulations are primarily concerned with the restrictions that have been put in place to contain the virus. The No 2 Regulations define those who are vulnerable purely for the purposes of explaining the basis of one of the exceptions for people being permitted to enter or remain in what is termed a “restricted area” - to visit a vulnerable person (see Regulations 11 and 12(d)(iii)). Paragraph 1(5) of the regulations provides that a vulnerable person includes

(a) any person aged 70 or older;

(b) any person under 70 who has an underlying health condition including but not limited to any of the conditions listed in Schedule 1;

(c) any person who is pregnant.

Schedule 1 to the Regulations sets out the following list (non-exhaustive) of underlying conditions:

- *Chronic (long-term) respiratory diseases, such as asthma, chronic obstructive pulmonary disease, emphysema or bronchitis.*
- *Chronic heart disease, such as heart failure.*
- *Chronic kidney disease.*
- *Chronic liver disease, such as hepatitis.*
- *Chronic neurological conditions, such as Parkinson's disease, motor neurone disease, multiple sclerosis, a learning disability or cerebral palsy.*
- *Diabetes.*
- *Problems with the spleen, such as sickle cell disease or removal of the spleen.*
- *A weakened immune system as the result of conditions such as HIV and AIDS, or medicines such as steroid tablets or chemotherapy.*
- *Being seriously overweight, with a body mass index of 40 or above.*

Being vulnerable does not afford a person any other rights under the regulations. As for the EqA, however: HIV and Multiple Sclerosis are deemed to be disabilities within the meaning of s.6 EqA (see EqA Schedule 1 para 6), as is cancer (as a result of which someone may be taking steroid tables or chemotherapy).

A BMI of 40 or above will mean that an employee is obese: obesity is a disability when it results in a limitation of activities i.e. a substantial adverse effect on day to day activities (such as impaired mobility) – see *Fag Og Arbejde, acting on behalf of Karsten Kaltoft v. Kummunernes*

Landsforening, acting on behalf of the Municipality of Billund [2015] IRLR 146.

It is highly likely that those in the other listed categories (bar those who are pregnant and those who are simply over 70) will be disabled under the EqA and so the obligations set out above, including a duty to make reasonable adjustments, will arise.

It is important to note, however, that the list is not exhaustive. There are others who may be vulnerable, just as there are others who still fall within the definition of disability for the purpose of the EqA and to whom employers retain their obligations not to discriminate, including the duty to make reasonable adjustments.

The No 3 Regulations which make provision for a local authority to give directions relating to premises, events and public outdoor places in its area, provide at Regulation 1(4) that "vulnerable person" includes any person aged 70 or older, any person under 70 who has a medical condition which increases vulnerability to Covid-19, and any person who is pregnant.

As with the No 2 Regulations, the No 3 Regulations provide that a person may have a reasonable excuse for entering or remaining in a public outdoor place to which a direction (made under No 3 Regulations) relates if, inter alia, it is reasonably necessary in order to provide care or assistance to a vulnerable person (Reg 7(4)(e)(iii)).

There is no list of those who may have increased vulnerability to Covid-19 but such conditions are likely to include those set out in Regulation No 2 and as above are likely to include anyone in respect of whom a medical professional has indicated that there is a vulnerability to the effects of Covid-19.

2.23. Is someone with Covid-19 likely to be a disabled person under the Equality Act 2010?

Short Answer

It seems likely given the significant impact that Covid-19 has that those who have been hospitalised with it will be disabled people within the meaning of s.6 Equality Act 2010 ("EqA").

Explanation

Whilst Covid-19 is a new virus and so knowledge of and about its impact is still developing, there are indications that its long term effects can be significant.

ScienceMag states that: "The list of lingering maladies from COVID-19 is longer and more varied than most doctors could have imagined. Ongoing problems include fatigue, a racing heartbeat, shortness of breath, achy joints, foggy thinking, a persistent loss of sense of smell, and damage to the heart, lungs, kidneys, and brain" (https://www.sciencemag.org/news/2020/07/brain-fog-heart-damage-covid-19-s-lingering-problems-alarm-scientists#:~:text=The%20list%20of%20lingering%20maladies,lungs%2C%20kidneys%2C%20and%20brain). Many SARS patients suffer from significant lung scarring and are affected by a condition known as advanced respiratory distress syndrome which can require months of recovery and there is said to be some initial evidence to suggest that for Covid-19 patients, it may take even longer; as well as evidence of blood clotting in different parts of the body, leading to higher risk of pulmonary embolism and stroke.

Covid-19 is a disease which leads to potentially physical and/or mental impairments which are likely, in view of the above, to have a substantial adverse effect on the ability to carry out normal day to day activities. "long

term" means lasted for at least 12 months, likely to last for at least 12 months or it is likely to last for the rest of the life of the person affected (EqA Schedule 1 paragraph 2) – with likely meaning "could well happen" (see *SCA Packaging Ltd v Boyle [2009] IRLR 746* at, for example, 70-73). In these circumstances, it seems likely that the effects for those who have been hospitalised will last beyond 12 months (particularly given that an effect is to be treated as continuing to have the effect if it is likely to recur) and thus that they will fall within the definition of disability in the EqA.

2.24. Can an employer compel an extremely clinically vulnerable person to return to the workplace?

Short Answer

If an extremely clinically vulnerable person wants to continue to shield at home – either because of government advice or because the vaccine does not remove all risk – then it is likely that any insistence on their returning to work may lead to potential claims under health and safety legislation and of discrimination.

Explanation

Shielding at present

Those who are extremely clinically vulnerable were advised to shield until 1 August 2020 and with Lockdown 3 were advised from 5 January 2021 to 'stay at home as much as possible' (see https://www.gov.uk/government/publications/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19#definition).

Insofar as work is concerned, the guidance now provides that if they cannot work from home, they *'should not attend work'*.[24]

Health and Safety

If an employee is extremely clinically vulnerable, returning to the workplace may involve contact with people who are carriers of Covid-19 ("the virus"), thus putting them in danger of being infected and of experiencing the effects of the virus more severely than others. The purpose of shielding is to avoid contact with those with the virus but more importantly to avoid that contact because the effects of the virus are more severe for those who are in this category.

These matters would have to be considered in the context of a risk assessment and in conjunction with the relevant Health and Safety Regulations as set out above.

Refusing to come to work

A clinically vulnerable employee's belief under s.44 / s.101 Employment Rights Act 1996 ("ERA") (see 2.14 above) as to the danger that they may be in is all the more likely to be reasonable because of their status as an extremely vulnerable person – giving rise to a potentially successful claim of detriment and/or dismissal under the health and safety provisions..

Discrimination – arising from disability

Further, under the Equality Act 2010 ("EqA") an employer has an obligation not to discriminate against a disabled employee by subjecting them to a detriment (s.39(2)(d)) and/or dismissing them (s.39(2)(c)).

---

[24] https://www.gov.uk/government/publications/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19

The most relevant types of discrimination in this situation are likely to be s.15 and s.20 EqA (though s.19 may also be engaged). S.15 EqA (discrimination because of something arising in consequence of disability) is likely to arise where a disabled employee is subjected to a detriment and/or dismissed because they are shielding because their disability makes them vulnerable to the virus. In these circumstances it is likely that they will have been treated unfavourably because of something arising in consequence of their disability (the need to shield, which arises from the disability but is not the same as the disability itself) – see *Pnaiser v NHS England and Ors [2016] IRLR 170 at [31]* for a step by step approach to be taken to s.15 and *Williams v Swansea Trustees of Swansea University Pension and Assurance Scheme and another [2019] 2 All ER 1031 at [28]* for a more concise summary. Whilst this type of discrimination can be justified, where there has been a failure to make reasonable adjustments such justification will be very difficult (see section 5.21 of the Equality and Human Rights Commission Employment Statutory Code of Practice, which must be taken into account where relevant – s.15 Equality Act 2006).

Discrimination – disability reasonable adjustments

S.21 EqA provides that it is discrimination to fail to comply with the duty to make reasonable adjustments as set out in s.20 EqA. Under s.20(3) EqA a provision criterion or practice ("pcp") which puts a disabled person at a substantial disadvantage in relation to a relevant matter – here employment[25] – is subject to the duty to take reasonable steps to avoid the disadvantage. A pcp which requires employees to work from the workplace could put disabled people who are extremely clinically

[25] EqA Sched 8 para 5(1)

vulnerable at a substantial disadvantage because it would expose them to potential risk of contracting the virus.

Reasonable steps to take to avoid the disadvantage could be allowing them to work from home in their existing post; transferring them to another job which might be capable of being done at home; if the former are not feasible, allowing them to remain at home. How long this continues however, and in particular, how long the employee has to be paid a full salary, will depend upon the prevalence of the virus and the circumstances of the employer. The courts have considered that the purpose of reasonable adjustments is to retain people in employment and that payment to remain off work is not in effect conducive to that (see *O'Hanlon v Commissioners for HM Revenue & Customs [2007] IRLR 404*). Equally it can be argued, in these circumstances, that payment enables the employee to remain solvent and to be in a position to return to his employment. It is likely to depend entirely on the employer's circumstances. Access to work may also provide practical support to enable work at home, see https://www.gov.uk/access-to-work

Shielding in these circumstances also engages whistleblowing protection – see 11 below.

2.25. Can an employer ask a vulnerable employee to return to the workplace?

Short answer

"Vulnerable" people were not advised by the government to shield. Nevertheless there is recognition that anyone with the health conditions set out in the regulations may be at greater risk from contracting the virus and may wish to or be advised to take extra precautions and to continue to work at home. Employers will still need to conduct a risk assessment (see 2.7 above), and may need to ask occupational health

for input and/or for medical guidance from the employee's GP. Forcing a "vulnerable" employee to return to work may engage the same potential legislative provisions i.e. health and safety and the EqA. Having been vaccinated reduces but does not remove all risk.

Explanation

Initially the government had published specific guidance aimed at vulnerable people, but this was withdrawn on 1 May 2020 after information had been updated and the "clinically vulnerable" category of persons had been developed**.** However, as indicated above, those who are "vulnerable" are recognised as being nevertheless more vulnerable to the virus and its effects than ordinary members of the pubic. For example, Diabetes UK, the organisation providing advice and information to those living with diabetes, states that "*everyone with diabetes, including those with type 1, type 2, gestational and other types, is vulnerable to developing a severe illness if they do get coronavirus, but the way it affects you can vary from person to person*" [at https://www.diabetes.org.uk/about_us/news/coronavirus?gclid=EAIaIQobChMI_dO53r2d6wIVFuDtCh18CwAeEAAYASAAEgJzRfD_BwE#affects] Particular vulnerability may depend on individual circumstances e.g. other complicating factors, nature of the work that is to be carried out (e.g. degree of exposure to the public). As a result, employers need to ensure that those who are "vulnerable" are subject to a thorough risk assessment which takes into account individual circumstances (see above); that medical evidence is considered where appropriate; that reasonable adjustments are also taken into account

2.26. Can an employer ask an employee who is neither on the extremely clinically vulnerable list, nor the vulnerable list but who nevertheless says that they need to work at home because of their vulnerability to the virus to the workplace?

Short answer

Simply because an employee is not on the extremely clinically vulnerable list; or the vulnerable list does not mean that they may not need to work from home because of particular individual vulnerabilities which mean that if they caught the virus they would be subject to greater chance of suffering its effects more seriously than others. They may well have a disability under the Equality Act 2010 ("EqA"), which means that the same duties apply as referred to above; and the health and safety obligations under the Employments Rights Act 1996 ("ERA") will also apply regardless of disability. Asking them to return to the workplace may therefore risk the same claims as if they were clinically extremely vulnerable or vulnerable.

Explanation

The extremely clinically vulnerable list identifies those who would be most at risk if they caught the virus. However it has, it seems, not been all encompassing and there were reports of people having been omitted from the list which the government had drawn up (see for example here). This means that there will be employees who though not in the list may fall within the relevant categories. Similarly, there will be those who are not listed in the regulations but who nevertheless are vulnerable, because of their own particular circumstances, should they catch the virus (for example, someone who does not have *chronic* bronchitis but who has a history of it and is having a particularly bad episode and who has had pneumonia in the past). Many if not all of these people are likely to meet the definition of disability in the EqA and thus employers owe a duty to make reasonable adjustments in relation to their working practices (unless they can show that they did not know or could not reasonably be expected to know of the disability or the likely impact upon them (see Schedule 8 para 20) – such as a requirement to attend the workplace in person. The fact that such employees are not on a government list does

not mean that they are not disabled under the EqA nor that there is no obligation under the EqA towards them. Obligations under the Health and Safety at Work Act 1974 and the relevant regulations will also apply. Employers would be advised to conduct a risk assessment, refer to occupational health and/or request information from the employee's GP as above.

2.27. If an employee wants to remain at home because s/he lives with a vulnerable or extremely clinically vulnerable person must an employer permit it?

Short answer

An employer may need to allow this in the short term to avoid a claim based on s.44 Employment Rights Act 1996 ("ERA"), as set out above at 2.14, if there is no other way of avoiding the danger to the extremely clinically vulnerable/vulnerable person.

Explanation

An employee may say that in order to avoid danger to another person who is having reduced social contact as a result of their being vulnerable or extremely clinically vulnerable s/he needs to avoid travelling to a workplace and being in that workplace; and so s/he may refuse to attend work, pursuant to s.44 ERA. Employers will need to comply with their health and safety obligations and to conduct a risk assessment (see 2.7 above). Consideration, in conjunction with the employee, will need to be given to the extent of the danger and whether the employee could take other steps to avert it (such as isolating in the house from the vulnerable person). If an employee is subjected to a detriment (for example, not being paid) and/or dismissal because they refuse to return to work, there is a risk of a claim for detriment and/or automatic unfair dismissal under the ERA. The more remote the danger though the more sympathy a

tribunal is likely to have for any action taken to get him back to the workplace and the more difficult a potential claim under s.44 ERA would be.

A tribunal will undoubtedly take into account the immediate context of the act at issue. From August 2020 to the start of Lockdown 3 on 5 January 2021, the fact that the government had relaxed the rules on shielding during that period is likely to be relevant. It will also be important to obtain advice as to the vulnerable person's individual risk because regardless of the general advice during that period, they may still need to maintain minimal contact and given that the advice is that they should work from home where possible, it is clear that they remained at risk.

Although the person who is shielding is likely to have a disability under the Equality Act 2010 ("EqA"), it is only if the employee is treated less favourably *because of* that disability that there would be a claim of discrimination pursuant to s.13 and s.39 EqA. Requiring an employee to return to work despite living with a vulnerable/extremely vulnerable is not discrimination because of disability (unless there were those in materially similar circumstances who had been treated differently). There is no obligation upon an employer to make reasonable adjustments because of someone else's disability – an individual must possess the protected characteristic of disability in order for a duty to make reasonable adjustments to arise (see *Hainsworth v Ministry of Defence [2014] IRLR 728).*

Whilst European caselaw has recognised indirect discrimination by association (see *CHEZ Razpredelenie Bulgaria C-83/14*) this is not an area that has as yet been tested in domestic tribunal; it would be difficult to maintain against a private employer (it is unlikely that the EqA could be read so as to be compatible with such a concept and would require legislative change). Whilst those in public employment could rely directly upon Council Directive 2000/78/ whether such a claim would be

successful remains to be seen, given that the *CHEZ* claim appeared to sit more neatly as one of direct discrimination by association.

3. FURLOUGH AND BEYOND (Ruaraidh Fitzpatrick, Tom Brown, Sally Robertson, Charlotte Goodman & Caspar Glyn QC)

3.1. Where can I find the Treasury Directions on the furlough scheme?

Short Answer

The Treasury made its first CJRS direction on 15 April 2020, exercising its powers under s71 and s76 of the Coronavirus Act 2020. Further directions modifying the initial scheme were made on 20 May 2020, 25 June 2020, 1 October 2020, 12 November 2020 and 25 January 2021. All iterations of the directions for the furlough, or Coronavirus Job Retention Scheme, can be found here: https://www.gov.uk/government/publications/treasury-direction-made-under-sections-71-and-76-of-the-coronavirus-act-2020?utm_campaign=govuk-notifications&utm_content=immediate&utm_medium=email&utm_source=0680f31c-0f8c-4d5d-be64-d697c49cf908

A further extension of CJRS, to the end of September 2021, was announced in the March 2021 budget: https://www.gov.uk/government/speeches/budget-speech-2021

3.2. What is the current position on furloughing an employee?

Short Answer

Treasury directions underpinning the CJRS furlough scheme take us to to 30 April 2021. Further directions to cover the announced extension to the end of September 2021 will be added at some point.

For periods from 1 May 2021 onwards, eligible employees (including workers who are paid through PAYE) are those who were employed and on the PAYE payroll on 2 March 2021.

Since 1 November 2020 and up to the end of June 2021, employers can claim 80% of an employee's usual salary for hours not worked up to a maximum of £2,500 a month. Employers will still have to pay secondary class 1 NI contributions and pension costs on the amount of the grant. Employers can pay full pay to their furloughed workers, but are not required to do so.

From 1 July 2021, employees will still be entitled to be paid at least 80% of their usual pay for the hours not worked up to a cap of £2,500 a month. However, employers will have to contribute more towards the grant. CJRS grants in respect of periods in July 2021 will cover 70% of usual wages for unworked hours, up to a cap of £2,187.50. Grants in respect of periods in August and September 2021 will be reduced to 60% of usual wages for unworked hours up to a cap of £1,875

Claims for furlough periods that ended on or before 31 October 2020 can no longer be submitted.

The main gov.uk page for JRS is at https://www.gov.uk/government/collections/coronavirus-job-retention-scheme

For information on previous iterations of CJRS, see the 9th or earlier versions of the Cloisters Toolkit. Older HMRC guidance is available through the National Archives.

Explanation

The current CJRS scheme is made under the CJRS Treasury Direction No 5 made on 12 November 2020, as extended by the 25 January 2021

Direction:
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/935146/201112_CJRS_DIRECTION_No_5___CJRS_extension_1_Nov_-_31_Jan__SIGNED.pdf

The CJRS to the end of April 2021 covers employees who were employed on 30 October 2020 if the employer had notified HMRC about a payment of earnings to the employee in a PAYE RTI submission made between 20 March 2020 and 30 October 2020.

Workers who are paid through PAYE and were included in a PAYE RTI submission between 20 March and 30 October 2020 can also be furloughed.

Workers transferred under TUPE on or after 1 September 2020 and 30 April 2021 who were employed by either the old or new employer on 30 October 2020 and had been included by either employer in a PAYE RTI submission between 20 March and 30 October 2020 can be furloughed.

The equivalent provision for TUPE transfers and business succession cases during the CJRS extension from May 2021 is that the employee must have been employed by the old employer on or before 2 March 2021; have transferred on or after 1 January 2021; and had been included by their old employer in a PAYE RTI submission between 20 March 2020 and 2 March 2021.

For other cases, the CJRS extension period from 1 May 2021 onwards, eligible employees (including workers who are paid through PAYE) are those who were employed and on the PAYE payroll on 2 March 2021. That means a PAYE Real Time Information submission to notify HMRC about that employee's earnings should have been made between 20 March 2020 and 2 March 2021.

There is no longer a requirement to have claimed previously for the particular employee. Nor is there a requirement for any set time or work patterns. The grant is based on the hours not worked. During furlough hours, the employee cannot undertake any work for the employer, but can take part in training and volunteer or work for another employer (if their contract permits that).

3.3. What is the minimum period for which an employee can be furloughed?

Short Answer

There is none, but a claim can only span seven days, unless, in some circumstances you can add on an orphan period of no more than 6 days.

Explanation

Claims will no longer be able to overlap calendar months. The minimum period for a claim within one calendar month is 7 days. 'Orphan' periods of no more than 6 days at the start or end of a calendar month are permitted (para 8.3 Direction No 5, 12.11.20). Claims must be made for each period of furlough within each month.

It may help avoid confusion to remember two things. First, think of each month as a separate CJRS scheme, with no overlap. Secondly, is to note there is a difference between the period in respect of which a claim may be made and the number of furloughed hours for which a claim is made. The pattern of furloughed hours depends on agreement with the employee. The employer just has to make sure they claim at the right time.

3.4. What is the exception for returning parents?

Short Answer

Under the CJRS No 5 scheme from 1 November 2020, there is no longer separate provision for workers returning from statutory family leave.

3.5. What is the exception for returning military reservists

Short Answer

Under the CJRS No 5 scheme from 1 November 2020, there is no longer separate provision for returning military reservists.

3.6. How does furlough work from 1 July 2020 to 1 November 2020?

Short Answer

A new flexible scheme was launched on 1st July 2020 allowing previously furloughed employees to return to work on reduced hours and remain within the ambit of the CJRS. For the extension to CJRS from 1 November 2020, there was no longer a requirement that the worker had been furloughed previously.

Explanation

The Flexible Furlough Scheme, also known as CJRS version 2, began on 1st July 2020. From that date to 30 October 2020, employers may agree with previously furloughed employees that they will return for any amount of time and any shift pattern agreed. Employers must confirm this agreement in writing. Similar written agreements are required for furloughing employees during the CJRS extension from 1 November 2020.

Should previously full-time employees return to part-time work, employers can continue to claim the CJRS grant for the balance of pay to bring employees up to 80% of their ordinary full-time pay. HMRC refer to this programme as ‘furloughed hours’.

Under the Flexible Furlough Scheme, employers must report and record three matters which we consider in more detail below. This information must be kept by the employer for a minimum of six years. Employers and employees may agree to flexible furlough of any hours they wish. When claiming a grant for furloughed hours, the minimum claim period is seven calendar days. There are three separate pieces of information that an employer must calculate and record. They are

(i) hours actually worked by employees;
(ii) the usual hours an employee would have worked but for the decrease in hours due to the Coronavirus pandemic; and
(iii) the number of furloughed hours which the employee has been furloughed by during the claim period.

Hours actually worked by employees are, of course, simple to record. We set out further guidance below on how to calculate the two central terms of "usual hours" (3.10 onwards) and "furloughed hours" (3.13).

Employers can continue to "fully furlough" employees who do not do any work for the employer in which event the calculations above do not need to be performed.

3.7. How is an employee paid if they are working and on furlough?

Short Answer

Employees will receive full pay for all hours that they actually work under the Flexible Furlough Scheme. Employers will pay this element themselves, and in full. Subject to the cap as to amount and 80%, employers will be able to claim for the shortfall in hours between hours actually worked and hours normally worked.

Explanation

Employers will remain responsible for paying employees for hours actually worked under the Flexible Furlough Scheme, including tax, pension contributions and National Insurance Contributions due both on hours worked and on CJRS grant.

Employers will be able to claim the shortfall between the hours actually worked and the employee's normal hours up to the 80% limit and the £2,500 cap. However, employers will have to pay National Insurance Contributions and pension contributions on CJRS grant as well as on pay.

From 1 July 2021 to the end of the CJRS scheme on 30 September 2021, employers will have to contribute more – see 3.2.

3.8. How do I calculate usual hours under the Flexible Furlough Scheme if an employee works variable hours or if they were not included in an RTI FPS on or before 19 March 2020?

Explanation

There are now two ways of working out the 'usual hours' for someone who works variable hours.

First, is for an employee to whom the employer paid earnings in the 2019 to 2020 tax year and reported the payment on an RTI full payment submission on or before 19 March 2020. Their usual hours are the higher of (i) the average number of hours worked in the 2019-2020 tax year or (ii) the corresponding calendar period in the 2019-2020 tax year as detailed respectively in the next two paragraphs below.

Second, is the averaging method for employees whose earnings were *not* reported on an RTI full payment submission (FPS) on or before 19 March 2020. In these cases, the average is worked out by:

First, taking the number of hours actually worked, or on paid annual leave or flexi-leave, from 6 April 2020 up to the day before the first day of furlough on or after 1 November 2020.

Second, divide that by the number of calendar days s/he was employed by the employer in that period. Do not count any calendar days in which the employee was on SSP, or family related statutory leave, or reduced rate paid leave following a period of family related statutory leave.

Then multiply by the number of calendar days in the pay period for which a CJRS claim is made.

When information is available about the calculation for claims in respect of periods from 1 May 2021, it will almost certainly be included in the Guidance at https://www.gov.uk/guidance/steps-to-take-before-calculating-your-claim-using-the-coronavirus-job-retention-scheme#variable-hours Examples are at https://www.gov.uk/government/publications/find-examples-to-help-you-work-out-80-of-your-employees-wages#taxyear-variable

3.9. How do I determine the average number of hours worked in the 2019-2020 tax year?

Explanation

To determine the average number of hours worked in the 2019-2020 tax year, employers must use the number of hours worked across that tax year, including paid leave, prior to the employee being furloughed. That is, if the employee in question was furloughed prior to 5 April 2020, the average runs up to that earlier date when the employee was furloughed.

That figure of total hours worked is then divided by the number of days the employee was employed during the 2019-2020 tax year, up to the date of furlough or to 5 April 2020, whichever is earlier. This provides an average number of hours worked per day of employment.

That number is then to be multiplied by the number of calendar days in the pay period being claimed for. This provides the average number of hours to be claimed for that pay period.

For example, assume an employee worked for 1000 hours in the 2019-2020 tax year and was employed for the full year. Also assume that they were not placed on furlough prior to 5 April 2020. We would then divide 1000 (hours) by 366 (days, as 2020 is a leap year). This provides a figure of 2.73.

Further assume that we wish to make a claim for a 14-day period. Here, 2.73 multiplied by 14 provides a figure of 38.22. Rounded up to the next full number, this means that the average usual hours worked, for the claim period of 14 days, is 39 hours.

The higher of this number or the usual hours worked by reference to a pay period based on the corresponding calendar period in the 2019-2020 tax year will be the usual hours worked for employees with variable hours.

3.10. How do I determine the usual hours worked by reference to a pay period based on the corresponding calendar period in the 2019-2020 tax year?

Explanation

To determine the usual hours worked by reference to a pay period based on the corresponding calendar period in the 2019-2020 tax year, employers must begin by identifying the correct pay period in the 2019-2020 tax year which corresponds to the pay period being claimed under the furlough scheme. HMRC guidance, including the lookback period for each CJRS claim month is

at https://www.gov.uk/guidance/steps-to-take-before-calculating-your-claim-using-the-coronavirus-job-retention-scheme#variable-hours

If the pay period in the 2019-2020 tax year corresponds exactly with the pay period which the employer wishes to claim for under the furlough scheme, that is an easy exercise. The usual hours worked for the furlough claim will be the number of hours worked in the pay period during the 2019-2020 tax year. That is, if the pay period being claimed for is March 2021, and the employer has a pay period for March 2019, the usual hours worked for furlough purposes are the number of hours worked in March 2019.

If the employee did not in fact work for the employer during the lookback period, one must use the averaging method instead.

3.11. How do I calculate an employee's usual hours if they are contracted for a fixed number of hours?

Short Answer

The hours calculation for an employee contracted for a fixed number of hours is similar to that used for an employee who works variable hours by reference to a corresponding calendar period in the 2019-2020 tax year, as detailed at 3.10 above.

Explanation

The employer must calculate the usual hours which would have been worked within the claim period. There are two methods.

First is for those who were on the payroll on 19 March 2020 or where a valid CJRS claim was made for them which ended at any time on or before 30 October 2020. Here, the hours to be used for this purpose are the hours the

employee was contracted for on their last pay period ending on or before 19 March 2020.

Second, for all other employees, their reference period for working out usual hours is their last pay period ending on or before 30 October 2020. These workers will only be eligible for CJRS for periods beginning on or after 1 November 2020.

As with determining hours worked for employees working variable hours, the employer must divide the claim period under the furlough scheme into the applicable pay periods.

The calculation is the same whether the employee works a fixed number of hours per week or works on a repeating shift pattern. The examples given by HMRC are of an employee who works 37 hours a week and an employee on a shift pattern of four consecutive twelve-hour days followed by four days off. The HMRC worked example is set out at https://www.gov.uk/government/publications/find-examples-to-help-you-work-out-80-of-your-employees-wages/examples-of-how-to-work-out-80-of-your-employees-wages-national-insurance-contributions-and-pension-contributions#fixed-hours

The first step is to identify the fixed hours contracted in the applicable pay period.

The second step is to divide that figure by the number of days in the working pattern. For the employee contracted to 37 hours a week, that will be a seven-day period and 37 (hours) will be divided by seven (days). For the employee on the 12-hour day, four days on, four days off, shift pattern that will be an eight-day period, i.e. 48 (hours) divided by eight (days).

The third step is to multiply the amount from the second step by the number of calendar days in the claim period for which the employer wishes to claim. For example, if the employer wishes to claim for a ten day period spanning two pay periods, they will multiply the average hours (the step two figure) each by five and add the totals together. If this calculation does not provide a whole number, this number is to be rounded up to the nearest whole number.

3.12. How do I calculate the usual hours of piece workers?

Explanation

If possible, the usual hours of piece workers, or employees paid per task, should be determined in the same manner as employees who work variable hours. If the employer does not know the number of hours the employee worked, this should be estimated based on the number of 'pieces' the employee produced and the employee's average rate of work per hour.

3.13. How do I calculate the number of working and furloughed hours for each employee?

Explanation

The Flexible Furlough Scheme allows employees to work for as many hours as agreed with their employer and for their employer to claim for the balance between hours worked and the employee's usual hours of work.

Once the usual hours of work have been calculated, the employer subtracts the number of hours actually worked by the employee under the Flexible Furlough Scheme. The balance is the sum which can be claimed by the employer.

For example, if an employee usually works 40 hours in a claim period but only actually works 20 hours, the employer would be able to claim for the remaining 20 hours under the Flexible Furlough Scheme.

3.14. How do I calculate the wages of employees on variable pay who are returning from family related leave and sick leave?

Explanation

If an employer wishes to furlough an employee returning from family related leave or sick leave who is on variable pay, how are they to calculate their pay under the furlough scheme? The calculation will be based on the employees' gross salary received prior to going on family related leave or sick leave.

The sum will be the higher of 80% of the month's wages from the previous year (up to the current cap of £2,500 a month) or 80% of the employee's average monthly wages for the 2018-2019 tax year (again, up to the current cap of £2,500 a month).

3.15. Calculating wages for hours not worked: what payments do I take into account?

Short Answer

To calculate 80% of employees' wages for hours not worked, employers must include regular wages and non-discretionary payments and disregard discretionary and non-cash payments.

Explanation

Under the Flexible Furlough Scheme, employees are entitled to full pay for work actually done, paid by their employer. At present, the employer may claim for 80% of hours not worked, so-called furloughed hours.

What is to be taken into account in calculating pay for hours not worked? Employers must include only non-discretionary payments, that is payments which they have a contractual obligation to pay and to which employees have an enforceable right, such as regular wages, non-discretionary payments for overtime (this is not guaranteed overtime but overtime which, if worked, is contractually due), bonus payments, fees, commission payments, and piece rate payments. However, employers must disregard discretionary payments such as tips, discretionary bonuses and commission payments, and non-cash payments and benefits in kind. Entitlements to, for example, a company car or salary sacrifice schemes are not included in calculating employee wages under the scheme.

3.16. What were the changes to employer costs from 1st July 2020?

Short Answer

Other than the changes outlined at 3.17 below, where an employee returned part time on 'flexible furlough', there were no changes to employer costs from 1st July 2020.

Explanation

From 1st July 2020 to 31st July 2020, the government continued to pay 80% of an employee's wages up to a cap of £2,500. The sole exception to this was where an employee returned part-time on flexible furlough. Where an employee returned part-time, the employer was responsible for paying wages, tax, and National Insurance Contributions for hours worked. This is addressed in further detail above at 3.7.

3.17. What changed from 1 August 2020?

Short Answer

From 1st August 2020, employers will be responsible for paying all employer National Insurance Contributions and pension contributions.

Explanation

From 1st August 2020, government support under the CJRS began to taper off. The government continued to pay 80% of wages up to a cap of £2,500. However, employers became responsible for paying all employer National Insurance Contributions and pension contributions. That responsibility remains under the extended scheme from 1 November 2020.

3.18. What changed from 1 September 2020?

Short Answer

From 1st September 2020, both the percentage paid by the government and the salary cap decreased with employer contributions rising.

Explanation

From 1st September 2020, the government reduced the amount employers may claim under the CJRS to 70% of employee wages. The applicable cap was also lowered from £2,500 to £2,187.50.

Employers who continued with the scheme in September faced increased employer costs on two fronts. Firstly, employers continued to be responsible for all employer National Insurance Contributions and pension contributions. Secondly, as the government reduced the percentage of salary paid from 80% to 70%, employers were required to pay the additional 10%, so as to keep employee wages under the scheme at 80%.

3.19. What changed from October 2020?

Short Answer

As in September, from 1st October 2020, government support under the CJRS decreased further with the percentage paid by the government and salary cap decreasing to 60% and £1,875.00 a month respectively.

3.20. What changed from November 2020?

Short Answer

Since 1 November 2020, CJRS support was restored to 80% of employee wages with a monthly cap of £2,500. Employers continue to be responsible for secondary NI contributions and pension contributions on CJRS grants. For the position from the May 2021 CJRS extension period, see 3.2

3.21. How do I end furlough?

Short Answer

If a furlough agreement has been used, including a collective agreement it can be ended in accordance with any terms in the agreement. Otherwise, by giving notice to the employee that they are required to return to work.

Explanation

The Coronavirus Job Retention Scheme is currently expected to operate until the end of September 2021. Treasury Directions take us to the end of April 2021, but further directions are expected.

The current iteration of the Job Retention Scheme in Direction No 5 from 1 November 2020 (“the Direction”) requires an employer and employee to have agreed in writing the employer’s instruction to the employee to cease

all work in relation to their employment, or not to work the full amount of the employee's usual hours.

The agreement (which includes a collective agreement) should be made before the start of the period to which the particular CJRS claim relates. But once made it can be varied by agreement retrospectively. It should be made or confirmed in writing, whether on hard copy or in electronic form such as by email.

It ought not to be necessary for an employer and employee to agree that the employee will resume work (since this is the default position), but many employers will have communicated a policy or process for how furlough will end (either agreeing to review furlough at particular dates, or agreeing to give notice to de-furlough). Where there is an express agreement, this should be followed. Otherwise, it is prudent to give reasonable notice in writing that an employee is being de-furloughed, and consider what if any related steps are required (e.g., health and safety consultation, consideration of reasonable adjustments for disabled employees, whether different groups of employees will be treated differently).

Note that in the original CJRS scheme under the Second Treasury Direction, the period for which the employee has ceased all work must have been 21 calendar days or more. Therefore, ending furlough before 21 calendar days elapsed would have dis-entitled the employer from recovering sums from HMRC, even if it had been anticipated that the employee would be furloughed for 21 days. This problem does not arise in the flexible CJRS schemes operating since 1 July 2020.

3.22. What happens to pay on ending furlough?

Short Answer

The default position is a return to normality in pay and other conditions. Provision for anything other than full pay is best dealt with by written agreement.

Explanation

Where an employer has, during furlough, been paying in full and continues to pay in full, no problems should arise. Nor do problems arise if the employer has been paying less than 100% of pay during furlough, and intends to resume full pay. Issues arise where the employer has been paying full pay during furlough (making up from 80% or £2,500) but intends to reduce pay on de-furlough, presumably for economic reasons. In these circumstances, employers will need, in good time, to consult with employees and seek to reach agreement about the contractual position (just as employers who have not furloughed, but have reduced pay, have). Otherwise, non-payment of full wages will amount to a breach of contract in respect of which the employee can sue and treat as repudiatory. This is especially significant where an employee might wish to take advantage of a repudiatory breach for example to escape post-termination restrictions or a fixed-term contract.

If agreement, cannot be reached, it is open to the employer to dismiss and re-engage on new terms, subject to the usual risks in respect of collective consultation and breach of contract and unfair dismissal claims: see section 4 for further consideration.

3.23. How should I resume a process which was interrupted by furlough?

Short Answer

It depends. Key considerations are acting reasonably and acting with reasonable expedition.

Explanation

For the reasons set out at 6.3 and 6.5, there are good grounds to consider that internal processes might continue during furlough, but if they have been paused, employers should consider when and how they will resume, and the consequences. For example, a disciplinary suspension might be re-confirmed on cessation of furlough. Where a process will not be able to continue in reasonable time because, e.g., an investigating manager or witness remains furloughed, or because of operational priorities during the pandemic, this should be considered and addressed. For example, should interim suspension during investigation be lifted on terms (if the issue is interference with witnesses, this may be no issue during remote working, because any contact will be trackable; or if the concern is about access to people or premises, this too may be controllable, but may provide a basis for showing that dismissal would not be reasonable in the future)? Should a replacement investigating manager be appointed to pick up or re-start an investigation? Can witnesses provide information as part of an internal investigation whilst on furlough (our view is that they probably can, since they are neither making money nor providing a service while they do so)?

Ongoing Grievance

Where an ongoing grievance may have been affected by permanent or long-term changes caused by the pandemic, it may be worth contacting the employee, identifying the change, and asking whether they really wish to continue their grievance, given that the problem has been resolved.

If any employee does wish to continue a grievance, again, consideration will need to be given to how it is going to be progressed without undue delay. On the one hand, courts and tribunals are likely to be more sympathetic to delays caused by pandemic-related operational difficulties, but on the other, there will be a heightened sense of the need

for compromise and pragmatism. Therefore, if an employer is intended to delay or do nothing because of the pandemic, it will face a lower risk if it can evidence that it has thought of ways to progress, has identified possible solutions, and can show that those solutions are impractical, unduly expensive, disruptive *etc.*

Capability

Where a capability procedure is in train, this should be reviewed and fresh targets set, to allow for any changes caused by furlough, e.g., absence targets or performance objectives which may need to be adjusted to allow for home working, reduced-hours working etc.

Where an employee has been on a phased return to work, this should be reviewed and, if necessary, up-to-date occupational health advice should be sought and considered, especially if there are now going to be long-term changes in ways of working.

3.24. How do you work out a week's pay where a furloughed employee is dismissed?

Short Answer

Since 31 July 2020, if a furloughed employee is dismissed or made redundant, a week's pay is calculated by ignoring any reductions in their pay due to furlough.

In effect, this means that a week's pay should be calculated as if the employee was furloughed at 100% pay. These rules, set out in the *Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay 2020,* ("the CJRS rules") are intended to ensure that furloughed employees receive statutory redundancy and notice pay based on their pre-furlough rate. The rules do not apply to dismissals involving

furloughed pay made before 31 July 2020 for which the standard method of calculating a week's pay found in ss.220-229 ERA 1996 remains unchanged. [The standard rules are not included in this toolkit.]

Explanation

When does a week's pay need to be calculated under the CJRS rules?

When a furloughed employee is entitled to a redundancy payment, including where they have been laid off or kept on short time, the CJRS rules apply. They also apply to notice pay and pay for a period of absence to look for employment or arrange training while an employee is working out their notice after redundancy. Finally, they apply where an employer has failed to provide a written statement giving particulars of the reasons for dismissal, or an employee is awarded compensation for unfair dismissal or a failure by the employer to comply with an order for reinstatement or re-engagement.

What is a week's pay for employees with normal working hours?

For an employee who works normal hours and whose pay does not vary with the amount of work done, a week's pay is calculated as if the employee had not been furloughed, if the calculation date is on or before 31 October 2020.

For an employee who works normal hours but whose pay varies with the amount of work done or with the time of work, a week's pay is the number of normal working hours in a week calculated at the average hourly rate across twelve weeks to the calculation date. Any furloughed hours are calculated as if there had been no reduction in wages due to furlough. This applies where the twelve week period includes at least one week during which the employee was furloughed.

What is a week's pay for employees without normal working hours?

A week's pay is the employee's average weekly remuneration across twelve weeks. If the employee is furloughed during the twelve week period, the weekly pay during the period of furlough is the amount that would have been payable under the CJRS if there had been no furlough reduction, and if the amount had not been capped under the scheme.

How do I calculate the average hourly rate?

In any part of the twelve-week period where the employee is furloughed, their average hourly rate is calculated in the same way as pay is calculated for furlough reimbursement. For an employee with variable working hours, that means their pay is calculated with reference to whatever is higher of the wages earned in the corresponding calendar period in the 2019-20 tax year, or the average wages payable in the 2019-20 tax year.

For any part of the twelve-week period where the employee is not furloughed, their average hourly rate is calculated by reference to the hours where they were working and the pay apportionable to those hours.

If that twelve week period includes a week where the employee is not furloughed but they are also not owed any pay, then their pay in earlier weeks is taken into account to bring up the number of weeks to twelve for the purpose of calculating an average. If work is done outside normal working hours, and the pay for that work is greater than it would have been if it was done in normal working hours, the pay is reduced as if the work had been done within normal working hours.

How do I calculate twelve weeks?

If the calculation date is the last day of the week, it is the twelve weeks until that date. Otherwise, the twelve weeks is calculated until the last complete week before the calculation date.

What if the employee hasn't been employed for twelve weeks yet?

If an employee has not been employed for long enough for a calculation to be made, the amount of a week's pay is the amount which "fairly represents a week's pay". This means an employer should apply as much of the rules as is appropriate, and take into account any pay the employee has in fact received, along with the amount offered to them as part of the employment, and the amount received by other people in relevant comparable employment with either the same employer or other employers.

The employee's work for a former employer within the twelve week period can also taken into account if a period of employment with the former employer counts as part of a continuous period of employment under the Employment Rights Act 1996.

Are there any exceptions?

The rules do not change the cap on maximum statutory redundancy pay or the unfair dismissal basic award. Redundancy pay is capped at £538 for a week's pay and the unfair dismissal basic award cap is £16,140.

The new rules also do not preclude employers paying a lower rate of pay for contractual notice periods which exceed the statutory minimum by at least one week.

3.25. Can CJRS grant be used to cover notice or redundancy pay?

Short Answer

No, not since 1 December 2020. CJRS grant cannot be used to cover contractual or statutory notice pay for a furloughed employee. Nor can it cover pay during a notice period for retirement or resignation.

3.26. What is the Job Support Scheme?

Short answer

The Job Support Scheme (JSS) was due to replace the furlough and financial support through the CJRS to try and prevent widescale job losses. JSS was intended to support 'viable' jobs. With the extension of CJRS, the JSS has been postponed.

3.27. What is the Job Retention Bonus?

Answer

It is one-off payment of £1,000 to an employer for each previously-furloughed employee who remained continuously employed until 31 January 2021. It was intended to have been paid from February 2021. However, with the extension of the CJRS to April 2021, the JRB has been postponed, see: https://www.gov.uk/government/publications/job-retention-bonus/job-retention-bonus

4. CHANGING TERMS AND CONDITIONS, AND IMPLICATION OF SUCH (Nathaniel Caiden, Laurene Veale & Caspar Glyn QC)

4.1. Can the employer reduce workers hours / working days / pay instead of redundancy?

Short Answer

Yes, with consent of the worker (which may be express or implied), or in certain circumstances if there is an express term in the contract (which is quite rare).

Explanation

If there is no express term in the contract allowing for a reduction in working hours / working days / pay (which is usually the case), such a change would amount to a variation of contract.

Some contracts may have wide variation clauses, but these are unlikely to be interpreted to allow such a fundamental change to the contract as a reduction in wages / working days / pay. Equally it has been held that such clauses must not be used in a way likely to damage the employment relationship (or be exercised irrationally): *United Bank v Akhtar [1989] IRLR 507* (moving the employee amounted to a breach of the implied term of mutual trust and confidence). Indeed, the argument in relation to a wide clause was unsuccessfully deployed in a changing shift pattern case that led to a reduction of hours: *SmithKline Beecham plc v Johnston EAT/559/96*. Alternatively, there may be an express clause, or the relevant terms may be included in another document that is incorporated into the contract and changing that document does not require a worker's consent (eg staff handbook and the case of *Bateman v Asda Stores Ltd [2010] IRLR 370*). In truth, the ability to side-step the issue of consent, by means of something express in the contract (including wide variation clauses) allowing for a reduction of pay / working hours / working days will be rare.

In light of the above, the main issue is whether or not the worker has consented to the change. If there has been express consent, an express agreement, the contract will be varied and hours / working days / pay will lawfully be reduced. The more difficult issue is if no express consent has been given, will consent be implied from the worker continuing to work in line with the reduced pay / working hours / working days?[26] This is a question of fact but the longer one works with the reduced term the more likely it is that consent will be implied. For this reason, it is advisable for a worker to make clear their objection to the term and that they are only working 'under protest'.

In the May 2020 High Court case of *Carluccio's Limited (in administration) [2020] EWHC 886 (Ch)*, it was held that an employee's consent to a variation of their contract for furlough purposes could not be inferred from their silence or inaction, especially because the letters sent by the employer in that case expressly required a positive response to the proposed variation and warned that a failure to respond could lead to the employee being considered for redundancy. The Court held that very strong evidence would be needed to reach a conclusion that the absence of objection within a few days of sending a variation letter was to be equated to consent to that variation. See also 4.3 below.

4.2. How can changes to workers hours / working days / pay be made?

Short Answer

There are generally four ways: (a) by individual agreement (b) by collective agreement (c) by dismissing and rehiring on the new terms (d) by simply imposing the change.

---

[26] *Solectron Scotland Ltd v Roper [2004] IRLR 4* at [30]: one can infer after a period of time continuing to work that employee accepted the change which immediately affected him/her.

Explanation

There is no single route, or method, by which a reduction to working hours / working days / pay must occur. In most situations however it is advisable to first seek agreement from the worker, so-called express agreement.

Express Agreement: In terms of obtaining express agreement, the proposed change needs to be brought to the worker's attention and it is often sensible to explain the rationale (as one is more likely to consent to a change that appears to their detriment if they are aware of the reasons for it). Normally it is advisable for the employer to have in writing the worker's express consent (agreement) to the change (as simple oral agreements can lead to disputes further down the line, including claims for unlawful deductions of wages). For contractual variations to be effective, there is a potential issue of whether they are supported by consideration (unless the changes are executed as a deed). However, in employment law it is generally accepted that continued employment amounts to consideration: *GAP Personnel Franchises Ltd v Robinson UKEAT/0342/07 at [14]*.

Collective Agreements: In some cases, the individual employment contract may have incorporated collective agreements. In this situation, it may be possible for changes to all of categories of worker contracts, including a reduction in pay / hours / working days, to be done via this route. In these cases, it may be that new reduced pay / hours structure is agreed with the relevant union(s). A recent example (still in early stages as of August 2020) is British Gas owner Centrica having announced in July that it would consult with the relevant unions in view of reducing overtime pay so as to avoid further redundancies in

response to a reduction in customers[27].

Fire and re-hire: In most situations where express agreement is not obtained, the employer would consider whether it simply terminates the contract and offers to rehire on the 'new terms'. If the worker / employee accepts, the new terms are effective in relation to the continuing relationship. Note that, if there are several contracts being terminated under this method it may amount to collective consultation being required (see 5 below). However, whether or not someone accepts the new terms, the termination of the contract of employment (if they are an employee and have sufficient continuity of employment) may lead to an unfair dismissal claim being brought and/or a redundancy claim depending on the circumstances. For this reason, it is particularly important that a fair process is followed, meaning that efforts are made to transparently explain the change and seek agreement, before having to terminate the agreement.

Imposed changes: An alternative to getting express agreement for the change, is for the employer to simply impose the change and see what the worker does in response. As noted above, if the worker does nothing and continues to work, consent to the change may be implied (it could also be said that they 'affirmed' the change to the contract). However, as noted below at 4.5, there is inherent risk in this course as other claims could be made (for example deduction of wages, or, if one is an employee with sufficient continuity of employment, resign claiming unfair constructive dismissal).

4.3. Can an employer unilaterally impose a reduction to working hours / working days / pay? Can consent be implied where a worker keeps

[27] https://www.bbc.co.uk/news/business-53433452

coming to work after the unilateral reduction to their hours / working days / pay?

Short Answer

Subject to an express term allowing a unilateral change, unilaterally reducing a workers' hours / work day / pay is unlikely to 'immediately' be lawful and binding. However, the change may be lawful and binding after a period of time whereby the worker without protest continues to work under the new terms.

Explanation

Please see above at 4.2 and implied consent in particular. The issue is of course very fact specific, but in *Abrahall v Nottingham CC [2018] ICR 1425* in a pay freeze context where there was a right to annual raises (so in effect a 'pay cut') Underhill LJ and Sir Patrick Elias at 85-89 and 108-110 went through relevant principles and some themes which seem to emerge from this and the law in general are:

- one is slower in inferring acceptance through conduct of a detrimental change (eg pay cut) in contrast to a positive change for the worker (egg pay rise);
- however, in a context where a detrimental change is made to avoid an even more detrimental change (eg redundancy) this general slowness to infer may be modified and in any event it is of course the case that continuing to work may indicate acceptance (by inference) to the change;
- one does not need to know at the stage of implementation what duration a worker will have to continue to work under the contract (without protest) for there to be inferred acceptance of the change;
- the inference must arise unequivocally, so a different explanation for the conduct will defeat such an inference;

- protest or objection at a collective level may negate the inference;
- In the May 2020 case of *Carluccio's Limited (in administration) [2020] EWHC 886 (Ch)*, consent to being furloughed was held not to be capable of being inferred from an employee's silence or inaction.

4.4. Can reduction in a workers' hours / working days / pay be time limited?

Short Answer

Yes.

Explanation

There is nothing to stop one agreeing to a reduction in working hours / working days / pay to be time limited. Indeed, it is likely that a worker is more likely to agree to this rather than an open-ended change to their detriment.

The employer could make the reduction conditional until the happening of an event. For example, the parties might agree that working hours or working days will be reduced for as long as official government guidance recommends social distancing. Upon the expiry of that guidance, the contract reverts to the previous one. An alternative way is to specify that the alteration is purely for a fixed period of time and agree to extend that period as and when required. For example,

> *The parties agree that* [name of individual] *pay will be reduced from* [X] *to* [Y] *for the period of June 2020. After this period elapses and subject to any further agreements to reduce pay*, [name of individual] *pay will revert to* [Y]. *For the avoidance of doubt, all other terms in* [name of individual] *contract of employment as dated* [Z] *remain unaffected.*

4.5. If reductions to working hours / working days / pay are not agreed, is that a termination of the employment contract and unfair dismissal?

Short Answer

Yes, it is likely that such a fundamental change will amount to the employment contract being terminated (although the worker may expressly say they are not accepting the breach, not terminating the contract, instead seeking to sue under the contract). Equally there is a serious risk that the dismissal will be found to be unfair (although this depends on the circumstances and in particular on the efforts to agree the change/the reasonableness of the change).

Explanation

Terms such as working hours / working days / pay are fundamental terms in an employment contract. Reducing these all have a negative impact on an employee's pay – which is a critical feature of the wage-work bargain (the employment contract). Accordingly, such a change where not agreed is likely to be a repudiatory breach.

However, the worker may make clear that they do not accept the breach and instead 'stand and sue' on the contract. This means that they bring a claim for breach of contract and/or bring a claim of unlawful deduction of wages for any shortfall in pay (eg *Rigby v Ferodo Ltd [1988] ICR 29*). In these circumstances the contract is not terminated.

Alternatively, the contract may be taken as so drastically different that it amounts to a new contract. Any continued work will be taken as being under a new (fresh) employment contract. This is referred to often as a *Hogg v Dover* ([1990] ICR 39) dismissal. In this situation an employee who had sufficient continuity of employment under the 'old' contract could bring a claim of unfair dismissal even though they are still employed by the employer they are suing (under the 'new' contract).

As to whether the dismissal would be unfair or not, this will depend on whether the employer can show a potential fair reason for the change, in this context most likely some other substantial reason, in particular a refusal to accept changes to terms and conditions, and that the dismissal

is fair under s.98(4) Employment Rights Act 1996. Experience dictates that the following factors are relevant to this: (a) employer's evidence of sound business reasons for the change and its reason for the change(s) (the economic consequences of Covid-19 would be an example of this); (b) the employee's reasons for refusing to accept the change; (c) level of warnings/consultation prior to the change; (d) alternatives to this course being taken; (e) reaction of other employees; (f) acceptance/objection by a relevant trade union of the changes.

It should be noted that the availability of the Coronavirus Job Retention Scheme to employers may be a factor in determining whether the constructive dismissal was fair. In certain situations, a tribunal may find that an employer acted unreasonably in pushing ahead with an unwanted variation of the employment contract rather than considering the option of putting the employee on furlough.

4.6. If an employee with at least two years continuous service refuses to accept the reduced working hours / working days / pay are not agreed, is that an unfair constructive dismissal?

Short Answer

It is likely that changes to working hours / working days / pay will amount to repudiatory breaches which the employee can resign in reliance upon (a constructive dismissal). If this occurs the employee would be entitled to notice pay (it is a wrongful dismissal claim). It will be fact specific whether or not it is an 'unfair' constructive dismissal claim also.

Explanation

A claim of unfair constructive dismissal requires:

- a repudiatory breach by the employer;
- the employee to resign in reliance on the breach (it has to be a cause but not the cause);

- no earlier affirmation / waiver of the breach prior to the resignation;
- the constructive dismissal (i.e. elements (a)-(c)) being unfair under s.98(4) Employment Rights Act 1996 ("ERA").

In the case of changes to pay, these are fundamental terms, so changes to this directly (or indirectly via hours / days being reduced) are likely to be a repudiatory breach. The Court of Appeal in *Cantor Fitzgerald v Callagahan [1999] IRLR 234* at 42-43 made it clear that any deliberate reduction in an employee's agreed remuneration package (including basic pay and bonuses) would be a repudiatory breach of contract, and that there was probably no "*de minimis*" exception.

With respect to the issue of 'affirmation / waiver' this is the same question or issue that has already been highlighted above in relation to whether or not one can infer consent to the change with an employee who has continued to work under the change.

At this point it is also worth noting that as the employee is resigning and has not been given notice pay / notice of dismissal, the employer would be liable for notice pay (a wrongful dismissal claim).

In terms of whether such a dismissal would also be 'unfair' this is a question of fact. It is of course possible for the dismissal to nevertheless be 'fair' even if a constructive dismissal. The employer would need to show that the alleged breach was for some other substantial reason and then the Tribunal would need to be satisfied that it is fair under s.98(4) ERA. The relevant factors in these cases would be the same as those set out in the last paragraph of 4.5 above.

4.7. If an employee with over two years continuous employment refuses to agree a reduction to hours / working days can redundancy be claimed?

Short Answer

Potentially but there are also issues as to whether there has been a refusal to accept an alternative job offer which might mean there is no redundancy pay owed.

Explanation

As noted above working hours / days without agreement can amount to a dismissal, be it by the employer (the change is so fundamental there is a new employment contract) or by the employee (resigning to claim constructive dismissal).

If the employee remains in employment and is treated as having moved on to a 'new' employment contract (i.e. *Hogg v Dover* dismissal, see 4.5 above) for a period theoretically the reason for the dismissal could amount to redundancy in s.139 Employment Rights Act 1996 ("ERA").[28] Equally – and more likely to be brought – is a claim of constructive redundancy dismissal: the reason for the employer's breach of contract that caused the employee to resign being 'redundancy' (a constructive redundancy dismissal) [29].

In the case of such changes to working hours / days, it is most likely to fall within s.139(1)(b) ERA:

> *(b) the fact that the requirements of that business—*
>
> *(i) for employees to carry out work of a particular kind, or*

[28] In reality, this is never in issue as the claim brought is for unfair dismissal and the basic award is the same as redundancy pay. If the claim were brought only for redundancy pay and one actually was still employed seemingly arguably what has occurred is suitable alternative employment, so the only likely claim is for those who start and leave. The fighting ground is then whether or not the 'new terms' amounted to suitable alternative employment to defeat the claim. In *Hardy v Tourism South East [2005] IRLR 242* at 12-18, the EAT accepted that a *Hogg v Dover* dismissal was possible for collective redundancy legislation purposes.

[29] *Berriman v Delabole Slate Ltd [1985] ICR 546 (CA)* and *Lees v Imperial College of Science Technology and Medicine UKEAT/0288/15/RN* at 24-25.

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

A return to work post lockdown, with potential social distancing still in place, and/or a dip in the market, could require a reduction of days / hours that would fall within these requirements. For example:

- there may be less business, less work available, so there is a need for fewer employees doing the kind of work, and the employer seeks initially to reduce all people's days / hours, or a group of workers days / hours, or just needs part of one's work done;
- an anticipated temporary / permanent closure of business is the reason for the reduction.

  (Note of course not all changes to terms and conditions would fall within redundancy, but the focus on hours of work / working days in effect means that the kind of work, or 'full time employees' is likely to be going down).
- Support for the fact that mere reduction in 'time' (days / hours) can fall within s.139(1)(b) ERA is found in *Packman t/a Packman Lucas Associates v Fauchon [2012] ICR 1362*. In that case the relevant employee refused to accept the reduced hours suggestion because of (in part) a proposed downturn in business and she was thus given notice of dismissal. At 32-36 it declined to follow previous authority and reasoned that a reduction of hours could be redundancy even if there were the same number of employees. Interestingly, *Servisair UK Ltd v O'Hare UKEAT/0118/13/JOJ,* which had the Judge whose earlier judgment was not followed in *Packman*, at 5 cited *Packman* stating

  The EAT in that case held that the replacement of a full-time worker by a part-time worker did give rise to a redundancy situation. The question is whether there has been a relevant reduction in full-time-equivalent (FTE) headcount upholding the decision of an employment tribunal that an employee dismissed because she

refused to agree to reduced hours in the face of a drop in the need for employees to do book-keeping work had been dismissed by reason of redundancy

[Note that redundancy would be based on the worker's normal pay, and not the pay they received under the furlough scheme *per* Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay) Regulations 2020).]

There is of course a further question however, which is whether in relation to any claim for redundancy pay, the 'new' job (the amended contract or the proposed change) amounts to suitable alternative employment under s.141 ERA which the employee unreasonably refused / terminates during the trial period. This is a question of fact but the more significant reduction in hours / pay, the more likely that it will be reasonable to refuse the offer / the offer would not amount to suitable alternative employment.

4.8. What is the interaction with reduction in any changes to working hours / working days and discrimination law?

Short Answer

It is complicated and employers should be cautious in particular in relation to potential indirect discrimination claims and equal pay.

Explanation

It is obviously discriminatory for reductions in pay / working hours / days to be applied to an employee because of a protected characteristic (direct discrimination). However, the more fraught areas we believe are potentially issues of

- indirect discrimination (s.19 Equality Act 2010, "EqA");
- equal pay (s.66(1) EqA, which inserts a sex equality clause in all contracts).

The above is particularly the case where a larger employer has different sections of the workforce which have large proportions of people with a certain protected characteristics (eg sex, race, age). In this situation it is possible that the reduction may have a disproportionate impact on that group (that is they are at a particular disadvantage when compared with persons who do not share the protected characteristic). The issue will then be whether the step (the provision, criterion or practice) is capable of being a proportionate means of achieving a legitimate aim. If the issue is purely client demands/drop in work/following government guidance this may well be made out, although as always it is a balancing exercise. However, costs by themselves are not a ground - one needs to show 'costs plus something else' (*Woodcock v Cumbria Primary Care Trust [2012] IRLR 491 (CA).*

Equally if one section of the workforce with predominantly women suffers a reduction of pay / working hours, there may be an Equal Pay claim.

These claims are complicated, but one can foresee that in some workforces it may be argued that the reduced pay / hours they are doing is like work or work of equal value to the other section of the workforce which has the male comparator(s) and not suffered such an extensive reduction. In such a case it would be the general material factor defense that would be at play.

4.9. What notice pay does an employer have to pay employees if they reduce the rate of pay or reduce the number of hours under the contract of employment?

Short Answer

Any valid changes to the contract of employment would result in a change to the rate that should be paid.

Explanation

There are two rules for notice.

- Statutory notice is one week after one month of service and then accrues to equal the number of years completed service up to a maximum of 12 weeks' notice after 12 years' service (s.86 Employment Rights Act 1996, "ERA"). As long as the employee is ready willing and able to work then they would be paid
    - If they have normal working hours then the amount that they would be paid under the contract in force during the period of notice (s.88(1) ERA);
    - If they do not have normal working hours then the average of their last 12 weeks' pay (only counting weeks in which they were paid).
- Contractual notice if the period of notice in the contract is at least one week more than the notice required by s.86 ERA. So, for instance, any person under a 3-month notice provision would not fall under the ERA provisions. This cohort would simply have their notice pay calculated under at the contractual rate.

As long as the changes to the contract were effective and either gave rise to new normal working hours or changed the rate of pay then they would be effective for someone with normal working hours. If a person doesn't have normal working hours then the average is taken which may be a combination of the old higher rate and the new lower rate.

4.10. Can an employer pay an employee only 80% of their normal pay during the notice period terminating their contract of employment if they are furloughed on 80% of their pay?

Short Answer

From 31 July 2020, in terms of statutory notice pay, the answer is no –one has to be paid at their normal rate of pay (not any lower furlough rate).

Prior to 31 July 2020 (or at any point for those whose contractual notice is at least one week's greater than statutory) the answer is it depended on the furlough agreement; although a Tribunal could be expected to approach a furlough agreement from the perspective of an employee.

Explanation

If an employee is furloughed on 100% of pay then there is no issue in respect of notice pay. It remains the same.

An issue arises where an employee is placed on furlough and is then paid 80% of their pay. Does that apply to any notice payment under furlough too?

The Government were concerned by such arguments and passed the *Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay) Regulations 2020*. This came into effect from 31 July 2020. In brief it means that for the calculation of a 'weeks' pay for statutory notice one uses the normal rate of pay (ie pre-furlough amount).

However, this still leaves the position unclear for those whose notice is either (a) one week more than statutory minimum (as the Employment Rights Act 1996 week's pay provisions do not apply) or (b) given before the commencement date of the Regulations (ie before 31 July 2020).

In such cases, the employee would have a good argument that their agreement to be paid 80% was, as the title of the Coronavirus Job Retention Scheme implies, to retain their job. The employee would argue that the compromise to 80% of wages was to retain their job - it was not an agreement to accept 80% of the notice that they would need to be paid if they were to be dismissed. A tribunal would be likely to be sympathetic. However, express agreement to vary the amount of notice pay to the 80% level during furlough would be likely to be enforceable but no agreement could vary the length of notice to be less than the statutory minimum above.

4.11. What happens to accrued holiday when an employer reduces a worker's hours?

Short Answer

It is necessary to calculate the number of hours accrued holiday in respect of each working pattern. Therefore, if a worker works for 6 months on a 5 day per week contract and 6 months on a 2 day per week contract then 2.8 weeks are paid at the 5 day rate and 2.8 weeks are paid at the 2 day rate.

Explanation

The *Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000* prevent an employer paying a worker for holiday at the new, lower weekly hours rate. The ECJ has held in a series of cases from *Land Tirol [2010] IRLR 631, Brandes v Land Niedersachsen EU Case C-415/2* and *Greenfield v The Care Bureau Ltd [2016] ICR 161* that leave accumulates for a part-time worker at the full-time rate for the period of time that the worker is on the full-time rate.

4.12. What happens to accrued holiday when an employer reduces a worker's pay?

Short Answer

Domestic law provides that the 5.6 weeks' holiday would be paid at whatever the contractual rate is on the first day of the holiday for someone with set hours. For a person without set hours then an average of the last 52 paid weeks is paid. However, there is an argument that holiday pay accrued at the higher rate is in respect of the proportion of 4 weeks' of the 5.6 weeks' holiday accrued under the higher rate.

Explanation

A weeks' pay under the domestic law is calculated according to Regulation 16 *Working Time Directive 1998* which refers to the calculation of a weeks' pay in the Employment Rights Act 1998. Effectively there are two rules

- A worker with normal hours is paid the contractual rate that is in effect on the first day of their holiday (the calculation date Reg16(3)(c) WTR) see s.221(1) which provides (added emphasis)

> *This section and sections 222 and 223 apply where there are normal working hours for the employee when employed under the contract of employment in force on the calculation date.*

Under this rule the payment rate is the one in force on the first day of the holiday. Nothing could be simpler, apparently.

- A worker who doesn't have normal hours is paid the average of the last 52 weeks of any weeks in which they were paid going back up to 2 years.

In both these cases a worker who takes holiday at the new and lower contractual rate would be paid less during the period of holiday than during the period of work during which work accrued. The UK courts have found in a string of cases since *Bear Scotland Ltd v Fulton [2015] ICR 221* that a worker is entitled to their normal pay on holiday. The European Court has held that the European right to annual leave is horizontally directly enforceable against employers in *Stadt Wuppertal v Bauer/Willmeroth v Broßonn [2019] IRLR 148*. In simple terms the worker may assert that the proportion of 4 weeks' leave (the amount provided by the European Working Time Directive) which accrued under the higher pay rate should be paid at that rate so that their holiday is paid at the same rate as their work. This argument would not be available for 1.6 weeks' leave which is the domestic right provided under Regulation 13A Working Time Regulations 1998.

5. INDIVIDUAL REDUNDANCY (Declan O'Dempsey, Nathaniel Caiden, & Caspar Glyn QC & Sally Robertson)

5.1. Can an employer make employees redundant following lockdown being lifted?

Short Answer

Yes, and subject to the standard rules. The widescale disruption to many businesses because of the pandemic, national and local lockdowns, and other restrictions mean that a 'redundancy situation' almost certainly exists. However, the reason for the termination of any particular employment contract post lockdown, as at any time, must satisfy the definition of redundancy. Unless the reason for deciding to dismiss this individual is a prohibited one and is not in fact mainly because of the redundancy situation, the main issue is often one of procedure

Explanation

The definition of redundancy is found in s.139 Employment Rights Act 1996 ("ERA"). This provides that the dismissal is by reason of redundancy if wholly or mainly attributable to

> *(a) the fact that his employer has ceased or intends to cease—*
>
> *(i) to carry on the business for the purposes of which the employee was employed by him, or*
>
> *(ii) to carry on that business in the place where the employee was so employed, or*
>
> *(b) the fact that the requirements of that business—*
>
> *(i) for employees to carry out work of a particular kind, or*
>
> *(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,*
>
> *have ceased or diminished or are expected to cease or diminish.*

In short, there are generally two types of scenarios:

- Workplace closures, including entire business closing or just certain factories/offices (even if simply to relocate to a new site or if purely a "*temporary cessation*");
- Reducing the number of employees carrying out work of a particular kind (in the relevant place).

The impact of the pandemic on businesses has led to some businesses closing and others closing certain offices. These would seem to be straightforward redundancy cases. Equally, there may be temporary closures of certain offices or changing types of business. These too may meet the definition of redundancy depending on the length of the closure and divergence between the original and 'new' business. Indeed, even reducing hours of employees to cope with the financial strains could amount to a redundancy see 4.7 below.

Equally a reduction in the number of employees often amounts to a redundancy situation. Even if an employee, perhaps one who is more skilled, is moved into another role and that person has their contract terminated, a so-called bumping dismissal, that amounts to a redundancy.

The main issue is therefore whether the procedure and process are fair, discussed below at 5.7. However, even if they are unfair it is still likely that the actual reason was redundancy and redundancy pay needs to be made (assuming at least 2 years continuous employment and there being no refusal of a suitable alternative role).

Note that an Employment Tribunal is entitled to consider whether a redundancy situation is genuine, but is not permitted to investigate the commercial and economic reasons behind the redundancy situation (*James W. Cook & Co (Wivenhoe) Ltd v Tipper and others [1990] I.C.R. 716*).

5.2. The joint TUC, CBI and ACAS statement of 24 September 2020: how does this affect the way in which an employer should approach the redundancy process?

Short Answer

The joint statement[30] reiterates some good and some necessary practices relating to consideration of dismissal for redundancy.

Explanation

The joint statement emphasises that employers should exhaust all possible alternatives before making redundancies. These often emerge from effective consultation with workers and trade unions. The statement does not carry the force of law, nor of the statutory codes issued by ACAS. However, the detailed recommendations are a good guide to how redundancies should be approached.

A dismissal for redundancy is more likely to be reasonable if alternatives to redundancy have been explored (for example by collective consultation and individual consultation). Factors that may be considered will include whether the employer considered voluntary redundancies, salary sacrifices, pay cuts, reduced hours and part time/flexi working together with over time reductions or bans.

Consultation

The joint statement has emphasised the importance of consultation at both the individual and the collective level. Employers can expect tribunals to consider whether the employer took reasonable steps to avoid

[30] https://www.acas.org.uk/joint-statement-acas-cbi-tuc

making redundancies. The joint statement emphasises *"we have seen joint decisions to save jobs based, for example, upon more part-time working, cuts to overtime, alternative roles, and retraining. When employers, unions and employee representatives work together, solutions can often result in retaining loyal skilled staff, and help avoid the costs of redundancy, employment tribunals and recruitment when the economy recovers".*

Employers who do not engage with the process of consultation plainly run the risk that their decision will be viewed as unreasonable because the existence of a redundancy situation, which could have been avoided by one of these means, could be found to be an insufficient reason for dismissal in the circumstances of a case. The joint statement is likely to train the focus of employees, and tribunals on this aspect of a reasonable employer's behaviour.

The joint statement calls on all employers to do the process of redundancy openly, thoroughly, genuinely, fairly and with dignity. A key point made is that: "*the sooner people understand the situation the better for everyone".*

5.3. The business is shutting down but parts of it seem to be carrying on. Does a redundancy exist?

Short Answer

Yes, unless TUPE transfers are taking place.

Explanation

Generally an employee is dismissed for redundancy where the principal reason for the dismissal is the fact that the employer intends to cease (or has ceased) either to carry on the business for the purposes of which the employee was employed by the employer or in the place where the was employed (section 139(1)(a) Employment Rights Act 1996). However, if

the business or part of it is being transferred to a new owner, the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) (TUPE) may apply. The core condition is that there must be a transfer of an economic entity which retains its identity.

5.4. The business is shrinking and is closing a workplace but it has other sites which remain open. Does a redundancy situation exist?

Short answer

Yes.

Explanation

The place where the employee is employed is determined by looking at what happened in practice. The existence of a mobility clause in the contract will not prevent a redundancy situation arising where the place the employee actually worked is closed (*High Table Ltd v Horst and others* [1997] IRLR 513). A contractual mobility agreement will be one factor in deciding whether the employee's workplace has closed if in fact the employee has worked in more than one place pursuant to it. But it is not conclusive.

5.5. The employer has more than one site: can a selection pool for redundancy always be confined to the site closing?

Short answer

No, it cannot be assumed that the selection can always be confined in this manner.

Explanation

It may be unreasonable to include only one site's workers in the pool if there has been a great deal of interchange of workers between sites in practice, how close the sites are and the extent to which they provided mutual support for one another (*Highland Fish Farmers v Thorburn*

EAT/1094/94). The point is that the employer should be able to justify the restriction to one site in terms of the reality of the working practices between the sites.

5.6. Will the employee be entitled to redundancy pay if their employment contract is terminated following lockdown?

Short Answer

It depends. In many circumstances, an employee who has at least 2 years continuous employment and whose employment is terminated post lockdown is likely to meet the definition of redundancy and, subject to not refusing suitable alternative employment with the employer, entitled to redundancy pay.

Explanation

An employee who has been employed for at least 2 years continuously and has their contract terminated by reason of redundancy is entitled to statutory redundancy pay (they may have contractual redundancy rights, but that is a matter of contract).

In relation to statutory redundancy pay, there is a statutory presumption of redundancy by virtue of s.163(2) Employment Rights Act 1996 ("ERA"), so the employer would need to show the reason for dismissal was something else if an employee makes a claim.

The main barrier to entitlement for redundancy pay for an employee with at least 2 years employment is an unreasonable refusal of an offer of alternative employment (s.141 ERA). This is of course very fact specific. Critically, it has two elements: (a) the employee must unreasonably refuse the offer and (b) the offer must be for suitable alternative employment.

5.7. What type of procedure needs to be followed? Will redundancy amount to an unfair redundancy?

Short Answer

There is no statutory procedure as such to follow. However, often for a redundancy to be 'fair' one would expect to see (i) warning/consultation, (ii) fair basis for selection (iii) consideration of alternative employment. Moreover, if an employee is pregnant or in her ordinary or additional maternity leave period, there is additional protection which needs to be addressed – see 9.5.

Explanation

This section assumes there is no need for collective consultation – that is that the employer is not proposing to dismiss 20 or more employees within 90 days (this is dealt with 6.1).

For a redundancy to be 'fair' and there be no unfair (redundancy) claim that succeeds (i) the employer needs to establish the reason was redundancy and (ii) the tribunal is satisfied that the procedure and decision to dismiss were 'reasonable' under s.98(4) Employment Rights Act 1996.

The leading cases in terms of procedure, *Williams v Compair Maxam Ltd [1982] IRLR 83* and *Polkey v A E Dayton Services Ltd [1987] IRLR 503* establishes that in most cases a fair procedure will require

(a) Warning / consultations;

(b) Fair basis for selection (i.e. criteria and manner of selection fair);

(c) Consideration of alternative employment.

Of course, the degree of each of the above will depend on the particular circumstances. But most fair procedures and fair redundancy dismissals would reasonably deal with all of these aspects.

It is no defence for the employer to show that consultation would have made no difference to the outcome. Even a small employer must consult, although its size and administrative resources will affect the nature and formality consultation requires (*De Grasse v Stockwell Tools Ltd [1992] I.R.L.R. 269*). Consultation must be carried out each time a redundancy is considered, and it is unlikely to be reasonable for an employer to fail to consult because in a previous round an employee said they did not want to be consulted (*Ferguson v Prestwick Circuits Ltd [1992] IRLR 266*).

Where a collective consultation has been carried out it is possible for a dismissal be fair despite a lack of individual consultation, but such circumstances are rare (*Mugford v Midland Bank Plc [1997] I.C.R. 399* and see the EAT's guidance at *406-7*). Collective consultation is not a substitute, however. Unions rarely wish to be involved in the actual selection of individuals for redundancy. So individual consultation is important because it gives the employee the chance to put the case to the manager carrying out the selection so that the manager can reach a fully informed decision.

Failing to consult an individual may not be justified by the employer's belief that they are the only person who could be made redundant. The employee may say something (such as expressing a willingness to redeploy to a more junior or lower paid post) that could change the employer's mind about dismissal (*Heron v Citylink-Nottingham [1993] I.R.L.R. 372*).

Simply warning employees of redundancies is very unlikely to be reasonable consultation (see *Rowell v Hubbard Group Services Limited [1995] I.R.L.R. 195*).

5.8. The TUC, CBI and ACAS joint statement refers to the need to do the selection genuinely and fairly. What does this mean?

Short answer

The criteria employed for selection should be genuinely applied and should be capable of being verified independently (i.e. objective), and not based simply on a manager's personal opinion. They should avoid any type of unlawful discrimination.

Explanation

Reasonably weighted criteria such as disciplinary records, appraisals, performance, attendance, and length of service are regularly and reasonably used as they can be objectively and independently verified. If records are sparse, objectivity can be obtained by more than one manager's view being evidenced concerning these criteria.

Subjective and vague criteria are likely to be unreasonable. Similarly, ambiguous criteria such as "attitude" are likely to result not only in an unreasonable selection but run an increased risk of unlawful discrimination arising from the selector's personal stereotypes or assumptions based on protected characteristics.

A degree of subjectivity can be reasonable, however. The fact that the selection criteria requires the manager to engage in a degree of judgment does not render them subjective if they can be assessed in a dispassionate (i.e. objective) way.

Thus if those in a selection pool have to compete for the remaining jobs, a subjective interview process may be reasonable if the employer has built in checks and balances (such as a large interview panel scoring independently) so as to render the selection objective (See *Canning v NICE UKEAT 0241/18*). So, it can be reasonable for the process to involve criteria which require personal judgement with some subjectivity (*Swinburne & Jackson LLP v Simpson UKEAT 0551/12*). Relying on appraisals by different managers may be risky, and an employer should consider using additional independent assessment to reduce the subjectivity of the reliance on appraisal.

Attendance records can be an objective criteria, but consideration should be given to ignoring absences due to pregnancy, maternity or family leave to avoid sex discrimination, and to ignoring absences linked to disability to avoid discrimination related to disability/reasonable adjustments.

LIFO: using “last in first out” as a main criterion (rather than as a tie-break where other criteria result in a tie) is risky. In terms of indirect age discrimination, it requires objective justification (albeit this is possible: *Rolls-Royce Plc v Unite the Union [2009] IRLR 576*). Similarly, it is likely indirectly to place women at a particular disadvantage, so its use will need to be objectively justified.

5.9. What does all this mean in practice? What is the typical process for redundancy selection?

Short Answer

Matters are always fact-specific but being open and fair are key. Reading the Acas advice on redundancy gives a good idea of what it should mean: https://www.acas.org.uk/manage-staff-redundancies

Explanation

Generally individual consultation will require an initial meeting with the employee to warn of redundancy as a possibility. At this meeting (which should be confirmed in writing) the employer will take the opportunity to explain non-viable alternatives to redundancy and hear what the employee says about ways to avoid redundancies.

The criteria for selection should be explained and comments sought. Some criteria may be discriminatory, so should be avoided. For example, counting disability-related absence during the time an exceptionally vulnerable person has been shielding during the pandemic is likely to be disability discrimination. Flexibility is another risky criterion: it could discriminate against women and

disabled people. Willingness to attend a workplace when working from home is reasonable during the pandemic is another potential criterion to avoid.

Scoring then takes place. Some employers will use two independent scorers but as that is one way of trying to ensure fairness and objectivity, it is not essential if it is reasonable to view the process as achieving those standards.

Those at risk thereafter should be invited to a consultation meeting in writing which communicates the reasons for redundancy and how that individual's scores were reached. The letter should make clear that there is no final decision but that this is a consultation process.

At the consultation meeting, the reasonable employer will consult the employee over their scores and listen to what the employee says. The meeting should be noted, and any suggestions from the employee (or reassessment) should be followed up, with feedback to the employee on the results.

Those who are still at risk of redundancy should then be invited to a further meeting at which they are consulted over the results of the selection process and over matters such as alternative employment. If after that meeting no alternative employment can be found a confirmation meeting should take place at which the employee is told they have been selected; the terms of the redundancy should be discussed and the employee should be informed of their right to appeal against the decision.

During the period of notice to the date of termination, the employee has the right to take reasonable time off to seek alternative employment (s52 ERA 1996

6. COLLECTIVE REDUNDANCY INFORMATION AND CONSULTATION (Sarah Fraser Butlin & Tom Brown)

6.1. When does the duty to undertake collective information and consultation arise under s.188?

Short Answer

When a business is proposing to dismiss as redundant 20 or more employees in one establishment within a period of 90 days or less. Each underlined word has a particular meaning.

Explanation

Section 188 Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA") provides that an employer "shall" consult where they are proposing to dismiss as redundant 20 or more employees at one establishment in 90 days or less.

"Dismiss as redundant" is broader than the usual meaning of redundancy and is defined as "a reason not related to the individual concerned or for a number of reasons all of which are not so related" (s.195 TULRCA). That means it includes situations when employers want to dismiss and re-engage employees on new terms and conditions, and anyone taking voluntary redundancy will be included in the numbers.

However, the numbers are counted per establishment. Establishment is generally understood to be "the unit to which the workers made redundant are assigned to carry out their duties" following *Athinaiki Chartopoiia AE v Panagiotidis (C-270/05) [2007] IRLR 284*, but there is scope for argument about what that actually means. In the *Woolworths* litigation (*Usdaw v WW Realisation 1 Ltd (in liquidation) [2015] IRLR 577*) it meant that there had to be 20 or more employees in each shop that were proposed to be dismissed as redundant before collective consultation was required.

Nevertheless, how an establishment is defined in practice can be tricky and is often very fact dependent.

6.2. When must collective redundancy consultation commence?

Short Answer

When the employer is proposing the redundancy dismissals, in "good time" and at least 45 days before the first dismissal if there are 100+ affected employees, or 30 days if 20 - 99 employees, unless there are special circumstances. Notification of the Secretary of State is required where 20+ employees are to be made redundant.

Explanation

There are three stages to working out when collective consultation must start. The easy part is that the s.188(1A) TULRCA requires that consultation commence:

- 45 days before the first of the dismissals take effect where there are 100 or more employees involved; or
- Otherwise at least 30 days before.

But the legislation also requires that the consultation must commence "in good time" and that will depend on the particular situation within the business.

In addition, the meaning of "proposing" to dismiss is not hard-edged. The EU Directive, from which our domestic legislation arises (Council Directive 98/59), uses the word "contemplating" which could be considered to arise at an earlier stage than "proposing" in s.188. The CJEU has emphasised that the duty to consult arises in relation to the point of "the declaration by an employer of his intention to terminate the contract of employment" (*Junk v Kuhnel (C188/03) [2005] IRLR 310).* That means that the consultation period must have concluded before notice is given and that the contract of

employment must not be terminated until after the conclusion of the consultation process.

There is however a lack of clarity about whether the duty is triggered (especially in the context of the closure of an entire business) when the employer is:

- proposing but has not yet made a strategic decision or operational decision that will foreseeably or inevitably lead to collective redundancies or
- only when that decision has been made and the employer is then proposing consequential redundancies.

Where there are special circumstances that "render it not reasonably practicable" for the employer to comply with this section, then they must take all such steps that are reasonably practicable in the circumstances. This is very fact dependent, but in essence the special circumstances defence will only come into play where the event is truly unexpected.

A careful approach is required where an employer proposes to dismiss 20+ employees, because of the statutory duty to notify the Secretary of State: s.193 TULR(C)A. Failure to do so is a criminal offence: s.194. Therefore, circumstance-specific legal advice should almost always be sought if the employer wishes to consider postponing notification beyond a date when arguably it is proposing to dismiss 20+ employees as redundant.

6.3. Can collective redundancy consultation take place when employees are furloughed?

Short Answer

Probably.

Explanation

There are four particular issues:

Are employees working when they are being consulted such that this breaks furlough?

Initially there was a lot of discussion on this point because the Job Retention Scheme Direction ("the Direction") provides that an employee is furloughed if:

- the employee has been instructed by the employer to cease all work in -relation to their employment,
- the period for which the employee has ceased (or will have ceased) all work for the employer is 21 calendar days or more, and
- the instruction is given by reason of circumstances arising as a result of coronavirus or coronavirus disease.

The Direction requires that employees undertake no work at all. Otherwise work is left undefined. Therefore, the question arises as to whether being consulted about being made redundant would constitute "work". For non-furlough periods and from 1 November 2020 after the end of the Job Retention Scheme, this is not a problem.

However, HMRC's Guidance on the Job Retention Scheme says that an employee can be made redundant while on furlough. Obviously, that would suggest that consultation could occur while employees are on furlough and the employer, by giving access to those employees to the representatives, would not be breaking furlough.

Further the 12 June 2020, like the 1 May 2020, version of the Guidance specifies only that employees cannot be asked to do work that makes money for the employer or provides services to the employer (or associated organisation). Consulting employees is unlikely to involve employees doing these things, with the possible exception of elected representatives. Since the Guidance is clear that furloughed employees may work as union or non-union representatives, if they do not provide services or generate revenue, these things may be done during furlough.

The Guidance is not legally binding, but it is likely to be persuasive.

There may be questions over whether the furlough grants can be used to pay for the consultation period. The Guidance indicates that they cannot be used to substitute redundancy payments. They can be used for earnings and that is what would have been paid during the consultation period, had the employee not been furloughed. The most recent Guidance also provides that an employer can claim for a furloughed employee serving a statutory notice period.

6.4. Can proper access to employees be granted, such that s.188(5A) TULRCA is complied with in respect of collective redundancy consultation?

Section 188(5A) TULRCA requires the employer to allow the appropriate representatives "access" to the affected employees and to provide them with such "accommodation and other facilities as may be appropriate". The difficulty therefore arises as to how that access will be given and what facilities must be provided.

First, there is a moot question as to whether virtual meetings of employees constitute suitable access so as to meet the requirements of s.188(5A). This is likely to be particularly acute where employees are furloughed, have caring responsibilities, do not speak English as a first language, are less literate, need disability-related reasonable adjustments to access virtual meetings, or have limited access to the internet (as may be the case in some industrial sectors). It may be difficult to provide adequate physical meeting space to ensure proper social distancing.

Second, the requirement to provide "appropriate" facilities may require the provision of the proper technology, or at least the infrastructure for it. Precisely what is going to be "appropriate" is a further question. The

practical provision of any, let alone any appropriate, technology may be a significant blockage for some businesses. If employees themselves lack the equipment they need, it is unclear how employers can provide it in this time of lockdown. If virtual meetings have to be set up by the employer, with management present during those virtual meetings, further issues may arise as to whether that means that the access is not full and unconstrained.

Third, arguments regarding compliance with the Article 11 ECHR right to freedom of association may also arise, most acutely (but not only) with public sector employers. In *Wandsworth LBC v Vining [2017] EWCA Civ 1092*, the Court of Appeal held that collective consultation was an essential element of the rights under Article 11. Therefore, where a trade union is recognised within a workplace in relation to the affected employees, there may be further considerations to ensure that the requirements of Article 11 are met. There must be a fair balance struck between the competing interests of the employer and the trade union. Any restriction of the right of access to proper consultation must be justified. However, the breadth of the margin of appreciation will also fall to be considered, especially given the extraordinary current circumstances. Similar considerations will arise in respect of rights under the EU Charter of Fundamental Rights in the context of collective redundancy consultation

Does the existence of the Job Retention Scheme and or the inherent uncertainty of the pandemic mean that there cannot be a proper assessment of the potential redundancy situation?

Given the number of extensions to the CJRS, until it actually does end (now expected on 30 September 2021), it may be argued that consultation cannot start because the true economic situation is unknown. This might bear on two elements of the consultation requirements.

First, it could be said that the employer is not yet proposing redundancies: they are consulting prematurely, when meaningful consultation is impossible and proper consultation within s.188(2) on ways of avoiding dismissals, reducing the numbers of those to be dismissed and mitigating the consequences of the dismissals cannot be conducted. However, this is likely to depend heavily on the factual matrix because where a business is closed under lockdown and cannot re-open, it may be more obvious that redundancies will indeed result once the JRS comes to an end. The effect of the postponed Job Support Scheme, which may be restored as CJRS ends on 30 September 2020, should not be ignored – see 3.26 above.

Second, s.188(2) requires that consultation is undertaken "with a view to reaching agreement". Where the position of the JRS is such that so much is effectively unknown, it may be argued that meaningful consultation is impossible. It may also flow into the information that an employer can realistically and properly provide under s.188(4) TULRCA. However, again it may be that – irrespective of the JRS - it is known that redundancies will result at the end of the JRS period and consultation in that context can take place.

In addition, Article 11 ECHR issues will also arise, as noted above, where a trade union is recognised for the affected employees.

Does lockdown mean that there cannot be meaningful, s.188(2) compliant consultation?

The issue here is whether consultation can occur "with a view to reaching agreement" when the employer and the representatives generally cannot meet in person. It must be borne in mind that the obligation in s.188 is more than just an employer hearing the views of the representatives; the provision requires more active consultation than that. Whether this is achievable in lockdown will depend heavily on how consultation meetings

are arranged and what facilities are provided to enable the representatives to speak privately during consultation meetings. Technology is available to enable this to happen but will need to be thought through fully to ensure that proper consultation can occur, particularly in a context where that consultation must be with a view to reaching agreement.

6.5. Are Trade Union reps able to consult for the purposes of collective redundancy consultation when furloughed?

Short Answer

It is very likely that they can, but care will be required on how consultation takes place.

Explanation

The most recent guidance provides that

> *Whilst on furlough, employees who are union or non-union representatives may undertake duties and activities for the purpose of individual or collective representation of employees or other workers. However in doing this, they must not provide services to or generate revenue for, or on behalf of your organisation or a linked or associated organisation.*

It is likely that collective consultation for s.188 purposes is intended to be captured by this guidance and so be permissible during furlough, not least because of the provisions in the employee guidance indicating that an employee can still be made redundant when on furlough.

There are some possible arguments to the contrary:

First, it is notable that the guidance goes on to refer to the representative not providing services to the employer by undertaking their duties of representation. It could be argued that when s.188 is read as a whole, a representative will be providing a service to the employer because they

will be assisting them to meet their s.188 duties and providing a service by providing ideas to avoid redundancies.

Second, the Direction makes it clear that an employee may not work when on furlough. The EAT has previously considered whether attendance at meetings as a trade union representative constitutes "work" for the purposes of the Working Time Regulations. In *Edwards v Encirc UKEAT/0367/14/DM* the broad answer was that it was work, where the employer had set up the relevant meetings. This echoes the approach in *Davies v Neath Port Talbot CBC [1999] ICR 1132* in which attendance at training courses was also considered to be work for the purposes of s.168 and s.169 TULRCA. If that case law is followed in the context of interpreting the JRS, then trade union representatives or employee representatives would be working and not on furlough.

However, it could be argued that the Working Time Regulations have a fundamentally different purpose as they are primarily concerned with the health and safety of employees. Thus, in those circumstances working time should be found to exist more readily; whereas the purpose of the JRS is to safeguard jobs and to attempt to provide some level of economic stability. The risk for employers is what the HMRC will determine, often retrospectively, and thus raises concerns about the uncertainty of the position. However, for example, employees are expressly allowed to take part in training whilst on furlough, so the concept of what is permissible or impermissible whilst furloughed probably has an autonomous meaning, different to work.

Third, it is useful to note that s.168 TULRCA provides that an employer must provide paid time off for union officials to undertake their duties, including in relation to collective consultation duties (s.168(1)(c) TULRCA). Thus if full pay is required when ordinarily undertaking these duties, it is arguable that those duties amount to work (and, indeed, that employees

might insist on pay and on their rights under the Working Time Regulations 1998 if not being paid in full whilst furloughed).

Fourth, it is important to note that paragraph 6.2 of the Direction provides that an employee must have ceased all work for both the employer and "a person connected with the employer … or otherwise works indirectly for the employer." The definition of "a person connected with the employer" is found in paragraph 13.4 of the Direction and cross refers to the provisions of s.993 Income Tax Act 2007, s.1122 Corporation Tax Act 2010 or particular charities. None of these provisions appear to capture the situation of a trade union. Therefore it could be argued that a trade union representative is working for the trade union, rather than indirectly for the employer (even if they are a local rep, paid by the employer and furloughed by the employer) but that they are not connected to the employer so furlough is not broken when consulting. However, as noted above, this may be argued to be artificial given that the reason for the trade union being consulted is to assist the employer and to provide services to them which would constitute work for the employer.

However, on balance it is probable that representatives can participate in collective consultation while on furlough, though note the real risks that trade union representatives claim that it is working time for the purposes of working time rights.

6.6. Who must be consulted in collective redundancy consultation?

Short answer

"Appropriate representatives" must be consulted. That may be trade union representatives or employee representatives.

Explanation

Section 188 provides that consultation must be conducted with "appropriate representatives" of any of those affected by the proposed

dismissals or the measures taken in connection with the dismissals. This may be a very wide group of employees indeed because it includes employees affected by measures in connection with the dismissals so they will not be within the 90 employees discussed above, but will still need to be consulted.

An appropriate representative is defined in s.188(1B) TULRCA as either a representative from a trade union recognised for that group of employees or an employee representative. Care must be taken in defining the scope of recognition before determining whether the appropriate representative is the trade union or not. Where it is not, then an employee representative may be consulted with: they are people who have been elected for other purposes or may be specially elected to conduct s.188 consultation.

6.7. What information must be provided for the purpose of collective redundancy consultation?

Short Answer

There is a specific statutory list of information that must be provided.

Explanation

Section 188(4) sets out the specific information that must be provided:

(a) the reasons for the employer's proposals,

(b) the numbers and descriptions of employees whom it is proposed to dismiss as redundant;

(c) the total number of employees of any such description employed by the employer at the establishment in question;

(d) the proposed method of selecting the employees who may be dismissed;

(e) the proposed method of carrying out the dismissals, with due regard to any agreed procedure, including the period over which the dismissals are to take effect;

(f) the proposed method of calculating the amount of any redundancy payments to be made (otherwise than in compliance with an obligation imposed by or by virtue of any enactment) to employees who may be dismissed;
(g) the number of agency workers working temporarily for and under the supervision and direction of the employer;
(h) the parts of the employer's undertaking in which those agency workers are working; and
(i) the type of work those agency workers are carrying out.

The information must be provided during the period of consultation but the consultation can commence before all the information is available: *Akavan Erityisalojen Keskusliitto AEK ry v Fujitsu Siemens Computers Oy, C-44/08 (CJEU).*

6.8. What must be consulted about for the purposes of collective redundancy consultation?

Short Answer

Once again the statutory provisions stipulate three specific points:

(i) avoiding the dismissals;
(ii) reducing the numbers of employees to be dismissed; and
(iii) mitigating the consequences of the dismissals.

Explanation

The three points are set out in s.188(2) and they are largely self-explanatory in theory. In practice, it can be difficult to establish whether or not consultation has gone far enough. Importantly, s.188(2) also goes on to state that consultation must be "with a view to reaching agreement". This is contentious, and as noted above, it may be argued that this provision means that collective consultation cannot be conducted while employees are on furlough and / or while the JRS is in place suspending the business reality. Equally, it should be noted that the special

circumstances defence in s.188(7) may provide an employer with an escape clause if it can be argued that consultation was lacking because they may be able to argue that although they did not meet the requirements of s.188(2), it was not reasonably practicable to do so and they took such steps as were reasonable in all the circumstances. It might be expected that the courts would show some latitude to employers in the current context.

Where the proposal to dismiss as redundant arises from the closure of an entire site or business, then it is likely that s.188 requires consultation about that prior decision, as well as the redundancies themselves: *UK Coal v NUM [2007] EAT/0397/06.*

6.9. What are the consequences of failing to comply with collective redundancy consultation?

Short Answer

A protective award of up to 90 days' pay per employees.

Explanation

Section 189 TULRCA provides that a protective award may be made where there is a breach of s.188 requirements. The award will be for remuneration for the protected period. That period begins with the date on which the first of the dismissals takes effect or the date of the award, whichever is earlier. It will be for a period that is "just and equitable in all the circumstances having regard to the seriousness of the employer's default" but will not exceed 90 days. The question for a tribunal in making a protective award is not any loss suffered by the employees but rather the seriousness of the employer's failure (*Susie Radin Ltd v GMB [2004] EWCA Civ 180*).

6.10. How do the ICE Regulations work in lockdown?

Short Answer

Much the same as they did before lockdown except that the duties are very likely to arise in the changing economic context caused by the pandemic. In addition, there are likely to be some complications as to how consultation can be achieved remotely.

Explanation

The Information and Consultation of Employees Regulations 2004 ("ICE Regs") do not require information and consultation on any specific matters but set up a mechanism by which information and consultation will be carried out. Therefore, the key issue will be what the terms of any ICE Agreement are that has been reached between the employer and the relevant representatives. Having said that, where no agreement can be reached then the standard information and consultation provisions ("SICP") will come into play. These provide the following obligations:

(a) to inform (not consult) the representatives about the recent and probable development of the undertaking's activities and economic situation.

(b) To inform and consult the representatives about the situation, structure and probable development of employment within the undertaking and any anticipatory measures envisaged. This will include information about the use of agency workers and where there is a threat to employment.

(c) To inform and consult with a view to reaching agreement about decisions likely to lead to substantial changes in work organisation or in contractual relations.

Changes in pay or monetary benefits are not meant to be covered by the ICE Regs.

Self-evidently, businesses who have an ICE Agreement will need to be particularly alert to the need to meet their ICE requirements, whether they

are those in their particular agreement or where the standard procedures apply. Careful consideration will have to be given to whether and how those consultation duties can be met virtually and many of the issues addressed above in the context of s.188 and furloughed employees will be as relevant in relation to the ICE Regulations.

6.11. How do the TICE Regulations work in lockdown?

Short Answer

Much the same as they did before lockdown except that the duties are very likely to arise in the changing economic context caused by the pandemic. In addition, there are likely to be some complications as to how consultation can be achieved remotely.

Explanation

The key question in most situations in which TICE (Transnational Information and Consultation of Employees Regulations 1999) arises, is the construction of the particular agreement that has set up the European Works Council ("EWC") and determines what consultation will be conducted. Therefore, the EWC Agreement should be the first consideration. There are standard procedures in the TICE Regulations that will apply where no agreement could be reached and in interpreting the particular EWC Agreement, it is often helpful to bear in mind the provisions in the Regulations.

It is also worth highlighting that where there are "exceptional circumstances affecting employees' interests to a considerable extent" it is likely to trigger the requirement for an exceptional information and consultation meeting. Where there are large-scale changes to the scale or nature of the operations of a business, it is very likely that an exceptional information and consultation meeting will be required. However, much will

depend on the context, the particular issues arising and care will be required to ascertain whether (i) the circumstances are exceptional and (ii) whether those circumstances affect employees' interests to a considerable extent.

If there is to be a meeting, then Regulation 19A TICE must be borne in mind. It requires that central management shall provide members of the EWC with the "means required" to fulfil their duty to present collectively the interests of the employees. That operates in two ways. Firstly, in their ability to interact with management and secondly, to interact with other employees who they represent. It is not at all straightforward to determine what facilities will be required to be provided to EWC members to enable that communication. For those EWC members in the UK and on furlough, similar considerations will arise as set out above in relation to s.188 consultation about whether they are then in fact working and not on furlough.

6.12. How does TUPE consultation work in lockdown?

Short Answer

There are likely to be particular challenges in ensuring that consultation with appropriate representatives is compliant with the TUPE Regulations 2006.

Explanation

Many of the same issues arise in relation to TUPE consultation as in s.188 collective redundancy consultation. There is a requirement to provide information to representatives of "affected employees" and for consultation "with a view to reaching agreement" to follow thereafter (Regulation 13). "Affected employees" are both those who are the subject of the transfer and those affected by measures taken in connection with it. Detailed

information about the transfer, its implications and measures thereafter must be provided to representatives "long enough before" the transfer to enable consultation to occur (Reg 13(2)).

Once information has been provided then consultation must be undertaken "with a view to reaching agreement". The same issues arise here as in s.188 consultation and considerable care will be required to ensure that proper consultation is possible.

6.13. Does an employer have to consult anyone about changes in work practices in respect of health and safety for when people return to work?

Short Answer

Yes

Explanation

The normal duties of consultation on health and safety matters still apply during the pandemic. Section 2(6) Health and Safety at Work etc Act 1974 provides that it is the duty of every employer to "consult any such representatives with a view to the making and maintenance of arrangements which will enable him and his employees to co-operate 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". The representatives may be appointed by trade unions as safety representatives from among the employees or may be employee appointed representatives.

6.14. Who does an employer have to consult about health and safety?

Short Answer

Either a trade union safety representative or an employee appointed safety representative.

Explanation

Where an employer recognises one or more trade union in any part of the business, then the trade union may appoint health and safety representatives. This will usually be agreed as part of the recognition agreement or with the assistance of ACAS.

However, if there are employees who are not represented by trade union health and safety representatives then a different scheme applies. This will arise where:

- The employer does not recognise a trade union;
- Although a trade union is recognised, no health and safety representatives have been appointed; or
- There are employees who are not part of the trade union and the trade union has not agreed to represent them.

If this is the situation, then the employer can either arrange for representatives to be elected from the employees ("representatives of employee safety") or to consult directly with the employees themselves. The latter option is often best used in a smaller business.

6.15. What does an employer have to consult about in respect of health and safety?

Short Answer

Consultation needs to take place to enable effective co-operation "in promoting and developing measures to ensure the health and safety at work of the employees, and in checking the effectiveness of such measures".

Explanation

The key to what must be consulted about is in the Health and Safety at Work Act 1974 ("the 1974 Act").

Trade union representatives have duties under the 1974 Act and the Safety Representatives and Safety Committees Regulations 1977 also apply. Regulation 4(1) requires representatives to investigate potential hazards and dangerous occurrences in the workplace and any complaints raised by an employee.

Non-union representatives must be consulted in accordance with The Health and Safety (Consultation with Employees) Regulations 1996. Regulation 4 requires that consultation is undertaken about:

> *(a) the introduction of any measure at the workplace which may substantially affect the health and safety of those employees; …*
> *(d) the planning and organisation of any health and safety training he is required to provide to those employees by or under the relevant statutory provisions; and*
> *(e) the health and safety consequences for those employees of the introduction (including the planning thereof) of new technologies into the workplace.*

Regulation 5 requires that an employer provide relevant information that is necessary to enable representatives to participate fully and effectively in consultation.

Therefore, once lockdown is lifted, even partially, employers will be under a duty to consult with representatives (or in certain circumstances, direct with employees) about how to ensure the health and safety of employees as they return to work. Those consultations are likely to include how they plan to ensure that social distancing can be maintained and the need for additional personal protective equipment. It may also include a discussion of changing shift times and patterns, continuation of remote working, and using rotating teams to limit the interaction between different people. It may include points of interplay between health and safety and equality law,

in relation to older employees (age), pregnant employees, disabled employees who are vulnerable by virtue of their disability, as well as conceivably considerations specific to BAME employees and men who appear to have been disproportionately affected by sars-CoV-2.

7. SICKNESS AND ISOLATION (Daniel Dyal, Sally Robertson, & Charlotte Goodman)

7.1. Classes of sickness: Has the coronavirus pandemic altered the definition of incapability for work for the purposes of statutory sick pay?

Short Answer

Yes, it has, but it was always a bit broader than was generally appreciated.

Explanation

In order to qualify for statutory sick pay an employee must be incapable, by reason of some specific disease or bodily or mental disablement, of doing work which they can reasonably be expected to do under their contract (section 151 *Social Security Contributions and Benefits Act 1992*).

However, there are also deeming provisions by which employees are treated as incapable for work even if they in fact are not. These are found in regulation 2 *Statutory Sick Pay (General) Regulation 1982* (as amended). Regulation 2 has always contained some quite wide deeming provisions. The deeming provisions have been expanded by a slew of recent amendments arising out of the pandemic. It can be difficult to follow through and work out the effect of all the changes. Happily at https://www.legislation.gov.uk/uksi/1982/894#commentary-key-033b2e5cde78cc59511181453e37dec6 one can now find the 1982 Regulations with amendments inserted up to the *Statutory Sick Pay (General) (Coronavirus Amendment) (No 7) Regulations 2020* which came into force on 24 December 2020.

Deemed incapability for work now includes the following main categories:

- Those who are under medical care for an underlying condition and who have been advised by a doctor to refrain from work. This is a longstanding deeming

provision. It applies to some, but not all, people who are shielding from Covid-19.

- Those who are self-isolating to prevent infection or contamination with coronavirus *and* by reason of that isolation are unable to work. This category includes;
    - Someone who lives with (or is in a linked or extended household with) a person who has symptoms of coronavirus, however mild, and is staying at home for 14 days (11 days since 24.12.20) (or until that person is notified they have tested negative for coronavirus);
    - Someone who was staying at home because they lived with (or were in a linked or extended household with) somebody with coronavirus symptoms but themselves then developed symptoms so must stay home for 7 days (11 days since 24.12.20).
    - Someone defined in public health guidance as extremely vulnerable and at very high risk of severe illness from coronavirus because of an underlying health condition, who has been notified that they must follow rigorous shielding measures for the period specified in the notification.
    - Someone who is staying at home for 14 days, having been told in writing by a listed health services official that they have had contact with a person who was infected with coronavirus.

The Government announced that the extra support and protection for people who are extremely vulnerable (see the penultimate bullet above) would be paused from 1 August 2020. A further shielding notification is enough to restore the deeming provision for the purposes of SSP for extremely vulnerable people (no amendment is required to Schedule 2 of the SSP Regulations). For the intervening period, those entitled to SSP are still employees. They may be entitled to SSP on another basis. Note that under the extended CJRS scheme from 1.11.20 (Treasury Direction No 5), there is no longer a condition requiring someone to have previously been furloughed in order to be furloughed at any later point. The Coronavirus Job Retention Scheme will continue to provide support until 30 September 2021 where all the other conditions have been met. There is no longer a requirement that a worker had been furloughed at least once by 10 June 2020.

7.2. Do the above changes to SSP also apply to contractual/enhanced sick pay?

Short Answer

Not usually. Where an employee has contractual sick pay provisions the definition of sickness is a matter of contractual interpretation. Most contracts of employment do not define sickness by reference to a statutory definition of incapability for work. Generally, then, the existing definition of sickness will continue to apply.

Explanation

Many employees enjoy contractual sick pay over and above SSP. Whether an employee qualifies for contractual sick pay or not is question that can only be answered by construing the contract of employment. Usually, any contractual entitlement over and above statutory entitlement, will be unaffected by changes to the SSP legislation. However, it is not impossible that, in some cases at least, changes to SSP will have an impact on contractual entitlement.

There are three types of cases:

- Firstly, contracts that have an express definition of sickness of their own. The definition of sickness will continue to apply.
- Secondly, contracts which define sickness by reference to the SSP legislation as amended from time to time. This is unusual but possible. Clearly in such cases, the contractual definition of sickness will follow the statutory one.
- Thirdly, contracts that do not define sickness at all. These are the most interesting for current purposes. There is no doubt that the pandemic has caused a huge shift in notions of what it means to be incapable of work. Vast numbers of people have been unable to work because of self-isolation and/or shielding requirements. This is set to continue and is a phenomenon that may well shift norms and expectations as to when sick pay is or should

be payable. Strictly speaking, when construing a contract, it is the intentions of the parties, objectively assessed, as at the date that the contract was formed, is what usually matters. However, in practice, subsequent developments and sensibilities can creep into the construction exercise.

7.3. Can SSP be claimed from day 1 of sickness?

Short Answer

Yes, but only in coronavirus related cases. In other cases it is payable from day four of absence.

Explanation

The general rule is that SSP is not payable in respect of the first three qualifying days of sickness (known as waiting days). In general, a 'qualifying' day is a day the employee would usually have worked. This is the effect of s.154 and s.155 Social Security Contributions and Benefits Act 1992. However, there is now an exception. Section 155 has been suspended for certain purposes by regulation 2 of the *Statutory Sick Pay (Coronavirus) (Suspension of Waiting Days and General Amendment) Regulations 2020.*

Broadly this means that where the incapability for work is because of, or deemed to be because of, coronavirus, there are no waiting days. SSP is payable from the first date of incapability.

7.4. Can an employer continue to rely on its existing sickness absence policy and procedure?

Short Answer

In principle, yes, because the pandemic has not changed the law as it relates to absence management. However, in practice, many absence management policies will need amendment in order to be fit for purpose.

Explanation

There is no specific law that now prevents an employer operating its existing policies and procedures. However, the coronavirus pandemic has thrown up many new issues and challenges around sickness and absence management. The net result is that many capability procedures will need some amendment or adaption in order to operate reasonably in the current circumstances.

Sickness absence policies need to take into account:

- Difficulties some employees are likely to have in obtaining GP certification for absences;
- Difficulties some employees will have in attending face to face meetings;
- Difficulties caused by increased childcare demands while schools, nurseries and childminders are closed. This could impact, for example, on the ability to attend virtual absence management meetings;
- Particular employees' abilities to participate effectively in virtual absence management meetings (do they have the necessary technology and/or technological ability?);
- The fact that current public health guidance requires certain categories of people to shield and thus not to work (unless they can work from home);
- Higher levels of sickness absence;
- Difficulties with accessing or producing an isolation note;
- Delays or omissions in NHS Digital's shielded patients list.

7.5. When does an employer have to be told about sickness?

Short Answer

Normally the time for notifying an employer will be stated in a sickness policy and procedure. If nothing has been said, the default position is 7 days. But time can be extended where reasonable. Note that the position is different since 28 September 2020 where there is a *legal requirement* to self-isolate – see 7.12 onwards below.

Explanation

The time limit for notifying an employer about sickness can be extended by one month if there is 'good cause' for the delayed notice. There is also a further extension where giving notice within a month was not 'reasonably practicable' – reg 7(2) SSP General Regulations 1982.

Where someone is at high risk from coronavirus and got a letter from the NHS or from their GP explaining that position before 16 April 2020, the gov.uk information gives a different time limit. They must have told the employer by 23 April 2020. We have not found this provision in regulations. Delay should be considered under reg 7(2), so if it was not reasonably practicable to notify the employer by 23 April, time should be extended.

7.6. Can an employer insist on the employee getting a fit note?

Short Answer

Not necessarily.

Explanation

It is probable that providing a fit note is not essential before SSP can be properly payable. In any event, during the first 7 days a self-certificate is sufficient. Thereafter, a doctor's statement of fitness for work for SSP and other social security purposes is just one of the two ways of evidencing fitness for work.

If it is not practicable to get a fit note, the *SSP Medical Evidence Regulations* provide that medical information shall be provided:

> *by such other means as may be sufficient in the circumstances of any particular case*

What is acceptable as being 'sufficient' in the time of coronavirus should be addressed in a review of or addendum to an employer's sickness policy and procedures. For example, an email or letter from a GP or midwife or other health professional should be 'sufficient' in these particular circumstances.

7.7. What about an 'isolation' fit note?

Short Answer

An isolation fit note should be accepted as sufficient

Explanation

People who are isolating because of coronavirus symptoms or because they live with someone who has symptoms, or who have been told to isolate by a test and trace service, can get an isolation fit note by calling the 111 coronavirus service in England, or NHS Direct Wales, or in Scotland, NHS Direct. This is explained at https://111.nhs.uk/isolation-note/

7.8. How much is SSP per week?

SSP is paid at a flat rate, currently at £95.85 a week, rising to £96.35 from 6 April 2021.

Note that the threshold of average pay of at least £120 a week remains the same in 2021.

7.9. Does having been furloughed affect the amount of SSP?

Short Answer

This may happen for those who fall ill within two months of returning to work. It is only likely to affect the calculation of SSP for low paid workers. To qualify for SSP, average weekly pay must be at least £120 a week, the point at which there is liability for national insurance contributions.

Normal earnings are based on the average pay during the 8 weeks ending on the last normal pay day before the week in which the person becomes or is deemed incapable of work. Currently, there have been no amendments to the definition of normal weekly earnings found in reg 19 of the SSP General

Regulations. As such, if those 8 weeks include weeks of lower furloughed pay and the average falls below £120 pw, there will be no entitlement to SSP.

7.10. How long is an employee entitled to SSP for?

Short Answer

In any one period of entitlement, 28 weeks. However, a linking rule means that spells separated by no more than 8 weeks are linked together and count as one period of entitlement. This is subject to a cut off once the period spans 3 calendar years.

7.11. Does the cost of statutory sick pay fall on the employer?

Short Answer

Yes, but there is one exception. An SSP rebate scheme has been announced but it is of quite limited application. It applies only to the first two weeks of SSP, only to employers with fewer than 250 employees and only in relation to coronavirus related incapacity for work.

Explanation

The employer is always responsible for paying the employee SSP. That has not changed. However, a new scheme has been announced, and partially legislated for, that will enable some employers to claim a rebate for some SSP.

The announcement came in the Chancellor's budget speech on 11 March 2020. A new section 159B was inserted into Social Security Contributions and Benefits Act 1992 by s.39 Coronavirus Act 2020. Section 159B contains a power for regulations to be made requiring HMRC to fund SSP payments.

From 26 May 2020, the *Statutory Sick Pay (Coronavirus) (Funding of Employers' Liabilities) Regulations 2020 (SI.No.512)* enable eligible

employers to apply to HMRC for a refund of the cost of SSP to any employee (up to £191.70 each) where –

- The employee was incapable of work either because she was infected with or contaminated by coronavirus, or has been deemed incapable of work under a specific coronavirus deeming provision; and
- the first day of incapacity for work in their period of incapacity falls on or after 13 March 2020.

There are also limitations on who can use the scheme. The main one is that the scheme only applies to employers who had fewer than 250 employees as at 28 February 2020 and only to employers that had a PAYE payroll scheme that was created and started on or before that date.

Employer who intend to use this scheme are guided to keep the records of all the statutory sick payments that they want to claim from HMRC, including:

- the reason why an employee could not work
- details of each period when an employee could not work, including start and end dates
- details of the SSP qualifying days when an employee could not work
- National Insurance numbers of all employees who you have been paid SSP

The records must be kept for at least 3 years following any claim.
Employers have one year in which to claim a rebate in respect of each individual employee. Claims cannot be made after the later of:

- one year beginning with the last day of SSP payable to that individual one year; or
- one year beginning with 26 May 2020

The legal requirement to isolate – in force from 28 September 2020

7.12. If an employee has been told by the NHS or local authority they are required to isolate for.

Short Answer

Up to 10 days, depending on the circumstances. Guidance is at https://www.gov.uk/government/publications/covid-19-stay-at-home-guidance/stay-at-home-guidance-for-households-with-possible-coronavirus-covid-19-infection and at:

https://www.gov.uk/government/publications/covid-19-stay-at-home-guidance?priority-taxon=774cee22-d896-44c1-a611-e3109cce8eae

Explanation

The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020[31] came into force on 28 September 2020. They provide for what happens when someone is told by the health services or local authority to self-isolate, either following a positive Covid-19 test or because they live with or have been in close contact with someone who had a positive Covid-19 test.

If the employee is told to self-isolate following a positive Covid-19 test, they will have to isolate for ten days starting either with the date 5 days before the positive test, or the day when they started to have symptoms, whichever is the later.

If the employee is told to self-isolate because they live with someone who had a positive test, they will isolate for ten days starting either with the date 5 days before the positive test, or the day when they started to have symptoms, whichever is the later.

[31] https://www.legislation.gov.uk/uksi/2020/1045/contents/made

If the employee is told to self-isolate because they had contact with someone that they do not live with and that person had a positive test, the employee will have to isolate for ten days starting with the last date they came into close contact with the person who had the positive test before that person was told to self-isolate.

Being told via the NHS Covid-19 contact tracing App does not count as notification – see reg 2(1)

7.13. Does an employee have to tell their employer they are self-isolating?

Short answer

Yes. They also must tell the employer the start and end dates of their self-isolation period. If they don't, that is a criminal offence.

Explanation

A worker must tell their employer about both their requirement to self-isolate, and the start and end dates of their self-isolation period[32]. They must tell the employer as soon as is reasonably practicable, and in any event before they are next due to start work within the isolation period.

If the worker is an agency worker, they have to tell either their agent, a principal, or their employer, if the employer is a different person[33].

7.14. Does the employer have to tell anyone else that the employee is self-isolating?

[32] https://www.legislation.gov.uk/uksi/2020/1045/regulation/8/made

[33] https://www.legislation.gov.uk/uksi/2020/1045/regulation/9/made

Short answer

If the worker is an agency worker, yes.

Explanation

If an agent, principal, or employer (where that is a different person) is told by an agency worker that the worker is self-isolating, and the start and end dates of their isolation, that agent, principal, or employer must pass the information on to any other agents, principals or employers as soon as is reasonably practicable[34]. For example, if a worker tells their agent the information, the agent must pass the information on to any principals, and to the worker's employer if that is a separate person.

7.15. Can an employer ask a self-isolating employee to come to work?

Short answer

No.

Explanation

Once employers are aware that their employee or agency worker is self-isolating because they were told to by the health service or local authority, the employer must not knowingly allow[35] that worker to attend any place other than the place where they are self-isolating for any purpose related to their employment. There is a defined and extremely narrow list[36] of reasons that

[34] https://www.legislation.gov.uk/uksi/2020/1045/regulation/9/made

[35] https://www.legislation.gov.uk/uksi/2020/1045/regulation/7/made

[36] https://www.legislation.gov.uk/uksi/2020/1045/regulation/2/made

define the cases in which a self-isolating person can leave the place where they are self-isolating, and they cannot leave the place for any other reason.

If an employer does knowingly allow the worker to leave their self-isolation place for a reason related to work 'without reasonable excuse', that is a criminal offence punishable by a fine[37]. A 'reasonable excuse' is not defined, but is probably quite difficult to establish.

The fixed penalty fine for a first offence is £1,000, for a second is £2,000, for a third is £4,000 and for a fourth and any subsequent offence is £10,000.

7.16. Can a self-isolating employee choose to go to work?

Short answer

No.

Explanation

If the employee has been told to self-isolate by a health service or local authority, they will commit an offence and be subject to a fine if they leave the place where they are self-isolating.

7.17. Can a self-isolating employee work from home?

Short answer

Yes.

Explanation

[37] https://www.legislation.gov.uk/uksi/2020/1045/regulation/11/made

If they are able to work from their self-isolation spot, there is nothing stopping them. The Regulations simply prevent them leaving their self-isolation place. If possible, a worker should continue to work from home and be paid as normal.

7.18. Can an individual employee get fined if it was the employer company who caused a worker to breach their self-isolation?

Short answer

Yes.

Explanation

Both body corporates and individuals can be fined. If a body corporate commits the offence, and either this is done with the consent or connivance of an officer of the body, or it is attributable to the neglect of an officer, that officer is personally guilty *as well as* the body corporate.[38]

7.19. Does an employer have to pay a worker who is self-isolating?

Short answer

If depends. See the answers below on pay and sick pay for workers who are quarantining upon return to the UK.

7.20. Can employees claim any other payment if they are required to stay at home and self-isolate?

Short answer

There is a £500 one off payment for those required to self-isolate. Payments will be made by a local authority under a Test and Trace Support Payment

[38] https://www.legislation.gov.uk/uksi/2020/1045/regulation/11/made

scheme, see https://www.gov.uk/government/publications/test-and-trace-support-payment-scheme-claiming-financial-support/claiming-financial-support-under-the-test-and-trace-support-payment-scheme and https://www.gov.uk/test-and-trace-support-payment

The *Social Security Contributions (Disregarded Payments) (Coronavirus) (England) Regulations 2020* came into force on 22 October 2020 – see https://www.legislation.gov.uk/uksi/2020/1065/made/data.xht?view=snippet&wrap=true Under these regulations a test and trace support payment is disregarded as earnings for the purposes of employee and employer national insurance contributions. Payments are taxable but do not affect means-tested benefits.

Quarantine: returning from work or holiday abroad

7.21. How long do people have to quarantine for after coming into to the UK?

Short answer

Travel corridors and 'exempt countries' are currently suspended. Anyone arriving in England from abroad must quarantine for 10 days and take 2 coronavirus tests while in quarantine. If they have left a country on the travel ban red list in the 10 days before their arrival, they need to spend their quarantine period in a government approved hotel. They cannot leave their quarantine home or hotel to go to work. Basic guidance is at https://www.gov.uk/guidance/coronavirus-covid-19-travel-corridors

7.22. If an employee cannot do their work from home, should employers pay employees while they are self-isolating?

Short answer

It depends.

Explanation

A worker's right to pay is mainly determined by their employment contract. If there is no express term in the contract on when pay can be deducted, a worker is generally entitled to pay if they are 'ready, able and willing' to work, even if they do not do any work. However, a self-isolating worker is probably not 'able' to work unless able to work from home and would not therefore be entitled to pay.

7.23. Can employees claim sick pay while they are self-isolating?

Short answer

Employers should check if their employees are entitled to company sick pay. However, there is no entitlement to SSP if people are self-isolating simply because they have returned to the UK. People are only entitled to SSP if they are self-isolating because they or someone in their household is symptomatic (see 7.1 and 7.3 above).

7.24. Can employees take other leave to cover their period of self-isolation?

Short answer

It will depend on the terms of individual contracts of employment and the employer's policies and procedures. It may make sense to allow or require an employee to take additional annual leave, or unpaid leave, during their quarantine period.

7.25. Can employers dismiss employees if they cannot work due to self-isolation?

Short answer

If they have worked for two years or more for their employer, probably not, unless they knowingly travelled to a non-exempt or red list country. If they have worked for fewer than two years, generally yes, provided it is in accordance with their employment contract.

Explanation

Employees who have worked for their employers for two or more years are protected from unfair dismissal. It would probably be unfair to dismiss an employee who cannot come to work because they unexpectedly had to quarantine. The case may be different if the employee knowingly travelled to a non-exempt or red list country. Workers who have not worked for their employer for more than two years will generally not have the same protection. They can usually be dismissed by notice provided it is in accordance with the terms of their contract.

7.26. Can employers stop employees from going to countries which require a 10-day period of isolation on return?

Short answer

Yes, in a limited way. Employers can restrict *when* employees take holiday, but it would be questionable to restrict *where* they can take holiday. During Lockdown No 3, since 5 November 2020, leaving home to go on holiday is not included in the exceptions from leaving home listed in reg 6 of the Health Protection (Coronavirus, Restrictions) (England) (No 4) Regulations 2020 - https://www.legislation.gov.uk/uksi/2020/1200

Explanation

Employers have the ability to restrict when employees take holiday under Regulation 15 of the Working Time Regulations 1998[39]. When Lockdown No 3 begins to be eased so far as to permit people to travel abroad, employers may consider using this power to restrict employees taking holiday for as long as the quarantine restrictions remain in place. It is worth noting that this may be unpopular, for example with employees with children who can only take holidays during school holidays. It is also not clear if the employer could apply a restriction on taking holidays abroad as opposed to in the UK. If such a provision or practice puts, or would put, those sharing a protected characteristic at a particular disadvantage when compared with others, it does risk indirect discrimination claims. For example, those with relatives living abroad are likely to be at a disadvantage by not being able to visit family. If that disadvantage is greater than for others, an employer would have to show the provision was a proportionate means of achieving a legitimate aim.

7.27. Can an employee carry over their holiday?

Short answer

Probably not. They can carry over up to four weeks of annual leave into the next two leave years if it is not 'reasonably practicable' to take it in the current leave year because of coronavirus. This might capture workers who are no longer able to take annual leave because of a requirement to quarantine upon their return, but so far it does not appear to have been interpreted that way.

Explanation

The Working Time (Coronavirus) (Amendment) Regulations 2020[40] allow workers to carry forward their right to annual leave for two years where it was

[39] https://www.legislation.gov.uk/uksi/1998/1833/regulation/15/made

[40] https://www.legislation.gov.uk/uksi/2020/365/pdfs/uksi_20200365_en.pdf

not reasonably practicable for them to take their annual leave in the current leave year as a result of the effects of Coronavirus. ‘Reasonably practicable’ is not defined in the Regulations, but so far it seems people do not interpret it to include people who have been unable to go abroad due to the requirement to quarantine. It appears that it has so far been interpreted to mean people who cannot take time off because of business requirements due to the pandemic.

8. CHILDCARE (Claire McCann)

8.1. Is an employee entitled not to work because they have no available childcare?

Short Answer

Yes, but in relatively limited circumstances.

Explanation

An employee is entitled to take reasonable time off as "dependants leave" but only in specified circumstances. There is no statutory obligation on employers to pay the employee for the time off and what is "reasonable" is not mandated.

An employee also has a separate entitlement to take unpaid parental leave of up to 18 weeks (per child), at any time until the child is 18; but advance notice must be given (whereas time off for dependants is designed to deal with emergency situations). One type of leave could transition into the other.

During the period of the Government's furlough scheme and according to its revised Guidance, an employer is permitted to place an employee who is unable to work because they have caring responsibilities resulting from the Covid-19 pandemic on furlough. The additional flexibility in the Furlough Scheme since 1 November 2020, enables employers to agree (in writing) with an employee to reduce their usual hours to any pattern of furloughed and part-time work. This would allow a parent to combine their childcare responsibilities with some part-time working, even though their contractual role is ordinarily full-time.

Where an employer's working arrangements – including for having to attend work or its policies on homeworking or flexible working – place a specific protected group (e.g., women) at a "particular disadvantage", then

this will constitute indirect discrimination which will be unlawful unless it can be justified as a proportionate means of achieving a legitimate aim.

An employee is protected from detrimental treatment by their employer because they have sought to take statutory time off. An employee may also have protection under existing whistleblowing laws (see 11 below on Whistleblowing).

What is "dependants leave" for?

Statutory dependants leave (under s.57A Employment Rights Act 1996, "ERA") is to enable – amongst various specific circumstances – an employee to take action which is necessary to provide assistance to, or make arrangements for the provision of care for, a dependant (including a child) who falls ill and/or where there has been an unexpected disruption or termination of arrangements for the care of a dependant.

However, where the child is no longer sick or the disruption in childcare arrangements is not unexpected, there is no statutory right to take time off. In *Qua v John Ford Morrison Solicitors [2003] ICR 482*, it was made clear that making arrangements for the provision of care for a dependent who is ill does not include the provision of longer-term care by the employee themselves. In *Royal Bank of Scotland v Harrison [2009] IRLR 28*, it was held that "unexpected" does not mean "sudden", such that the unplanned absence of a childminder with two weeks' notice was still found to be unexpected. However, where the disruption to childcare arrangements is foreseen and is known about for some time – such as it likely to be the case in relation to the Covid-19 pandemic, particularly as time goes on – it is more doubtful that an employee could claim an entitlement to dependants leave.

What is "parental leave" for?

Statutory parental leave (under s.76 ERA 1996 and under the Maternity & Parental Leave etc Regulations 1999, "MAPL Regulations") is to enable an eligible employee to take leave for the purpose of caring for that child.

Who is eligible?

The statutory entitlement to both dependents leave and parental leave applies only to employees (which would include part-time employees, those on temporary employment contracts and fixed term contracts). It does not apply to the self-employed or to workers.

Dependants leave is a "day one" right (i.e. no minimum length of service is required); whilst parental leave only applies to an employee who, at the time the leave is to be taken, has been continuously employed for a period of not less than one year and has (or expects to have) responsibility for the child (Regulation 13 MAPL Regulations)

How much time off can be taken for dependants leave?

The amount is not specified, with s.57A(1) ERA 1996 providing only that an employer must permit an employee a "reasonable" amount. What is a reasonable amount of time off will depend upon the nature of the incident and the employee's individual circumstances. In the case of *Qua*, it was clarified that disruption or inconvenience caused to the employer's business should not be taken into account. The EAT also noted that, in the vast majority of cases, a few hours to a few days would often be regarded as reasonable to deal with the particular emergency that had arisen.

How much time off can be taken for parental leave?

An employee is entitled to take up to 18 weeks per qualifying child for each employee (Regulation 14 MAPL Regulations). That means that two parents may take up to 36 weeks' parental leave between them for each

child (so long as both parents are qualifying employees and both have responsibility for the child).

Employers are encouraged by the legislation to devise their own schemes for implementing parental leave but if no agreement is in place, then a default scheme will apply (set out in Schedule 2 to the MAPL Regulations). Under the default scheme, an employee cannot take more than four weeks' leave in respect of any individual child during any year and only in blocks of a week (unless the parent is in receipt of certain allowances, such as the disability living allowance, in respect of the child); but this rule can be disapplied by agreement.

"Responsibility" for a child includes not only someone with legal 'parental responsibility' under the Children Act 1989 but also someone who has been registered as the child's father on the child's birth certificate, which ensures that unmarried fathers are entitled to parental leave. The entitlement is to take up to 18 weeks' leave in total in relation to each child (and not 18 weeks with each separate employer).

Is it paid?

There is no statutory obligation on employers to pay the employee for their time off for dependants or parental leave; but an employee's contract of employment may provide for a right to paid leave in these circumstances.

For parental leave, certain terms and conditions will continue to apply during the period of absence (such as the contractual terms relating to notice periods, compensation for redundancy, disciplinary and grievance procedures, as well as statutory rights to the accrual and payment of annual leave). Because parental leave is unpaid – unless there is an agreement to the contrary – provisions relating to pay or other benefits are suspended. Lower-paid employees may be able to take advantage of tax

credits, universal credit, income support, housing benefit and/or council tax reduction.

Does the employee have to give notice?

Not for dependants leave, but the employee must tell their employer the reason for the absence as soon as is reasonably practicable and how long they expect to be absence (s.57A(2) ERA 1996). This need not be in writing.

Yes, for parental leave: under the default scheme (in Schedule 2 to the MAPL Regulations), an employee must give 21 days' notice to the employer of the beginning and end dates of the requested leave and comply with any request by the employer to produce evidence of entitlement to parental leave. An employer is entitled (under the default scheme) to postpone an employee's request for leave where it considers that the operation of its business would otherwise be unduly disrupted; but the employer cannot deny the leave or split it up into shorter periods and must consult with the employee before reaching a decision.

Is there an alternative to dependants or parental leave?

An employee also has a right to make a flexible working request, by which they could request to reduce their hours and/or work from home. However, if granted, this would have the effect of varying their contract of employment; and the employee would have to work in accordance with the flexible working arrangement which had been agreed; so could not refuse to work entirely. An employee could also ask to use their annual leave entitlement for the purpose of caring for their child.

What about furlough leave?

The Revised Government Guidance[41] on the Coronavirus Job Retention Scheme (last updated on 3 March 2021) now just says someone can be furloughed if they are: *'… unable to work, including from home or working reduced hours because they …. have caring responsibilities resulting from coronavirus, such as caring for children who are at home as a result of school and childcare facilities closing, or caring for a vulnerable individual in their household'*. The furlough scheme has obvious advantages for an employee in that it covers long-term and pre-existing caring requirements and is paid. See 3 above.

Protection from detriment?

An employee has a right not to be subjected to any detriment by their employer for having requested and/or taken time off for dependants leave or as parental leave (s.47C ERA 1996); and if the employee is dismissed because they took or sought to take time off in accordance with their right, such a dismissal will be automatically unfair (s.99 ERA 1996).

An employee who has taken a period of parental leave of more than four weeks has the right to return to the same job in which they were employed prior to that leave unless that is not reasonably practicable for the employer, in which case they will be entitled to return to another job which is both suitable and appropriate (Regulation 18 MAPL Regulations). On the return to work (whether to the same or to an alternative job), the employee is entitled to benefit from terms and conditions which are not less favourable to those which would have applied if they had not been absent (Regulation 18A).

Other protection?

[41] https://www.gov.uk/guidance/check-which-employees-you-can-put-on-furlough-to-use-the-coronavirus-job-retention-scheme

The workplace and working arrangements made by an employer in the face of the Covid-10 pandemic will constitute provisions, criteria or practices (PCPs) which may apply to all or sections of the employer's workforce. If those PCPs cause a particular disadvantage to any group with a protected characteristic (e.g., women), then this may constitute indirect discrimination which will be unlawful unless it can be justified by the employer as a proportionate means of achieving a legitimate aim. Furthermore, if an employer decides to give some employees time off work but not other employees, then care must be taken to avoid any conscious or unconscious direct discrimination in this decision-making.

It is possible that, in dealing with a situation involving an employee's lack of or disruption to childcare arrangements, the employee discloses information which – for example – tends to show, in their reasonable belief, that the health or safety of their child may be endangered. Accordingly, such an employee may make a whistleblowing disclosure which would trigger the statutory protection under the public interest disclosure provisions in the ERA 1996. See 11 below on Whistleblowing.

8.2. How can an employer deal with an employee refusing to work due to lack of available childcare?

The employer should discuss the individual circumstances fully and openly with the employee, with a view to applying its policies fairly and consistently whilst considering whether any of the statutory rights referred to above may be engaged. The employer should take care to avoid any discrimination in its decision-making.

Notably the Government's "Our Plan to Rebuild" document of 11th May 2020 (updated 12th June 2020) provides:

> *The Government is also amending its guidance to clarify that paid childcare, for example nannies and childminders, can take place subject to being able to meet the public health principles at Annex*

A, because these are roles where working from home is not possible. This should enable more working parents to return to work." [42]

Where care-givers are working in the family home or indeed from their own homes it is almost inconceivable that they would be able to maintain social distancing from young children. Many parents would be uneasy with opening up risks of infection in such a way.

Some practical tips:

When an employee gives little or no notice and appears to be refusing to work because they face an emergency in relation to their childcare, remember that the employee is very likely to be entitled to time off as dependants leave. A short email acknowledging that the employee is facing an unexpected difficulty will help and then, if further evidence or discussion is needed (because the employee's refusal to work is more prolonged than a few hours or days), it is likely that the employee will already feel supported.

Get the employee to articulate the problem they face and ask them to set out what alternative arrangements they have already considered. Take care to avoid a knee-jerk reaction and think of all the angles, including:

- If the employer has expert HR advice to hand, seek HR advice;
- Communicate as openly as possible with the employee;
- Inform the employee of their potential statutory entitlements set out above (to dependants leave or parental leave);

[42] https://www.gov.uk/government/publications/our-plan-to-rebuild-the-uk-governments-covid-19-recovery-strategy/our-plan-to-rebuild-the-uk-governments-covid-19-recovery-strategy

- Check all the policies on flexible working (including reduced hours and/or homeworking), parental leave, other types of paid and unpaid leave and send these policies to the employee;
- Consider the possibility of flexible furlough;
- Ask the employee what they wish to do and for how long;
- Assume that all options are possible, until it has been ruled out on reasonable and objective grounds, recalling that the statutory entitlement to dependants leave is not contingent on business needs; whilst the right to parental leave can only be postponed, not curtailed;
- Avoid making assumptions as these could lead to stereotyping and are more likely to taint the decision-making with discrimination;
- Remember that working arrangements are likely to constitute "PCPs" which may particularly disadvantage an employee as a member of a protected group and, accordingly, amount to indirect discrimination which may need to be justified;
- Keep a record of all decisions taken and the rationale for them;
- Arrange for a regular review process, unless an employee has taken a fixed period of parental leave, in which case, arrange for a return to work discussion towards the end of that period, particularly where the employee has taken a period of more than four weeks' leave.
- Misconduct or capability:
    - It is possible – albeit rare – that an employee may be guilty of misconduct in connection with their asserted inability to continue working for childcare reasons; for example, where they seek to abuse a right (whether a statutory entitlement or a contractual right) in connection with their childcare responsibilities, or where they simply go "AWOL" because they fail to communicate with their employer about their inability to work. In those unusual

circumstances, it might be open to the employer to take disciplinary action, up to and including dismissal, although a knee jerk reaction should be avoided. Employers should assume that there are rational reasons for an employee's absence and seek to work with the employee to put such absence onto an authorised footing, rather than jump into disciplinary proceedings; particularly, when resources might be stretched as a result of the pandemic.

- It is more likely that any requirement on the part of an employee to prolonged time off will create difficulties for the employer in the operation of its business. Where the employee has lawfully exercised their entitlement to dependants leave or unpaid parental leave, an employer is extremely unlikely to be able lawfully to consider the disciplinary/dismissal route and should tread especially carefully where any default by the employee is technical (e.g., they have not complied with notice requirements).
- However, where an employee has exhausted all of their statutory and/or contractual entitlements to leave (paid and/or unpaid), and remains unable to return to work due to continuing childcare disruption (and cannot be furloughed, either fully or flexibly), then it may well be open to dismiss that employee by reason of capability or "some other substantial reason", although the employer will need to be careful not to discriminate in any dismissal process, including by deciding to dismiss. For example, it may be more proportionate to allow the employee – on an entirely discretionary basis - to take a longer-term period of unpaid leave, including a sabbatical.

- Keep contemporaneous records:

- It is stressful to combine work with childcare when usual arrangements have been disrupted. An employee may, therefore, feel unsupported and may tend to perceive that any adverse treatment which follows their request for (and/or absence during) leave for childcare purposes is because they sought to avail themselves of their statutory rights.
- The burden of proof under s.48 ERA 1996 can be challenging for employers because it is for the employer to show the reason for any detriment and (under s.98(1) ERA 1996), it is for the employer to show the reason, or principal reason, for a dismissal.

Accordingly, employers will be best placed to prove a reasonable and lawful reason for any alleged detrimental treatment (or a dismissal) if there are appropriate and contemporaneous records available which demonstrate the legitimate basis for the decision-making.

9. MATERNITY ISSUES (Sally Robertson)

9.1. Can an employee be furloughed if they are getting SMP or any type of parental leave payment?

Short Answer

Yes and note that the CJRS scheme now is due to end on 30 September 2021

Explanation

The catch has been that an employer eligible to make claims under the CJRS will not get any subsidy under the scheme for Statutory Maternity Pay (SMP), nor for any other type of statutory parental leave payment. These statutory payments are all listed in the Treasury Direction for the relevant period – para 26.2 in Direction No 5, as extended, which covers the period to the end of April 2021. So, unless the employee is contractually entitled to an enhanced maternity or parental leave payment, there is no point in furloughing them.

An employer has been able to claim under the CJRS to cover a percentage of a contractual enhanced payment to a statutory social benefit such as SMP or a Shared Parental Leave Payment (ShPLP). Initially and since 1 November 2020 this has been 80% up to a cap of £2,500 a month. The total, subject to the original cap of £2,500, and higher contributions from the employer from July 2021 to the end of September 2021, makes up 80% of the employee's wages.

Do note that the statutory element of a statutory social benefit cannot be included in a claim under CJRS – see Treasury Direction No 5 para 26.1. This is to avoid an employer being given subsidy twice for the same statutory benefit. For an element of a statutory benefit that is not

subsidised, that is something the employer is expected to pay in any event.

Parents who have been on statutory leave and who return to work can be furloughed: see 3.1 above.

9.2. Can someone who is already on furlough be paid SMP or any other statutory payment?

Short Answer

Yes.

Explanation

As HMRC Guidance emphasises, the normal rules for maternity and other forms of parental leave and pay apply.

As the 'normal rules' might have led to people getting a lower statutory payment because lower furlough pay was taken into account, amending regulations have corrected the position.

The *Maternity Allowance, Statutory Maternity Pay, Statutory Paternity Pay, Statutory Adoption Pay, Statutory Shared Parental Pay and Statutory Parental Bereavement Pay (Normal Weekly Earnings etc) (Coronavirus) (Amendment) Regulations 2020 / 450* came into force on 25 April 2020. They provide that where on or after 25 April 2020 is the first day of a period in respect of which one of these statutory payments is to be made, and being on furlough means they get less than they would otherwise have been paid, the calculation of 'normal weekly earnings' is based on pre-furlough pay.

For SMP, 'normal earnings' are defined as the actual average in the 8 weeks before the start of the 15th week before the week in which the baby is due.

The furlough position for assessing normal weekly earnings applies where:

- The first day of SMP falls on or after 25 April 2020; and

for all or part of the 8 weeks before the start of the 15th week before the week the baby is due:

- The woman was a furloughed employee
- her employer has claimed and received financial support under the Job Retention Scheme in respect of her earnings; and
- her earnings are lower than they would otherwise have been as a result of her being a furloughed employee

During the parts of the 8 week 'relevant period' in which the woman was furloughed, the calculation is done as if she had been *'paid the amount which she would have derived from that employment had she not been a furloughed employee.'*

Similar provisions apply to other statutory payments.

9.3. What if someone was on SSP during the period in which normal weekly earnings were based?

Short Answer

If SSP is their only income from the employment, they might get less, or even no statutory payment.

Explanation

SSP is £95.85 a week (£96.35 from 6 April 2021). That is below the £120 pw threshold of liability for employee national insurance contributions. Average pay is usually worked out over an 8 week period. In SMP cases, that period is the 8 weeks ending immediately before the 15th week before the week in which the baby is expected. If the average pay drops below £120 pw, and no part of that drop in average pay is because of lower furlough pay, this excludes payment altogether. There is no extra help.

Workers who are entitled to occupational sick pay in addition to SSP are less likely to be affected. It depends on the amount of occupational sick pay. As the first 6 weeks of pay during a statutory leave period are paid at 90% of normal weekly earnings, that calculation will be affected where pay is lower than normal. The only extra help is where the drop in average earnings is because of having received lower furlough pay.

The rules are different for state maternity allowance. If an employer finds an employee does not meet the conditions for SMP, they have to issue a form SMP1 and give them back their original MATB1 maternity certificate to help the woman claim maternity allowance. For maternity allowance one takes the best 13 weeks' earnings out of the 66 weeks before the week the baby is due. So long as average earnings reach £30 pw, maternity allowance is payable. If furlough pay has affected that average, the calculation takes account of what she would have been paid had she not been furloughed.

9.4. Does an employer get any financial help with statutory payments?

Short Answer

In all cases, an employer will usually get help with 92% of an employee's SMP, Statutory Paternity Pay, Statutory Adoption Pay, Statutory Parental Bereavement and Statutory Shared Parental Pay.

If the business qualifies for Small Employer's Relief, it will get 103% of the statutory payment.

Explanation

Small Employer's Relief is available for businesses that paid £45,000 pa or less in Class 1 national insurance contributions in the last complete tax year before a 'qualifying week'. If the business had a reduction in NI because of Employment Allowance, the effect of that reduction is disregarded.

For SMP, and shared parental pay in birth cases, the qualifying week is the 15th week before the week in which the baby is expected. For statutory adoption pay, and shared parental pay in adoption cases, it is the week in which the employee was told they had been 'matched' for adoption. For statutory parental bereavement pay it is the week before the death or stillbirth.

9.5. Can an employee on maternity leave be made redundant?

Short Answer

Yes. But the law gives extra protection to women who are pregnant or on maternity leave.

Explanation

Redundancy can be appropriate in some cases. However, the law gives priority to women who are pregnant or on statutory maternity leave. If there is any suitable vacancy, it must be offered to the woman first (under Regulation 10 and 20(1)(b) of *The Maternity and Parental Leave etc Regulations 1999 (MPL)*). Selection for redundancy on grounds of pregnancy is unlawful. Similar protection is available for those on other types of statutory leave.

The extra protection under regulation 10 applies *"during an employee's ordinary or additional maternity leave **period**"* (OML and AML, added emphasis). The AML period lasts for 26 weeks from the day after the end of the woman's OML (a minimum of 26 weeks). The provision of statutory maternity leave comes under ss71 to 75 of the Employment Rights Act 1996 (ERA). The MPL Regs, made under the ERA, by regs 6 and 7 provide that the extra protection continues to the end of the AML. Apart from the effect of reg 7(5) MPL which ends AML at the time of a dismissal, no provision in the MPL Regs explicitly cuts short the AML period. As such, it is arguable that if a woman has returned to work, or to being furloughed before her AML has ended, the extra protection of reg 10 MPL remains in place until the end of the AML period. This is in line with the extra protection seen as necessary in the *Pregnant Workers Directive 92/85/EEC* for pregnant women and those who have recently given birth.

9.6. Is a woman who has returned to work or to being furloughed before the end of her additional maternity leave protected against pregnancy and maternity discrimination?

Short answer

Probably not.

Explanation

Section 18(2) of the Equality Act 2010 (EqA) protects against unfavourable treatment during the 'protected period'. S.18(6) defines 'protected period' by reference to the concepts of ordinary and additional maternity leave. However, s18(6)(a) includes a caveat. It provides that where the worker has the right to OML and AML, it ends '*at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy'*.

A return to carrying out actual work for the employer would end protection under s18(2), although not under s18(4) or (5). Protection against sex discrimination, harassment and victimisation would continue.

However, ‘work’ is not defined, except in so far as reg 12A of the MPL Regs, which deals with ‘keep in touch’ days, sheds light on its meaning. The emphasis in reg 12A is on work as an activity, carrying out work under the contract. If a woman returns straight to being furloughed before the end of the AML period, it is arguable the s18(2) EqA protection continues. A day, other than a ‘keep in touch’ day, of active work is arguably necessary to satisfy the caveat.

10. DATA PROTECTION (Claire McCann)

10.1. Can an employer collect information from individuals relating to Covid-19?

Short Answer

Yes if it is relevant and necessary to do so (that is, there is a lawful basis under data protection laws) but, as a data controller of its employees' personal data, employers must take care to keep data protection requirements firmly in mind when considering whether and/or how to collect, process and retain such information.

Note that the Information Commissioner's website has a regularly updated data protection and coronavirus information hub. It is intended to help individuals and organisations navigate data protection during the pandemic: https://ico.org.uk/global/data-protection-and-coronavirus-information-hub/

ICO guidance includes guidance on data protection and vaccinations: https://ico.org.uk/global/data-protection-and-coronavirus-information-hub/coronavirus-recovery-data-protection-advice-for-organisations/vaccinations/

Explanation

In an effort to manage the impact of the Covid-19 pandemic and in order to help safeguard employees, customers and others against the risks caused by the virus, employers may decide to collect and process information from workers and their household members that would not typically be collected. For example, employers might process data about the health status of their employees and individuals living in their household; the results of any Covid-19 testing and locations that members of staff have visited. This data is highly likely to constitute

"personal data" and "special category" personal data, which must comply with the data protection measures set out in the *General Data Protection Regulation* ("GDPR") and the *Data Protection Act 2018* ("DPA").

Under the GDPR/DPA, employers can only lawfully collect and process health data about its employees where it has both a "legitimate interest" under Article 6 GDPR but also satisfies a specific condition for processing "special category" under Article 9 GDPR (read together with paragraph 3 to Schedule 1 of DPA). The European Data Protection Board ("EDPB") – the body tasked with ensuring that data protection legislation is applied evenly across the EU – released a statement on 20 March 2020[43] to clarify that the GDPR,

> *Allows competent public health authorities and employers to process personal data in the context of an epidemic, in accordance with national law and within the conditions set therein. For example, when processing is necessary for reasons of substantial public interest in the area of public health. Under those circumstances, there is no need to rely on consent of individuals*.

And, specifically as regards employers, it advised that:

> *The processing of personal data may be necessary for compliance with a legal obligation to which the employer is subject such as obligations relating to health and safety at the workplace, or to the public interest, such as the control of diseases and other threats to health. The GDPR also foresees derogations to the prohibition of processing of certain special categories of personal data, such as health data, where it is necessary for reasons of substantial public interest in the area of public health (Art. 9.2.i), on the basis of Union or national law, or where there is the need to protect the vital interests of the data subject (Art.9.2.c), as recital 46 explicitly refers to the control of an epidemic.*

[43] https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_statement_2020_processingpersonaldataandcovid-19_en.pdf

Accordingly, employers can collection information from individual employees relating to Covid-19 but must be transparent about the basis for obtaining such information and as to the way in which the data will processed and retained. This may require an amendment or addition to its Privacy Notice relating to the processing of employee data.

10.2. What GPDR/DPA risks should employers think about?

Short Answer

As a result of the pandemic, the majority of employers will have required staff to work from home and/or placed staff on furlough. Even once lockdown restrictions begin to be lifted, it is likely that social distancing measures will mean that employees will be working in ways which may vary substantially from the position before the outbreak of coronavirus. As a result, an organisation's data is perhaps being accessed and processed in different ways to its 'business as usual' operations.

This may heighten the risk of data protection breaches under the GDPR/DPA. The Information Commissioner's Office ("ICO") has issued guidance (15 April 2020, now updated to 24 September 2020) about its regulatory approach during the coronavirus public health emergency which suggests that a more pragmatic and flexible approach will be adopted.[44] Nevertheless, employers are still bound by data protection legislation and will need to continue to act in accordance with their obligations, even if the ICO's regulatory approach has been somewhat relaxed.

[44] https://ico.org.uk/media/about-the-ico/policies-and-procedures/2617613/ico-regulatory-approach-during-coronavirus.pdf

10.3. What about the risks of homeworking and data?

Short Answer

Data protection is not a barrier to increased and different types of flexible working, such as working from home, and employers should think about the same kinds of security measures for homeworking that would be used in the workplace, whilst acknowledging that additional risks exist outside the workplace (for example, storage of hard copy of documents in a home environment; tech devices used by other family members; more significant use of email and, accordingly, greater risk of phishing attacks; higher risk of breaches of security and confidentiality via the increased use of personal email accounts and devices and personal video conferencing platforms such as Zoom, Houseparty etc). The Information Commissioner's Office has produced useful guidance "How do I work from home securely" which contains ten easy and practical steps to minimise the risk of data protection breaches from homeworking.[45]

10.4. Can staff be informed that a colleague may have contracted Covid-19?

Short Answer

Yes, in limited and necessary circumstances.

Explanation

Staff should be informed about cases where there is any real possibility that they might have come into contact with the colleague who may have been infected. This is because employers have a duty of care to

[45] https://ico.org.uk/for-organisations/working-from-home/how-do-i-work-from-home-securely/

safeguard the health and safety of all of its employees. Employers should not, however, provide more information than is necessary; for example, it is unlikely to be necessary to disclose the name of the infected colleague. Legal advice should be taken before disclosing the identity of any infected individual to others.

10.5. Can an employer force a worker to take a Covid-19 test if such tests become more widely available?

Short Answer

It is generally not lawful to require workers to have any particular medical treatment or procedure but, as with drug and alcohol testing, it may be something an employer could reasonably require in certain relatively unusual circumstances (for example, when it can be justified due to the specific nature of the worker's role, such as for those working in a health or social care setting and/or with vulnerable people). It is also possible that, if tests become more widely available, employers and employees may wish to utilise them on a more voluntary/consensual basis.

Specific ICO guidance on the data protection compliant approach to testing is here: https://ico.org.uk/global/data-protection-and-coronavirus-information-hub/coronavirus-recovery-data-protection-advice-for-organisations/testing/

10.6. Can employees' health information be shared with government agencies and other relevant authorities?

Short Answer

Yes, where that is necessary for public health purposes. Health information falls within the "special categories of personal data" and, as such, employers will need to rely on a condition for processing special category data under Article 9 GDPR, read together with Schedule 1, paragraph 3 of the DPA. These include, as a condition (Article 9(2)(i) GDPR):

> *Where processing is necessary for reasons of public interest in the area of public health, such as protecting against serious cross-border threats to health or ensuring high standards of quality and safety of health care….*

And, by virtue of paragraph 3 to Schedule 1 GDPR:

> *This condition is met if the processing –*
>
> *is necessary for reasons of public interest in the area of public health; and*
>
> *is carried out –*
>
> *by or under the responsibility of a health professional, or*
>
> *by another person who in the circumstances owes a duty of confidentiality under an enactment or rule of law*.

10.7. Can employers insist on having access to data relating to its employees held on any "contact tracing" apps which may be introduced?

Short Answer

These apps will contain "special category" data about the employee and, as such, access to and processing of this data must be in compliance with Article 9 GDPR (read together with Schedule 1 DPA). It may be possible for an employer to insist on its employees having and using such an app and having access to the data on the app (particularly if held on a device owned by the employer) so as to ensure that workers do not pose a risk

to the rest of the workforce. However, a more proportionate approach may be to require employees to self-declare that the app is showing them as having not been in contagion proximity of an infected third party, before allowing entry to the workplace. The implementation of any "contact tracing" app in the UK is likely to trigger specific government and ICO guidance so employers should adhere to all relevant advice as and when it is published.

10.8. If an employee breaches data protection laws when processing data in relation to which their employer is the data controller, is the employer liable?

Short Answer

Yes, probably (but not where the employee's breach arises from conduct which is not closely connected to what the employee is authorised to do and could not be regarded as done by them while acting in the ordinary course of their employment: see *WM Morrison Supermarkets plc v Various Claimants [2020] UKSC 12*). The Supreme Court in the *Morrison Supermarkets* case decided that Morrison was not vicariously liable for unauthorised breaches of the Data Protection Act 1998 committed by an employee who, without authorisation and in a deliberate attempt to harm the supermarket, uploaded payroll data to the internet using personal equipment at home. The Court concluded that the circumstances in which the disgruntled employee had wrongfully disclosed the data were not so closely connected with acts which he was authorised to do that they could properly be regarded as having been done by him in the course of his employment. However, the Court did conclude that vicarious liability would normally apply to breaches of the obligations imposed on employers by data protection legislation committed by an employee who is acting in the course of their employment.

10.9. Can employees use personal devices such as laptops / phones in order to carry out their work?

Short Answer

Yes, but with appropriate technical and organisational measures to ensure that personal data is processed securely.

Explanation

Over time, employers have adopted many different approaches to facilitate flexible working (including working from home) but the coronavirus pandemic has required organisations and individuals to adapt very quickly to new methods of working which may involve much more increased use of personal devices. Different approaches have different security considerations.

As a minimum, employers must require (via a well-publicised data protection and security management policy) all staff to encrypt all devices which they use for their work. This will significantly reduce the risk and severity of any data breach incident.

On the whole, corporate cloud storage solutions are the most secure and enable employers to continue to monitor and control what data is accessed and how it is processed by their workers. These solutions allow users to access data away from the office on any device, whilst preventing staff from downloading data onto their own personal storage and messaging services and so reduces the risk of data breaches.

10.10. Practical tips

- Employers should implement some easy measures to mitigate the risks caused by workers using their own devices;

- Adopt and communicate clear policies, procedures and guidance for staff who are remote working and/or who use their own devices in the workplace. This should encompass access, handling and disposal of personal data;
- Use the most up-to-date version of the remote access platform which has been adopted;
- Remind all workers to use unique and complex passwords and to encrypt all devices on which they access and process the company's data;
- Implement multi-factor authentication for remote access, including for access to emails;
- Ensure that all accounts have lockouts so that the account is disable after a fixed number of failed log-ins;
- Review the National Cyber Security Centre's Guidance on *"Phishing Attacks: Defend Your Organisation*"[46]
- Review the Information Commissioner's Office guidance on working from home, including on "Bring Your Own Device" ("BYOD").[47]

[46] https://www.ncsc.gov.uk/guidance/phishing

[47] https://ico.org.uk/for-organisations/working-from-home/

11. WHISTLEBLOWING (Schona Jolly QC & Dee Masters)

11.1. Can a refusal to work and / or complaints about the working environment amount to a Protected Disclosure?

Short Answer

Yes, a refusal to work and / or complaints about the working environment can, in the right circumstances, amount to a Protected Disclosure. Bearing in mind the health and safety implications of Covid-19, and the employer's obligation to provide a safe working environment, there is evidently scope for complaints to amount to Protected Disclosures.

Explanation

Any communication will amount to a Protected Disclosure, and entitle an individual to protection as a whistle-blower, where the following *cumulative* test has been satisfied:

- *Disclosure of information:* There must be a disclosure of information (s.43B(1) Employment Rights Act 1996, "ERA").[48] This means that an individual should do more than simply articulate an allegation; the facts underpinning their concern should be explained.[49] There is no limitation on the method of disclosure. It can be oral or in writing or the information can be expressed by way of a photograph or video recording.

- *Public interest:* The individual must have a reasonable belief that the disclosed information is made in the public interest (s.43B(1) ERA).

[48] Special provisions apply in relation to information which is legally privileged (s.43B(4) ERA 1996). Equally, a disclosure of information cannot amount to a Protected Disclosure where the person commits an offence by disclosing the information (S.43(3) ERA 1996).

[49] *Kilraine v London Borough of Wandsworth* [2018] ICR 1850. Equally, raising a query or threatening to make a disclosure is highly unlikely to amount to a valid disclosure of information.

The threshold is low and can be met even if there is an element of self-interest (i.e. a desire to protect oneself).[50]

- *Reasonable belief:* The individual must have a reasonable belief[51] that the disclosed information tends to show one or more of six specified categories of risk.[52] They do not need to be correct in their belief. In the context of a whistleblower concerned about returning to a safe working environment against the current Covid-19 crisis, three of the six risk categories may be relevant as follows:

    - A person has failed, is failing or is likely to fail to comply with any legal obligation to which they are subject (s.43B(1)(b) ERA). It is not necessary for a whistleblower to show that a legal obligation has been breached, only that they reasonably believed this to be the case. This is likely to be important bearing in mind that most employees are unlikely to have a detailed grasp of an employer's legal obligations in this area. However, save in the most obvious cases, a whistleblower should be able to identify the source of the relevant legal obligation.[53]

---

[50] See, for example*, Chesterton Global Limited (t/a Chestertons) v Nurmohamed (Public Concern at Work intervening) [2018] ICR 731* and *Morgan v Royal Mencap Society [2016] IRLR 428*.

[51] This is a mixed subjective / objective test so that the individual must both hold the belief and hold it on objectively reasonable grounds. It is not enough to formulate a belief on the basis of rumours or unfounded suspicions. Individuals with "*insider*" or "*professional*" knowledge will be held to a higher standard in relation to the objective element of the test. See *Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4*.

[52] The ERA 1996 sets aside any contractual duties of confidentiality in so far as it purports to preclude a worker from making a Protected Disclosure (s.43J ERA 1996). It follows that in so far as an employee disclosed confidential information which was not a Protected Disclosure then they will not be protected. Moreover, an individual who recklessly disclosed inaccurate information would not be immune from a defamation action from their employer. Equally, nothing prevents an employer from bringing an action against an individual who owed it a duty of confidentiality, for example because they were an employee, where disclosure of confidential information which was not protected by the ERA 1996.

[53] *Blackbay Ventures Limited (t/a Chemistree) v Gahir [2014] ICR 747*.

- The health and safety of any individual has been, is being or is likely to be endangered (s.43(1)(d) ERA). This provision dovetails with regulation 14(2) of the Management of Health and Safety at Work Regulations 1999 which requires employees to report certain concerns they may have about health and safety issues and is discussed in more detail 2 above.
- Information has been concealed or is likely to be deliberately concealed which tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which they are subject or that health and safety of any individual has been, is being or is likely to be endangered (s.43B(1)(f) ERA).

- *Recipient of the information:* A Protected Disclosure will only occur where the relevant information is disclosed to *one or more* of the following people or bodies:
  - The individual's employer (s.43C(1)(a) ERA).[54]
  - A person other than the employer where the worker reasonably believes that the relevant failure relates solely or mainly to the conduct of that person (s.43C(1)(b)(i) ERA).
  - A person other than the employer where that person has legal responsibility for the relevant failure (s.43C(1)(b)(ii) ERA).

[54] There is an extended definition of "*employer*" in relation to the whistleblower provisions within the ERA 1996. Accordingly, "*employer*" in the context of an agency worker includes the person who substantially determines or determined their terms and conditions (s.43K(2) ERA 1996). For NHS practitioners, the "*employer*" can be the National Health Service Commissioning Board, Local Health Board (in Scotland), Health Authority or Primary Care Trust for which the worker performs, or to which they provide services. For trainees, "*employer*" includes the person who provides the work experience or training. For the police force, the "*employer*" is the "*relevant officer*" as defined by s.43KA(2) ERA 1996.

- A person whom a worker is authorised to disclose the information to by virtue of an employer sanctioned procedure (s.43C(2) ERA).

- A legal advisor where the disclosure is made by the individual in the course of obtaining legal advice (s.43D ERA).

- The Minister of the Crown or a member of the Scottish executive where an individual's employer is a person or body appointed by a Minister of the Crown or a member of the Scottish Executive (s.43E ERA).

- Certain organisations prescribed by the Secretary of State for the purposes of whistleblowing provided always that the worker reasonably believes that organisation is responsible for the relevant failure and the information disclosed and any allegation in it are substantially true (s.43F ERA). A list of these organisations is set out in Schedule 1 to the Public Interest Disclosure (Prescribed Persons) Order 2014. There are a number of organisations which may well be relevant to individuals seeking to raise concerns about safety and the Covid-19 crisis, for example, the Care Inspectorate, the Care Quality Commission, the Children's Commissioner, Food Standards Agency, Health and Safety Executive and the National Health Service Trust Development Authority.

- Any other person or body provided that the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true, and, they do not make the disclosure for the purposes of personal gain, and, in all the circumstances it was reasonable for the worker to make the disclosure, and, one of the following conditions is satisfied: at the time the worker makes the disclosure they reasonably

believe that they will be subjected to a detriment by their employer if they disclose it to them or to a prescribed organisation, or, there is no prescribed person and the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed/destroyed if the disclosure is made to their employer, or, the worker has previously made a disclosure of substantially the same information to their employer or a prescribed person (s.43G ERA).

- Any other person or body where the worker reasonably believes that the information disclosed, and any information in it, are substantially true, they do not make the disclosure for personal gain, and, the relevant failure is exceptionally serious and, in the circumstances, it was reasonable for them to make the disclosure (s.43H ERA).

It follows that an individual who refuses to work and this is accompanied by a communication which satisfies the definition of a Protected Disclosure will gain the protected status of a whistleblower. Similarly, where an individual complains about the working environment in a post Covid-19 world, the communication will amount to a Protected Disclosure where the cumulative test outlined above is met.

In the right circumstances, as explained at 11.3 below, the whistleblower will be entitled to protection under the ERA from dismissal and other forms of detrimental treatment.

11.2. How should employees formulate a Protected Disclosure?

Short Answer

There are some practical steps which individuals can take to maximise their chances of ensuring that any communication is a Protected Disclosure:

Explanation

Communicate in writing

Most disputes as to whether a communication is a valid Protected Disclosure arise where the individual has expressed their concerns orally rather than in writing. To avoid any future factual dispute as to what was said, and whether it is valid Protected Disclosure, it is always advisable to set out concerns *in writing*.

Equally, where an individual initially raises a matter orally, it is always advisable to "follow up" in writing with a record of precisely what was said as quickly as possible. This will increase the likelihood of being able to prove later, if necessary, what was said at the time. Further, the "follow up" written record may also amount to a second Protected Disclosure thereby offering additional legal protection to the individual complainant.

Clearly articulate the factual basis of concerns or any refusal to work

Since only a "*disclosure of information*" as opposed to a pure allegation will be protected as a Protected Disclosure, it is crucial that individuals explain, in detail, the factual basis of their concerns. For example, it is always preferable to say, "*I am not coming to work tomorrow as I believe that the working environment is unsafe due to the lack of PPE which is needed for my role etc*" rather than merely asserting that the working environment is unsafe.

Speak directly to the employer

The statutory definition of a valid Protected Disclosure, as outlined above, is crafted so as to encourage workers to disclose information to employers rather than third parties. That is, there are additional hurdles to overcome where the recipient is a non-employer. It follows that individuals should *always* seek to speak to their employer in the first instance if they have concerns about the safety of the working environment. Whilst speaking to

third parties, such as the media, can be protected in certain limited circumstances, it is much harder for an individual to show that any communication beyond the employer is a valid Protected Disclosure.

Contemporaneously record thought process

Many of the ingredients to a valid Protected Disclosure involve the purported whistleblower showing that they had a "*reasonable belief*" as explained above. It makes sense for individuals to record contemporaneously the basis for their belief in relation to those ingredients (public interest, category of risk and the identity of the recipient of the information etc) so as to explain, as credibly as possible, how their communication satisfied the statutory definition of a Protected Disclosure in the event of future contentious litigation.

11.3. How should employers address a Protected Disclosure?

Short Answer

The ERA 1996 protects whistleblowers in two ways: certain individuals[55] must not be subject to "*any detriment*" on the ground that they made a Protected Disclosure (s.47B Employment Rights Act 1996 "ERA") and employees will be automatically unfairly dismissed where the reason or

[55] There is a long list of individuals who are protected against detrimental treatment, which includes: employees (s.230(1)/(2) ERA 1996), workers (s.230 (3) ERA 1996), office holders (whilst office holders will not work under a contract so as to fall within the strict definition of a "*worker*", the courts have shown a willingness to broadly interpret the ERA 1996 so as to protect office holders in certain circumstances such as members of the judiciary: see *Gilham v Ministry of Justice [2019] UKSC 44*), agency workers (s.43K(1)(a) ERA 1996), NHS practitioners (s.43K(1)(ba)-(bc) ERA 1996), student nurses and student midwives (s.43K(1)(cb) ERA 1996), freelancers (s.43K(1)(b) ERA 1996), certain trainees (s.43K(1)(d) ERA 1996), job applicants in the NHS (S.49B(7)(a)-(p) ERA 1996 & the Employment Rights Act 1996 (NHS Recruitment – Protected Disclosures) Regulations 2018. Job applicants in other sectors are *not* protected. The equivalent protection for job applicants in the social care sector, provided by s.49C ERA 1996, has not yet been brought into force), crown employment (s.191(3) ERA 1996) and police constables and cadets (s.43KA ERA 1996).

principal reason for their dismissal is that they have made a Protected Disclosure (s.103A ERA).

Explanation

In order to limit their exposure to such claims, there are some practical steps which employers can take:

Assume a complaint or concern might be a Protected Disclosure

Sometimes it is difficult for employers to ascertain whether a complaint or concern will amount to a valid Protected Disclosure because the statutory definition contained in the ERA, as explained at 11.1 above, is largely dependent on matters which only the complainant will know e.g. the basis of their belief that a legal obligation has been breached. Accordingly, it will often be sensible to *assume* that all complaints or concerns have the potential to be a valid Protected Disclosure and to ensure that no detrimental treatment is experienced by the complainant due to the disclosure.

Moreover, even if it transpires that the complaint or concern was not a valid Protected Disclosure, any detrimental treatment might amount to a breach of the implied term of trust and confidence in any event even if s.47B ERA is not engaged. A breach of the implied term of trust and confidence can give rise to a constructive unfair dismissal.

Co-workers and agents

Ensure that all workers are aware that they should not treat their co-workers detrimentally because of a Protected Disclosure since s.47B(1A) ERA imposes liability on co-workers, and the employer is then also vicariously liable for the co-worker's acts under s.47B(1B) ERA, subject to the employer's defence in s.47B(1D) ERA. Taking all reasonable steps to ensure that co-workers do not treat whistleblowers in a detrimental way has the dual benefit of minimising the risk of a breach of s.47(1A) and also

boosting an employer's chances of successfully relying on the employer's defence.

Employers should take an equally proactive approach towards their agents since s.47(1A)(b) ERA also imposes vicarious liability on employers in relation to them. Crucially, there is no employer's defence in these circumstances which means that the exposure is significant.

Contemporaneous records

The burden of proof in s.47B ERA claims can be challenging for employers. In order to establish causation, the Employment Tribunal need only conclude that the Protected Disclosure is one of many reasons for the detriment.[56] It is for the employer (or fellow worker / agent) to prove that their conduct was for a legitimate reason (s.48 (2) & s.48(5)(b) ERA) once the employee has proved that there was a protected act and detrimental treatment. It follows that employers will be best placed to "prove" a proper reason for any alleged detrimental treatment if there are comprehensive and contemporaneous records available which demonstrate the legitimate basis for any decisions.

Similarly, where an employee brings a claim for automatic unfair dismissal under s.103A ERA, it is normally for the employer to prove that there is a potentially fair reason for dismissal[57] meaning that comprehensive and contemporaneous record taking is important so as to demonstrate the legitimate basis for any decisions.

---

[56] *Fecitt v NHS Manchester (Public Concern at Work intervening) [2012] ICR 372.*

[57] Where the employee is asserting that their dismissal was due to whistleblowing, they will need to at least show some basis for this assertion before the burden of proof shifts to the employer: see *Maund v Penwith District Council [1984] ICR 142.* However, where an employee has less than 2 years' service, they must show on the balance of probabilities that the reason for dismissal was in breach of s.103A ERA: see *Smith v Hayle Town Council [1978] ICR 996*.

Act promptly and comprehensively

It is common for Tribunals to also examine, when seeking to resolve contentious causation issues, the employer's reaction to the Protected Disclosure. A swift and proactive response to an individual's concerns can be powerful evidence in any future litigation in order for the employer to demonstrate that there is no causative link between any subsequent detrimental treatment or dismissal and the Protected Disclosure. In other words, an employer who embraces a complaint, rather than procrastinates, is more likely to persuade an Employment Tribunal that there was no ill will towards the whistleblower.

Be clear about the distinction between the fact of a complaint and some other legitimate matter

In the current Covid-19 crisis, employers may object not to the Protected Disclosure itself but some other separable reason. An employer might object to the way in which a complaint has been raised (for example, in a threatening manner) and in those circumstances it is possible, in the right circumstances, for detrimental action to be taken (for example, disciplinary action).[58] However, proving the distinction between taking detrimental action because of the Protected Disclosure as opposed to for some other legitimate reason, can sometimes be difficult for employers to evidence without clear and reasoned decision making which is carefully, contemporaneously recorded.

11.4. What is the interplay between a Protected Disclosure and a Protected Act?

Short Answer

[58] See *Martin v Devonshire Solicitors [2011] ICR 352 (paragraph 12)* and *Jesudason v Alder Hey [2020] EWCA Civ 73* (paragraphs 64 – 65).

In the post Covid-19 world it is possible that when individuals complain about the workplace or decline to work, they will be undertaking a Protected Act as well as a Protected Disclosure. There is the scope for discrimination issues to arise alongside health and safety concerns. A Protected Act will occur where an individual makes "*an allegation (whether or not express)*" that the Equality Act 2010 ("EqA") has been contravened (s.27(2)(d) EqA) unless it is a false allegation and made in bad faith (s.27(3) EqA). Individuals are protected in the workplace against detrimental treatment because of doing a Protected Act alongside the protection offered to whistleblowers under s.47B ERA and s.103A ERA.

12. DIRECTORS AND CORONAVIRUS (Declan O'Dempsey)

12.1. What problems are likely to emerge for directors from the Covid 19 outbreak?

Short Answer

The principal issue in practice is whether they have breached their duties to the company, so that the company seeks to terminate their contract of employment. However, there will also be situations in which a company may seek to recover losses caused by decisions by a director. Some of these are discussed below.

12.2. How do the director's fiduciary duties interact with the current outbreak?

Answer

The director's composite fiduciary duty to the company remains in operation during the Coronavirus outbreak. These are put on a statutory footing by the Companies Act 2006 (CA 2006). The first of these is to act within the director's powers. In terms of corporate governance, the powers of a company may not have been sufficiently strong before the outbreak to allow matters such as remote board meetings to taken place. The

powers of the company (see sections 171 and 257 CA 2006) are contained in the company's articles, decisions in accordance with them, and other decisions taken by the members (or a class of them if they can be regarded as decisions of the company) and resolutions or agreements affecting the company's constitution.

Express powers must nonetheless be exercised for a proper purpose (see *Eclairs Group Ltd and Glengary Overseas Ltd v JKX Oil and Gas plc [2015] UKSC 71*). When considering whether a director has exercised an abuse of power, by doing acts which are within its scope but done for an improper reason, the test is subjective, and the motive of the director must be established. Decisions which are taken against the backdrop of the onset of the pandemic and lockdown will be judged with this context in mind. However, the powers of the company must be exercised, in any event, to promote the success of the company.

Second, the duty is (in good faith) to promote the success of the company for the benefit of the members as a whole. This pre-existing equitable duty is contained in section 172 CA 2006 and includes the duty to have regard (inter alia) to: the likely long-term consequences of a decision; the interests of the employees; the need to foster the company's business relationships with suppliers, customers and others; the impact of the company's operations on the community and the environment; the desirability of the company maintaining a reputation for high standards of business conduct; the need to act fairly as between the members of the company.

In this context, “success” means the long-term increase in value of the company. Where there is evidence of actual consideration of success, breach will only be established if the director did not honestly believe that they acted in a way most likely to promote the company's success (see e.g. *Re Southern Counties Fresh Foods Ltd [2008] EWHC 2810*). Otherwise an objective test will be applied.

12.3. What are the implications of the need to take account of the interests of employees?

Answer

It is obvious that the need to take account of the interests of employees will include their health interests as well as simply their financial interests. If a company has on average 250 or more UK employees, it must issue a statement summarising how the company has engaged with UK employees. This must state how directors have had regard to their interests, and the effect of that regard, including on the principal decisions taken by the company during the financial year.

If the company has purposes other than for the benefit of its members, the director must act in the way they consider, in good faith, is most likely to achieve these purposes (section 172(2) CA 2006).

12.4. When are the interests of creditors going to cause difficulties?

Answer

Duties under s.172 CA 2006

All of the duties under section 172 CA 2006 are subject to the duty requiring directors, in certain circumstances, to consider or act in the interests of the creditors of the company (section 172(3)). One such circumstance is the situation in which the company is near insolvency.

There is a fiduciary duty, embodied in section 172(3) of the CA 2006, to the creditors of a company, which arises when the directors know or should know that the company is or is likely to become insolvent. Here "likely" means that there is a real, as opposed to a remote, risk of insolvency. (see *BTI 2014 LLC v Sequana S.A. & Ors [2019] EWCA Civ 112* at 220-1).

The payment of dividends, therefore, during the Covid-19 pandemic or a furlough period will, in many cases, be of doubtful legality if the company is at this sort of risk of insolvency.

Other duties under the CA 2006

The director must exercise independent judgement (section 173); avoid conflicts of interest (section 175) and must not accept benefits from third parties (section 176). They must declare an interest in a proposed transaction or arrangement (section 177).

There is, in addition, a distinct duty to exercise reasonable care skill and diligence as a director (section 174 and see below). This duty places a reasonably high burden on the director during the pandemic as regards ensuring that health and safety requirements are observed by the company.

12.5. What are a listed company's duties in relation to health and safety?

Short Answer

It is possible for an employee to seek an injunction against the employer if the employer is failing to comply with Health and Safety Regulations (under the general principles in section 37(1) Senior Courts Act 1981, and CPR 25.1(1)(a) and where the damage has not yet occurred but there is an obvious risk, *Khorasandjian v Bush [1993] QB 727* at 736).

12.6. How can the director be fixed with liability for failures to implement health and safety measures in the workplace?

Answer

The level of risk to a company caused by the pandemic may be such that the success of the company will rely on proper steps being taken by the directors to ensure the health and safety of the staff.

The UK corporate governance code requires a director in a listed company to maintain a sound system of internal controls to safeguard shareholders' investments and company's assets. The director must also conduct a review of the effectiveness of the company's internal controls at least once a year. The director must also report to shareholders on this review in the annual report. One area which must be covered is health and safety (because of the effect that a fine can have on share values). So, as a matter of corporate governance, the director must ensure that there are adequate controls in relation to health and safety issues. There must be proper policies and procedures which ensure compliance with health and safety legislation. This is normally delegated to the management of the company.

One aspect of corporate governance which will come to the fore during the pandemic will be the need to ensure that those dealing with the day-to-day management of health and safety matters provide regular reports for the Board of Directors to review the internal controls that exist in relation to health and safety.

In particular, good corporate governance will require a company director to ensure that the annual assessment covers any changes since the last assessment in the nature and extent of significant risks faced by the company and the company's ability to respond to changes that have taken place. The review should also cover the scope and quality of the monitoring that is being undertaken by those managing the internal control systems. The review should also deal with the extent of the communication to the board of information gathered in the course of monitoring and the frequency with which it is communicated.

The review should identify any significant weaknesses in the internal controls that had occurred during the previous year and the extent to which they may materially have affected the company's financial performance or condition. Finally, the review should deal with the effectiveness of the company's public reporting processes in this respect.

So, in order to ensure the success of the company, a director will need to consider the reports that are made concerning health and safety properly. The director will have to form their own view on whether the procedures within the company are effective in managing health and safety risks.

If the board of directors becomes aware that there are deficiencies in the internal control systems, it must decide how to remedy the situation and reassess procedures that it has for the assessment of the controls.

12.7. How extensive is the duty to exercise reasonable care, skill and diligence?

Answer

Perhaps the clearest expression of the need for directors, in whatever type of company, to exercise care over their decisions during the pandemic is the duty to exercise reasonable care, skill and diligence.

Section 174 of the CoA 2006 provides that a director must exercise reasonable care, skill and diligence in carrying out their duties (having regard both to their own knowledge, skill and experience and that which may reasonably be expected of a person carrying out the functions carried out by the director). This means that the director will need to have sufficient knowledge of health and safety.

The duty on a director to acquire and maintain sufficient knowledge and understanding of the Company's business to enable them to discharge their duties as director, is inescapable. Even an incoming, inexperienced director must acquire the necessary knowledge and understanding of the Company's operations, and ensure that it is compliant with issues as wide

ranging as trading standards, health and safety and taxation, in order to avoid potential liability to the company for breach of his or her fiduciary duties.

12.8. What claims might a director face for breach of their duties?

Answer

Where a director has breached the fiduciary and other statutory duties under the CA 2006, the Company may bring a claim against the director. Derivative actions can also be brought on behalf of the company. In cases of marginal survival by companies, it may be that directors will face increasing numbers of these claims. However, a director is entitled to claim relief from liability where their decision-making has been ratified by the Board (section 239 CA 2006), or if the court grants relief under section 1157 CA 2006. It will grant this relief if it concludes that the director acted honestly and reasonably and that, considering all the circumstances of the case, the director ought fairly to be excused.

In the light of the very difficult circumstances in which decisions have to be made at present by directors, it is likely that claims for relief will be heard sympathetically if the decision was made on the best available information that the director had.

12.9. Do the normal rules relating to wrongful trading apply to the directors of the company?

Short Answer

On 28 March 2020, the Business Secretary, Alok Sharma, announced that changes would be made to insolvency legislation, including to temporarily suspend wrongful trading rules (retrospectively with effect from 1 March 2020, for three months). This removes until June 2020 the threat of directors incurring personal liability. However, as at 4 May 2020, no amending legislation has actually been introduced which would have this effect.

12.10. What is wrongful trading?

Answer

Sections 214 and 246B of the Insolvency Act 1986 provide that if it appears, in the course of an insolvent winding up or insolvent administration of a company, that a current or former director of it knew (or ought to have known) at some point before the start of the liquidation/administration, that there was no reasonable prospect that the company would avoid going into insolvent liquidation/administration, but continued to allow the company to trade to its detriment, then whoever is liquidating or administering the company can apply to the court for a declaration that the director make a contribution to the company's assets.

What is important is whether the person occupies the position of director (and it does not matter what they are called); so this will include a de facto/shadow director.

Liability will only arise if it is shown that the company is worse off as a result of continuing to trade. By section 214 (3) and 246ZB (3) of the Insolvency Act 1986 no wrongful trading order will be made if the director took every step with a view to minimising potential loss to creditors as ought to have been taken by him at the time he or she knew that there was no reasonable prospect of the company avoiding the insolvent state (liquidation or administration).

The questions that will arise out of the pandemic and which will require clarification relate to the following:

Will the suspension of the wrongful trading provisions curtail the period of time which may be taken into account by the court in considering whether the company was trading wrongfully?

Given that the suspension of the wrongful trading rules was aimed at ensuring that businesses can survive during the period of lockdown, what

effect will the suspension have on what a director ought reasonably to have known about trading prospects?

If no legislation is in fact introduced what impact will the announcement have on what a director ought reasonably to have known?

Will there be any changes made more generally to the fiduciary duty standards owed by a director where a company is nearly but not actually insolvent?

12.11. What is the effect of the Corporate Insolvency and Governance Act 2020?

Answer

The Bill was introduced on 20 May 2020 and received Royal Assent on 25 June 2020. It is designed to amend insolvency and governance law so as to help support businesses through the economic instability caused by the pandemic.

it addresses many of the difficulties identified above. For example, it temporarily removes the threat of personal liability for wrongful trading, allowing directors to try and keep their companies alive. It gives retrospective authority for closed AGMs, for business to be conducted electronically and for extending deadlines.

For more information, see the links at:
https://www.gov.uk/government/publications/corporate-insolvency-and-governance-act-2020

13. REMOTE HEARINGS (Rachel Crasnow QC, Sally Cowen & Caroline Musgrave)

13.1. Who is Using Remote Hearings?

Short Answer

All Employment Tribunals and Civil Courts have used remote hearings to various levels during the pandemic to ensure the continued operation of the justice system. Jury trials are not compatible with remote hearings, so crown courts have focused on dealing remotely with case management and non-jury matters, also to various levels.

New Employment Tribunal Presidential Guidance is essential reading for the options for remote hearings going forward[59]. It provides clear and sensible steps to follow in the lead up to and during such hearings and is accompanied by a Practice Direction[60].

Explanation

Lockdown prevented Employment Tribunals and Civil Courts holding hearings face to face. The Coronavirus has accelerated the use of remote access, video conferencing and electronic paperwork. We are all coming to grips with how to best continue our work, using all the technology available.

---

[59] https://www.judiciary.uk/wp-content/uploads/2013/08/14-Sept-2020-SPT-ET-EW-PG-Remote-and-In-Person-Hearings-1.pdf

[60] https://www.judiciary.uk/wp-content/uploads/2013/08/14-Sept-2020-SPT-ET-EW-PD-Remote-Hearings-and-Open-Justice.pdf

Some excellent tips about how develop familiarity to all aspects of these new systems are given by members of Cloisters in this recent webinar: at https://www.cloisters.com/news/remote-hearings-webinar-available-now/

The courts and Tribunals have had to work quickly to accelerate setting up a remote video platform ("CVP") and increase the use of telephone hearings for administrative hearings to ensure that hearings can continue as quickly and easily as possible.

Since the end of June 2020, Tribunals have begun to hear the more complex matters again through a 'mix and match' combination of in-person and online communication (see the Employment Tribunals road map[61]). Since July the Tribunal began determining multi day standard claims such as unfair dismissal. Since September more complex hearings have started coming to trial in a variety of formats (see below).

There is no one-size fits all to determine whether the hearing will be remote or in person. In our experience, the Tribunal will ask a series of questions about who the witnesses and representatives are, if anyone is self-isolating or shielding and what the parties views are as to whether the hearing can be held in person with social distancing guidelines or remotely. These factors are set out in the recent Guidance and identified below. Ultimately it is for the Judge to decide how to proceed and there is a means to review such a decision in the Guidance at para 15.

13.2. Who decides which kind of hearing will take place?

Short Answer

[61] https://www.judiciary.uk/wp-content/uploads/2020/06/FAQ-edition-date-1-June-2020.pdf

The choice of style of hearing: remote, in person or partly-remote or hybrid, is a judicial decision (see rule 14 of the new Presidential Guidance) but one to which the parties can have input.

Explanation

The decision will be based on a number of factors which have at their core the objective of feasibility. The Presidential Guidance sets out these at paras 16-17 and they are in summary form: :

Feasibility factors:

- Is there enough space to be safe for an in person hearing?
- Is safe travel to the venue possible?
- Do the Tribunal and the litigants have access to suitable hardware and software to allow for remote hearings?
- Are there sufficient Tribunal staff to support a remote hearing?
- How much delay would be involved if the hearing was in person rather than held remotely?
- Do personal circumstances like particular vulnerability, language issues or disability suggest one kind of hearing is more appropriate or fairer than another? Current circumstances like the need to shield will also be relevant here.
- Are the parties legally represented which may make a remote hearing more feasible?
- Are participants able to cope with the necessary technology
- Does the need to evaluate evidence make a face to face environment more appropriate?

Representatives can find useful guidance in the “Good practice for remote hearings” publication which is produced by the editors of the Equal Treatment Bench Book

13.3. How can we best prepare for a remote hearing?

Short Answer

Litigants must prepare their factual and legal evidence and arguments for a remote hearing with as much diligence and thought as they would an in person hearing. Additional time must then be given to consider the technology required, the home environment and the nuances of participant conduct specific to a remote hearing.

Explanation

Effective communication is at the heart of a fair justice system. Remote hearings present unique challenges in ensuring that everyone understands and is understood. The Cloisters' paper "Preparing Ourselves and Our Clients for Participation in Remote Hearings[62]" gives a thorough review of what is needed to prepare. The headlines are:

1. Effective use of technology: parties need to ensure they have the required computer with video camera and a stable internet connection. There is no substitute for a practice run with witnesses to familiarise them with the technology leaving them free to focus on the disputes of fact and law and not on the technology and unusual format.

2. Home environment: taking time to prepare the environment for the hearing will help focus the mind on the task at hand rather than the list of domestic chores just behind the door. Encourage participants to find a quiet corner with a neutral wall backdrop, ensure sufficient space to spread out the

[62] https://www.cloisters.com/preparing-for-remote-hearings/

papers and suggest use of noise cancelling headphones to try to create the required privacy and space for full engagement in the hearing.

3. Participant conduct: remote hearings can feel more informal than in person so extra attention is required to ensure participants are professional in their conduct and responses to questions. A pre-hearing conference with counsel, dialling in to the call waiting room early and, again, practice runs can help familiarise participants with the format and how to maintain the upmost professionalism in an unusual situation.

13.4. Do we have to work with electronic bundles?

Short Answer

The Tribunal prefers them because they make the Tribunal safer and support the operation of remote hearings. However where they do not serve justice, parties can explain that hard copy documents and bundles may be the fairer option (see paras 23 and 25-30 of the Presidential Guidance).

Explanation

Judges and their members are using electronic bundles where feasible as this significantly aids working remotely where it is harder to acquire access to hard copy bundles or Court files. This doesn't necessarily mean that all participants have to be paperless and those who find it too difficult to cope with soft copy bundles will be able to remain with hard copy. It is important to ensure that the pagination is the same across hard and electronic copies so that participants can all find the relevant pages easily and quickly. There are excellent tips to making electronic bundles work for you on the Cloisters webinar hearings … https://www.cloisters.com/news/remote-hearings-webinar-available-now/

When using electronic bundles, it is important to ensure that the participant has a device which is separate to the device they will use to connect to the

hearing. Reviewing documents on a small phone screen while using a main computer screen for the call is far from satisfactory.

As with all aspects of a remote hearing, there is no substitute for practicing use of electronic bundles in advance of the hearing.

If some witnesses are not using electronic bundles it is essential that printed witness statements and the bundle are sent to witnesses early enough to make it safe for them to be physically handed: it is recommended at least 24 hours passes before they are handed by the receiver and hard copies must be sent to the Tribunal if required a week in advance of the hearing.

All witnesses who intend to use a hard copy statement and bundle when giving remote evidence must be reminded to keep one copy clean. If they use post-its, all must be removed before they give live evidence.

13.5. How do I talk to my clients during a remote hearing?

Short answer

Using a separate encrypted communication channel such as email, WhatsApp or regular texting.

Explanation

Juggling multiple communication channels during a remote hearing is a real challenge. Nonetheless it is important for clients to be able to privately give instructions to their representatives. Establish a means for private communication ahead of the hearing and ensure that everyone knows what it is. Given that emails and text messages may have a delay, representatives may need to openly ask Judges for a few moments offline to take instructions from their clients.

Being able to communicate with clients during remote hearings to take instructions is essential. If you use a What's App group, care must be taken

as to exactly who needs to be in the group and when witnesses should be removed - such as during their live evidence.

Particularly in case witnesses' video link goes down, parties must ensure they have a way to immediately contact their witnesses (such as email address, telephone number or instant messaging) on the days and times when they are to give their evidence (Guidance para 19.8).

13.6. Is it fair to expect a Litigant in Person to conduct their trial via video conferencing such as CVP?

Short answer

Litigants in Person will be asked to engage in remote hearings however their ability to do so and the requirements to ensure they are fully able to participate will vary from case to case.

Explanation

LIPs account for a large number of Claimants and rather less Respondents in the Tribunal. Most LIPs will never have engaged in the Tribunal process before, let alone been involved in a hearing conducted over the internet. It is widely thought they will find the move to entirely remote hearings far more alienating than lawyers.

There are a number of issues which the Tribunal must consider when conducting remote hearings with LIPs. If the Judge does not raise these issues during case management hearings where forthcoming remote hearings are arranged, then a barrister/solicitor on the opposite side should consider raising them. Matters of particular relevance to LIPs are:

- Hardware: Trying to conduct a trial via a smartphone won't be suitable on CVP so ensuring that the LIP has access to a device to stream the video link and possibly another to access the electronic bundle as well as a stable internet connection will be vital. Where LIPs say they don't

possess either the right computer or a decent connection the ET and lawyer present will need to be creative about finding solutions, including possibly provision of equipment by the represented party.

- Technical awareness: Conducting ones' own litigation as a LIP is stressful at the best of times, but doing it remotely is likely to put more pressure on a LIP. If this is not addressed at the outset and the LIP is placed at a disadvantage, in due course an appeal point raising the infringement of fair trial rights under Article 6 of the EHRC could arise. Represented parties may be well advised to help an LIP conduct a trial run with their equipment.

- Juggling the hearing and electronic bundle: Some LIP, and indeed some witnesses, may feel this is beyond their capability. This needs to be explored in advance and if necessary, a paper bundle sent to the Claimant prior to the hearing. Whatever the relationship between the parties, Employment Judges will expect and welcome a positive and practical approach by the represented party in this regard.

- Use of paper bundles – If papers bundles are being used, either during a remote hearing or in person, then hard copy documents must be provided 48 hours in advance of the hearing (in order to quarantine them). LIP must be clear that they need to send any papers in advance and that they will not be allowed to introduce new papers during the hearing, unless this can be done electronically.

    - Timetable: Evidence takes much longer to be heard remotely so timetables will need to be adjusted.

    - Use of Written Documents: Employment Judges may be more inclined than usual to direct that a list of issues, agreed facts and written submissions should be filed and exchanged before the hearing starts. A proactive approach by representatives in providing first drafts of any agreed documents will be very much welcomed by Employment Judges.

13.7. Can LIPs refuse to engage with remote hearings?

Short answer

Possibly but intentionally doing so will be discouraged.

Explanation

Employment Judges are expected to take a robust yet understanding approach to the question of LIPs and remote hearings. An IT programmer who asserts they do not think they can cope with a CVP hearing is unlikely to get a sympathetic hearing at a preliminary hearing. But the most likely scenario is the LIP who is wary of "losing face" by admitting they are terrified of trial via computer, but is in reality wishing they could have a "regular" hearing. Judge and representatives will need to assist in explaining and helping to find a balance between the delay that a non-remote outcome engenders and the fairness owed to LIPs, now, as much as if not more than ever. For example, if the Judge wishes a witness to remove their mask during in-person evidence to allow for greater clarity of communication, the witness should have every opportunity to explain their reaction to this suggestion and should not be forced to do so.

13.8. Can an Employment Judge order some people to attend Tribunal and some to attend remotely?

Short answer

Yes.

Explanation

A "hybrid" trial will consist of a combination of in person and remote video conferencing. Parties and the Judge may be in the room while witnesses

and wing members may be online. An even-handed approach between the parties is key to ensure no risk of bias.

Tribunals are advising parties with large numbers of witnesses to stagger their attendance and some are giving specific arrival times to parties. Parties need to be aware of the local policy and risk assessments issued by the relevant Tribunal and adhere to the Presidential Guidance and Practice Direction.

13.9. What provision will be made for those with disabilities?

Short answer

As always, Tribunals have a duty to ensure that everyone who appears before them is able to fully participate in the hearing.

Explanation

Opportunities to identify impairments and necessary adjustments are lost or reduced when a hearing is conducted via video-link so it is more important than ever to be alert to what might be needed for full participation and to raise it at the earliest opportunity.

The Equal Treatment Bench Book has provided guidance on the conduct of remote hearing so that there can be effective communication and full participation by all parties, witnesses and advocates (Good Practice for Remote Hearings) [63]The guidance makes a few suggestions along the lines already in this chapter. The overarching recommendation is that Judges consider holding a case management discussion to decide whether a remote hearing can fairly proceed and what case and participant specific measures might be needed.

[63] The Committee have released the guide "Good practice for remote hearings" to offer practical advice to judges and any who appear before them be they defendant, party, witness, or advocate (Good Practice Guide).

We know from existing case law that such a hearing need not necessarily be a standalone case management hearing but could be incorporated into the ordinary course of proceedings.

13.10. How can the principle of Open Justice operate in Tribunals during the pandemic?

Short answer

By the Tribunal giving clear directions following the parties' input on issues such as public and press observation of the proceedings.

Explanation

It will be a contempt of court for anyone to record or broadcast any kind of hearing, remote or in person without Tribunal consent (Guidance para 34).

We already know that whilst members of the public are entitled to observe Tribunal hearings unless exceptionally it is ordered otherwise (Rule 46), including inspecting the statements and bundle, this does not extend to taking a copy of any document (Rule 44). This has implications for how the press and public are able to view such documents remotely: how can they be prevented from downloading a page from a statement[64]?

The parties should familiarise themselves with the Presidential Practice Direction on remote hearings and open justice of 14 September 2020, the key parts of which provide:

-In wholly or partly-remote hearings open justice will be safeguarded by the press or public contacting the Tribunal administrative staff in

[64] Neither rule 44 nor the recent Practice Direction refers to remote means of inspecting the Tribunal bundle although it is accepted practice for a spare hard copy bundle to be available for press/public inspection in the hearing room.

advance of the hearing whereupon they will be given dial-in or log-in details

-The integrity and order of the hearing will be preserved by log-in details not being forwarded to anyone else without the tribunal's permission

-If a witness statement cannot be read by those observing on the screen or if reading it aloud would cause disproportionate delay to the hearing, the Tribunal will hear submissions on the best way to ensure open justice (such as via a time-limited sharing platform that does not possess a download option[65]).

Whatever the format of the hearing, whilst the press are permitted to "live-tweet" as usual, members of the public must seek permission to do so from the Tribunal. (Practice Direction para 12.6).

13.11. How can in-person or partly-remote hearings be safe, if members of the press and public are allowed to observe?

Short answer

Taking care with safe distancing and safe handling of documents will ensure open justice measures can prevail.

Explanation

If there is no space in the Tribunal hearing room for members of the public to safely attend, the hearing may be relayed by video link to another room in the building. If it is not practicable for members of the press and public to attend the venue physically to observe the hearing, they may apply to the Tribunal

[65] Alternative methods of sharing which allow for downloading appear to go beyond the permitted scope of inspection provided for in rule 44, but there will presumably be cases where the parties have no objection to members of the press and public being able to download statements on a read-only basis subject to their agreement not to copy, publish or distribute.

for a means to observe it remotely. The important rule prohibiting recording or broadcasting a hearing applies as much in these circumstances as where the entire hearing is held remotely: to do so without permission is a criminal offence!

13.12. What about other judicial proceedings like mediations?

Short answer

Judicial mediations can also be carried out in the formats set out above and where in person, safe distancing is needed.

Explanation

The new Presidential Guidance applies equally to judicial mediations, which can even be carried out in a partly remote form. The guidance concerning finding a way of staying in touch with those participating remotely in the mediation along with the provision of documents like position statements, supporting documents and draft settlement agreements in electronic form are likewise reinforced at para 36.