Wedlake Bell

RETURN TO WORK DURING THE CORONAVIRUS PANDEMIC – NAVIGATING THROUGH THE EMPLOYMENT LAW MINEFIELD

Introduction

1. With the recent announcement that lockdown measures are to be eased, and those who cannot work from home should return to work, we are likely to see a greater proportion of the workplace slowly return to work. The Prime Minister has announced that those in construction and manufacturing, scientific research, logistics and food production should return to work, once their employers have confirmed that it is safe for them to do so and set a "road-map" for the re-opening of shops, restaurants and other venues as well as workplace specific guidance for working safely during coronavirus.
2. Businesses that will continue to operate "from home" will be looking to these industries to pave the way. This new world comes with a minefield of employment law issues which employers should start to consider now to ensure a smooth transition in the return to work.
3. At the same time, millions of employees have been furloughed. On 12 May 2020, it was reported that the Coronavirus Job Retention Scheme ("**CJRS**") will be extended in its current form to 31 July 2020 and then in an amended form until 31 October 2020. Employers are likely to be asked to share the cost of payments to their employees from August 2020, however employees will continue to receive the level of support currently available through the CJRS.
4. We will address some of these issues and attempt to provide a safe passageway through the danger that lurks. We will say, at the outset, that cases are fact specific and legal advice should be sought.

How can employers end furlough?

5. Although the CJRS has been extended, as workplaces get moving again the natural place to start is ending furlough. In determining how that should end, one must look at what exactly was agreed with the individual employee. Some employees may have had a lay off provision in their employment contracts which was simply evoked by the employer. If the lay off provision contains a specific notice requirement then that should be followed. The CJRS Direction required the employer and employee to agree in writing that the employee will cease work. If that written communication contains a notice period to end furlough, again that should be followed. If there are no agreed notice periods, reasonable notice allowing the employee time to prepare for the return will suffice. However, employers should be wary about bringing furloughed employees back to work before the expiration of the minimum 21-day period for which the employee must have ceased work in order for the employer to obtain furlough payments.
6. Some employees will still not have roles to return to, and employers may be considering other options to avoid redundancy, such as unpaid leave or their own form of CJRS, when the expectation is that the role will be required again in the future.

Can employers make employees redundant even though the CJRS has been extended? How about once the lockdown is relaxed/CJRS comes to an end?

7. The answer is yes, if the definition of redundancy under s139 Employment Rights Act 1996 ("**ERA 1996**") is satisfied. In essence, a redundancy situation broadly covers three scenarios: (1) a closure of the business, (2) a closure of the particular employee's workplace, or (3) a diminishing need for employees to do work of a particular kind. One of the many unfortunate consequences of the coronavirus pandemic is that businesses or certain workplaces will have to close. Employers may also decide that due to, for example a reduced demand for services, they require fewer employees to undertake work of a particular kind. These situations would likely fall under the definition of redundancy.
8. However, simply satisfying the definition of redundancy is not enough. Employers must ensure that they follow a fair procedure which is documented. This would usually involve three matters: (1) adequate warning and consultation, (2) objective selection criteria which is fairly applied where multiple employees are undertaking the same or similar role, and (3) genuine attempts to seek alternative employment or otherwise avoid redundancies. Failing to follow these procedures may well result in claims for unfair dismissal (if the relevant employee has the necessary 2-year qualifying service). The value of these claims will depend on how long employees are out of work for, and so in the current market we may see the value of claims rise.

Employers may also be faced with increased requests for reinstatement and employees less inclined to settle. Considering how flat the employment market currently is, we also expect to see employees suggest more alternatives to redundancies which may include unpaid leave, pay reductions and job share.

9. Larger employers should also be aware of their collective consultation obligations. An employer is under a duty to undertake collective consultation where it is proposing to dismiss as redundant 20 or more employees in one establishment, all within a period of 90 days or less (s188 Trade Union and Labour Relations (Consolidation) Act 1992 ("**TULRCA**")). The definition contains legal terms of art and advice should be sought. A failure to collectively consult may render an employer liable for a protective award of up to 90 days' pay per employee (s189 TULRCA).

What are employers' health and safety obligations when employees return to work?

10. Whilst the coronavirus pandemic subsists, the post-lock down world provides employers with novel and challenging health and safety issues.

11. Employers have a common law duty to provide safe staff, safe equipment, safe place of work and a safe system of work (see *Wilsons and Clyde Coal Co Ltd v English* [1938] A.C. 57). Added to this is a requirement under s2(1) Health and Safety at Work Act 1974 which requires employers *"to ensure, so far as is reasonably practicable, the health, safety and welfare at work"* of employees. A breach of this duty is a criminal offence and also opens the employer up to civil liability. There are a myriad of regulations that have been enacted over the years which deal with specific health and safety obligations. One such set of regulations, The Personal Protective Equipment at Work Regulations 1992 ("**PPE Regulations**") which regulate the provision of PPE, will now come to the fore. In the past, employers employing office workers would probably not have had a need to be aware of the PPE Regulations; however, this is no longer the case.

12. The touchstone to employers' health and safety obligations is what is "reasonably practicable". In essence, employers will be required to undertake coronavirus specific risk assessments, establish a safe system of work following those assessments and ensure that the system is implemented and that training is provided to employees.

13. Guidance for employers, employees and the self-employed on working safely during coronavirus has been published and can be found on the Government website. Different guidelines are available depending on the nature of the workplace, each containing steps and suggestions for implementation. A requirement that the guidelines have in common is that social distancing measures of 2 metre distance are to be maintained within the workplace wherever possible, including while arriving at and departing from work and travelling between sites. Employers will need to think of new and creative ways to adapt the workplace and the guidance provides a number of recommendations.

14. The Government has suggested using shift patterns and rotas and keeping people in smaller contained teams and alternating the workforce. Staggered start and finish times also need to be considered. The extent of employers' health and safety obligations will be a moving feast which much like the CJRS, will change with updated Government guidance. Employers should ensure that they are kept abreast of any changes in guidance, update procedures accordingly and consider consulting with employees on the same. Employers with over 5 employees must have a written health and safety policy, but we would advise all employers to do so in the current environment. Updating policies and keeping contemporaneous notes of the efforts undertaken by employers in respect of the protection of employees' health and safety will be valuable evidence in any future Tribunal claims that may be brought by employees for unfair dismissal and/or detriments (see below). A number of consultation and reporting obligations have also been adopted in the latest Government guidance which employers must be alive to including that risk assessments should be shared with employees and published on employers' websites where they employ more than 50 employees.

15. It is also advisable for employers to reconsider disciplinary and grievance policies in light of the current climate. Attending work with coronavirus related symptoms or not following self-isolation or social distancing rules may now be considered a disciplinary offence. Employers should also be alive to those individuals who may have protection as a whistleblower by disclosing information that they reasonably believe shows a breach of a legal obligation or risk to health and safety. In the circumstances, consider whistleblowing policies to encourage concerns to be dealt with internally and avoid escalation to regulators and the press.

What can employers do if employees refuse to come into work because of coronavirus?

16. This is an issue which will gain a great deal of traction in the coming weeks and months. The answer is not straightforward. If not handled carefully, the issue may lead to claims for disability discrimination

under the Equality Act 2010 ("**EA 2010**"), constructive dismissal, unfair dismissal for health and safety issues under s100 ERA 1996 and detriments suffered as a result of not attending work due to health and safety concerns under s44 ERA 1996.

17. Turning first to the health and safety dismissal/detriment issue under ERA 1996. Under s100(1)(d) and (e) ERA 1996 an employee will be regarded as unfairly dismissed if the principal reason for dismissal is that in *"circumstances of danger which the employee reasonably believed to be serious and imminent"*

    a. and which he could not reasonably have been expected to avert, he left work or refused to return to work; or

    b. he took or proposed to take steps to protect himself or other persons from danger.

    S44(1)(d) and (e) ERA 1996 protect an employee from being subjected to a detriment (practically this is likely to be unpaid wages) for the same reasons. It is arguable that ss100 and 44 also apply to an employee's commute to and from work.

18. The litmus test here is "reasonable belief" on the part of the employee that there is a "serious and imminent" danger. Coronavirus is likely to amount to serious and imminent danger. Employers may argue that they have conducted sufficient risk assessments and provided PPE and therefore the employee's belief that there is likely to be serious and imminent danger is not reasonable. However, it is not that simple. A Tribunal will focus on the employees' state of mind as to whether he or she honestly and reasonably believed that there was serious and imminent danger – the fact that the employer disagreed will be irrelevant (*Oudahar v Esporta Group Ltd* UKEAT/0566/10). Employees may argue that the PPE provided is insufficient, or regardless of the provision of PPE they reasonably believe that there is a serious and imminent danger. The analysis will be fact specific.

19. Employers should also be aware of their obligations under the EA 2010. The Government has identified two groups of vulnerable people: (1) extremely clinically vulnerable, and (2) clinically vulnerable. Those individuals in group 1 have been advised to stay at home and shield. Those individuals in group 2 have been included in the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 in the context of people being allowed to leave their homes to visit people who fall within that group. A list of medical conditions has been published to identify individuals who fall within those groups. Most of the individuals who fall within these groups will also be classified as "disabled" under s6 EA 2010.

20. Disabled workers have a right to reasonable adjustments (ss 20 and 21 EA 2010). In the current pandemic this could include adjustments such as allowing such workers to work from home, if their roles do not permit working from home then transferring them to a role which does or failing that to potentially require them to stay at home on full pay. The "reasonableness" of these adjustments may change depending on how long the current pandemic subsists.

21. An individual who is dismissed (which would include a constructive dismissal) or is subjected to a detriment (e.g. deduction in wages) for refusing to attend work because of their particular vulnerability to coronavirus would likely have a claim under s15 EA 2010 (discrimination because of something arising in consequence of disability). The "thing" arising in consequence of the disability would be the need to stay at home. S15 EA 2010 contains a justification defence if the employer demonstrates that the treatment complained of was a proportionate means of achieving a legitimate aim. However, employers will find it very difficult to avail themselves of this defence if they do not provide reasonable adjustments.

22. In the circumstances, employers should listen to employees' concerns about returning to work, and in particular try to establish whether the employee in question suffers from an underlying condition which could amount to a disability. It would be advisable in the first instance to seek to agree certain protective measures and alternative solutions. If this is not fruitful and an employee nevertheless refuses to attend work, employers should be cautious of dismissing or refusing to pay wages before seeking legal advice.

Conclusion

23. The coronavirus pandemic has tested, and will continue to test, the boundaries of employment law. Employers will have to be alive to the pitfalls ahead and to come up with novel ways in which to deal with the practical issues posed by a return to work whilst the pandemic remains in play. Planning ahead, keeping up with guidance and where appropriate consulting with employees is advisable. It is therefore sensible to have an early consideration of risk assessments, ordering PPE and methods to deal with issues such as social distancing in the workplace. It will also be useful to identify those employees who are vulnerable and to start an early dialogue with such employees as to what adjustments can be made. The path ahead is far from clear, however considering these issues in advance will help to navigate risk.

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