

**RETURNING TO WORK IN THE TIME OF CORONAVIRUS**  
**THE CLOISTERS TOOLKIT - LEGAL DUTIES & SOLUTIONS**

**Second Edition**

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## 1. INTRODUCTION

### 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) & [2.12](#) (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](mailto: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**

## **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](mailto: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](#) (2<sup>nd</sup> 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](#) (2<sup>nd</sup> 6 Pupil).

Edition 1: 5 May 2020

## 2. HEALTH AND SAFETY ([Caspar Glyn QC](#), [Catherine Casserley](#), [Schona Jolly QC](#), [Claire McCann & Rachel Crasnow QC](#))

### 2.1. 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](#).

Over the next few days the Government is expected to be releasing guidance for employers in different sectors.

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.

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 a safe systems of work with staff representatives such as trades unions. See the duties on health and safety consultation [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.

## **2.2. Where is the Government Guidance and what does it say?**

### **Short Answer**

The current [Government Guidance](#) for employers and businesses is that employees should work from home when they can but, if that is not possible, then they can go to work unless they are in one of the sectors

that has been shut. The Government also issued [Guidance](#) (updated on 4 May 2020) on social distancing at work which was targeted at various specific workplaces.

[Specific Guidance](#) was then published on 11 May 2020 aimed at helping employers, employees and the self-employed to work safely during the pandemic. This Guidance covers 8 specific sectors or types of workplace:

- i) Construction & other outdoor work
- ii) Factories, plants & warehouse
- iii) Labs & research facilities
- iv) Offices & contact centres
- v) Working in other people's homes
- vi) Restaurants offering takeaways and delivery
- vii) Shops and branches
- viii) Vehicles (for people working in or from vehicles)

### **Explanation**

The general Government guidance for employers and businesses was last updated on 7 April 2020, with the social distancing guidance updated on 4 May 2020. This is a dynamic and fast changing area, as is apparent from the publication of the 8 sector-specific guides published on 11 May 2020. 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 (last updated on 24 April 2020) does not set out that working will necessarily be safe. That is left to the employer. The guidance, provides that

*Businesses and workplaces should make every possible effort to enable working from home as a first option. Where working from home is not possible, workplaces should make every effort to comply with the social distancing guidelines set out by the government*

However, with the 8 sector-specific guides, it is apparent that the Government has 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 8 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 Government has issued [Guidance](#) (also on 11 May 2020) on implementing protective measures in education and childcare settings. This is ahead of the proposal (should the [5 tests](#) set by Government justify it) to bring back reception, year 1 and year 6 children into primary schools from the week commencing 1 June 2020. This guidance is very high level and leaves many practical questions unanswered. It advises 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)

The [Health and Safety Executive Guidance](#) sets out that, with the exception of some non-essential shops and public venues, it is not asking businesses to close. The obligations do differ depending whether the employer is located in [England](#), [Scotland](#), [Wales](#) and [Northern Ireland](#). However, whether it is safe to remain open and employing people is a matter for the employer to assess.

### **2.3. 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.

### **2.4. 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).

## 2.5. 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](#). Set out below are the questions that an employer will want to consider in a risk assessment. The practical advice set out in the 8 sector-specific guides (published on 11 May 2020) 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.

## **2.6. The Government Guidance to work from home?**

### **Short Answer**

The various pieces of Government guidance make clear that every reasonable effort should be made to work from home and, if not, then social distancing and hygiene at work must be adhered to.

### **Explanation**

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

- ALL businesses should make every reasonable effort to enable working from home as a first option;
- Only if that is not possible should employees be required to go to work and only where every reasonable effort is made to manage transmission risk by reinforcing hygiene and cleaning measures and



complying with social distancing rules – keeping 2m from others wherever possible.

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. Social distancing is the starting point for precautions. It is not the end point.

## **2.7. 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 has to 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.

## **2.8. 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 issued on 11 May](#) duplicate many of the same steps and are of general application to a much wider cross-section of businesses.

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 [here](#). The new 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 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 instruction – notices can be a good way to do this as well:
  - o 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 consider, each day before attending, whether they have symptoms and whether they should attend work.

- 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:
  - o 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:
  - o Can the employer reallocate tasks / provide equipment to that person to perform in the home?
  - o If not ,then they should be offered the safest available workplace roles observing social distancing;
  - o 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:
  - o 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 [here](#).

### **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. If they cannot 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 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
  - o 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;
  - o Only have the minimum number of staff at the workplace at any one time;
  - o Is 7 day working or staggered working hours possible?
  - o Reducing visitors and making deliveries contactless.
- Coming and leaving work
  - o increase entry / exit points;
  - o Additional parking areas and bicycle racks;
  - o Leaving seats empty in company minibuses to reduce density;
  - o entry control;
  - o one-way flow at entry and exit points – floor markings;
  - o alternatives to keypads, such as non-touch opening;
  - o deactivating turnstiles and using distant presentation of security pass;
  - o wedging open non-fire doors (to prevent use of doorhandles etc);

- 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 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
  - Only have necessary 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
  - o Remember the evidence that the protection from face coverings is weak and it is not an alternative to the other risk mitigation strategies;
  - o Wash hands before applying and after removing;
  - o Change when it becomes damp.
- Travel
  - o Minimise the need for it;
  - o Reducing density in vehicles;
  - o Ensuring that social distancing is possible at any overnight accommodation;
- Deliveries
  - o Making them contactless where possible;
  - o If a two-person job, then using fixed paired working;
  - o Ordering / delivering large quantities, less frequently;
  - o Encouraging drivers to stay in their vehicles;
  - o Cleaning external packaging and or unpacking and washing of hands;
  - o Stopping personal deliveries to the workplace;
- Maintenance
  - o To be scheduled during non-working times or when the workplace is emptier;
- Catering
  - o Wipe down laminated menus between use;
  - o Restrict numbers in kitchens
  - o Screens for tills etc;
  - o Non-contact passing over of food;
- Customer-facing businesses
  - o Limiting customers in store;
  - o Encourage lone shopping;
  - o Reminding parents to supervise movement of children;
  - o Queue management, preferably outside



- One-way movement in premises;
- Changing customer services that can't be delivered without social distancing;
- 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](#)

- 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.

## **2.9. 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](#) 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](#). [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](#).
- It is clear that the use of high-quality PPE reduces transmission.
- The 8 sector-specific [guides](#) (as with the [guidance](#) for education and childcare settings) state that PPE for Covid-19 risks is only appropriate for clinical settings. That PPE involves high quality respiratory masks and shields etc.
- 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 Covi-19 PPE.

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

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 can be maintained then WHO Guidance is complied with. However, the issues become more difficult where social distancing cannot be maintained, whether it be 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.

## **2.10. Now I have set out the system how do I implement it?**

### **Short Answer**

Many safe systems fall down 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.

## **2.11. 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 [here](#).

## **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 Directive 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 Jouvène 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 themselves 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 2020/350* 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 section 10 [below](#).

## 2.12. Does the protection apply to travelling to and from work?

### **Short Answer**

It arguably does extend that far so that if the employee has 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 provides that "*When travelling everybody (including critical workers) should continue to avoid public transport wherever possible.* Further, 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*<sup>1</sup>, 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

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<sup>1</sup> [https://www.bailii.org/uk/cases/UKCAT/2014/0123\\_14\\_2407.html](https://www.bailii.org/uk/cases/UKCAT/2014/0123_14_2407.html)

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.

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.

### **2.13. 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 stating that they should stay at home and shield. The [list](#) states that the following people are extremely clinically vulnerable:

- *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 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) .

#### **2.14. 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 there is no vaccine for the virus available – 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**

###### *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 under the Health and Safety Regulations are set out above.

*Refusing to come to work*

Further, such an employee's belief under s.44 / s.101 Employment Rights Act 1996 ("ERA") (see [question 2.7](#) above) is all the more likely to be reasonable because of the status as an extremely vulnerable person.

*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)).

The most relevant discrimination in this situation is 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 is likely that they will have been treated unfavourably because of something arising in consequence of their disability (the need to shield arising from the disability but not being the disability itself) – see *Phaiser 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<sup>2</sup> – 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 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 how the length of time required to shield 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.

Shielding in these circumstances also engages whistleblowing protection – see [section 10](#).

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<sup>2</sup> EqA Sched 8 para 5(1)



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

**Short answer**

Those people who are listed as “vulnerable” in the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (SI 2020/350) (“the Regulations”) are 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 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.

**Explanation**

The Regulations are primarily concerned with the restrictions that have been put in place to contain the virus. They list those who are vulnerable purely for the purposes of explaining the basis of one of the exceptions for people being permitted to leave the house – to visit a vulnerable person. Paragraph 1(c) of the regulations provides that vulnerable person “includes any person aged 70 or older any person under 70 who has an underlying health condition including but not limited to any of the conditions listed in Schedule 1; and 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).

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.

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 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.

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

**Answer**

“Vulnerable” people have not been advised by the government to shield. 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. 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 continue to shield. **Employers will still need to conduct a risk assessment (see question 2.5), and may need to ask occupational health for input and/or for medical guidance from the employee’s GP. The same potential legislative provisions will apply i.e. health and safety and the EqA.**

**2.17. Can an employer ask an employee who is neither on the extremely clinically vulnerable list, or vulnerable list but they who nevertheless says that they need to shield to return 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 shield; or that they may not have 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 Employment Rights Act 1996 (“ERA”) also apply. 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 have been reports of people having been

omitted from the list (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 has a history of chest problems 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.

**2.18. If an employee wants to shield at home because 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 [question 2.7](#), and 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 shielding he needs to avoid travelling to a workplace and being in that workplace; and so 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 [question 2.5](#)). 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.

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 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 would be a difficult claim to bring domestically particularly 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.

## **2.19. 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. A recent [report](#), for example referred to the psychological impact that SARS had had, particularly on those who spent time in ICU – leading to depression anxiety and post-traumatic symptoms, which it is expected those who have had the virus will face. 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.

## **2.20. 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 it will be discrimination if an employer 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.

**2.21. 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 – has been floated by a number of sources (see for example [here](#)) as providing a solution to a fully functioning return to society and avoiding the need for social distancing. 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.

**Explanation**

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. 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 have been shielding because they are at risk of suffering significantly if they contract the virus are unlikely ever to have immunity passports (unless they are vaccinated in which case they may 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 be 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.

## 2.22. 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 [question 2.7](#) 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 “particularly vulnerable” to poor outcomes following coronavirus infection for medical reasons because of underlying health conditions. For these groups, the Government’s advice is clear: “particular care” should be taken to minimise contact with others outside the person’s household”.<sup>3</sup>

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 21 April 2020) for employers and pregnant women during the pandemic<sup>4</sup> 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

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<sup>3</sup> <https://www.gov.uk/government/publications/covid-19-guidance-on-social-distancing-and-for-vulnerable-people/guidance-on-social-distancing-for-everyone-in-the-uk-and-protecting-older-people-and-vulnerable-adults>

<sup>4</sup> <https://www.rcog.org.uk/globalassets/documents/guidelines/2020-04-21-occupational-health-advice-for-employers-and-pregnant-women.pdf>

seriously unwell if they become infected. However, 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,*

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). 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.

### 3. ENDING FURLOUGH ([Tom Brown & Caspar Glyn QC](#))

#### 3.1. What changes were announced to furlough on 12 May?

##### **Short Answer**

The Coronavirus Job Retention Scheme in its current form was extended until the end of October 2020 but, flexibility will be introduced from 1 August 2020 to support part-time working.

##### **Explanation**

Until 1 August the scheme will exist as it is currently with 80% pay capped at £2,500 per month with an employee able to do NO work save for training.

However, from 1 August 2020 the scheme will support part-time working. Employers will need to pay a percentage towards the salaries of their part-time furloughed staff. The announcement as to how this work and whether

- The reduction paid by the Government will only apply to those employers voluntarily returning their employees to work;
- The reduction paid by the Government will apply whether or not the employee returns to work;
- The terms of the new scheme from 1 August 2020.

The 45 day s.188 consultation period would have started from 15 May if the scheme had been allowed to end on 30 June. Accordingly, the extension of the scheme until the end of October may mean that businesses and employees do not get the clarity at least 45 days ahead of 1 August as there is no cliff edge on that day. However, given the lack of clarity it is to be hoped that further guidance will be issued on or before 15 June.

#### 3.2. How do I end furlough?

## **Short Answer**

If a furlough agreement has been used, 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 in operation until the end of June 2020; this extension was made on 17 April 2020, when, otherwise, collective consultation would have had to begin for employees who would not have been covered beyond the end of May 2020. It remains to be seen whether there will be a further extension of the CJRS beyond 30 June 2020. If not, for many businesses, collective consultation may have to start. Otherwise, the Job Retention Scheme Direction (“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. 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 under the Direction, the period for which the employee has ceased all work must be 21 calendar days or more. Therefore, ending furlough before 21 calendar days have elapsed will dis-entitle the employer to recover sums from HMRC, even if it was anticipated that the employee would be furloughed for 21 days.

### **3.3. 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.

### **3.4. 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 section 5.3 and 5.5, 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.



#### 4. CHANGING TERMS AND CONDITIONS ([Nathaniel Caiden](#), [Laurene Veale](#) & [Caspar Glyn QC](#))

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

###### **Short Answer**

Yes, the termination of certain employment contracts post lockdown is likely to meet the definition of redundancy. 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).

Following lockdown and given the financial situation for many businesses, there may be many businesses or offices of businesses being closed. 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 [question 4.10](#) 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, amounts to a redundancy.

The main issue is therefore whether the procedure and process are fair, discussed below at [question 4.3](#). 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).

#### **4.2. 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.

#### **4.3. 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.

##### **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 [below](#)).

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.

#### **4.4. 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 and equally it has been held that such clause must not be used in a way likely to damage the employment relationship (or 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 unsuccessful 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 (egg 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?<sup>5</sup> 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'. See also [4.6](#) below.

#### **4.5. 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.

##### **Explanation**

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<sup>5</sup> *Solelectron 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.

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 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).

*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 [section 5](#)). 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 [section 4.8](#), 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).

#### **4.6. Can an employer unilaterally impose a reduction to working hours / working days / pay? Can consent be implied where a worker keeps 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 [section 4.5](#) 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 (egg 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 (egg 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.

#### **4.7. 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.*

**4.8. 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 it is not accepting the breach, not terminating the contract, 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 the contract may be taken as so drastically different that it amounts to a new contract. That is the 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) (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.

**4.9. 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 Callaghan* [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 [question 4.8](#) above.

**4.10. 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 [question 4.8](#)) for a period theoretically the reason for the dismissal could amount to redundancy in s.139 Employment Rights Act 1996 ("ERA").<sup>6</sup> 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)<sup>7</sup>.

In these changes to working hours / days cases it is most likely to fall within s.139(1)(b) ERA:

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<sup>6</sup> 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.

<sup>7</sup> *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.

(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.*

It is therefore possible to envisage of scenarios that following ‘lockdown’ and a return to work, with potential social distancing still in place, a reduction of days / hours falls within this. For example:

- there may simply 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 to part of one job;
- there is an anticipation of future business temporary / permanent closure even after lockdown 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*

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 of course 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.

#### **4.11. 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 (egg 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, of course 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.

**4.12. 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 1 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.

**4.13. 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**

It depends on the furlough agreement. A Tribunal can 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 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.

**4.14. 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.

**4.15. 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 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. COLLECTIVE REDUNDANCY INFORMATION AND CONSULTATION ([Sarah Fraser Butlin](#) & [Tom Brown](#))

### 5.1. 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.

## 5.2. 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.

### **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 100+ 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 100+ employees as redundant.

### **5.3. 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”.

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 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, as long as 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. However, the payment of notice pay through the grants is less clear: Paragraph 5a)ii) provides that a claim can be made for an employee “in relation to whom the employer has not reported a date of cessation of employment on or before that date”.

It is unclear whether the date referred to is the date of giving notice or the date on which that notice is given effect. Our view is that an employee can remain on paid furlough during consultation.

**5.4. 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).

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?*

While the JRS operates, 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.

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 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.

#### **5.5. 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.

## **5.6. 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.

## **5.7. 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).

### **5.8. 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.

## **5.9. 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*).

**5.10. 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.

#### **5.11. 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.

#### **5.12. 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.

### **5.13. 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.

#### **5.14. 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.

**5.15. 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.

## 6. SICKNESS AND ISOLATION ([Daniel Dyal](#), [Sally Robertson](#), & [Charlotte Goodman](#))

### 6.1. 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.

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;
  - o Someone with symptoms of coronavirus, however mild, who is staying at home for seven days;

- Someone who lives with a person that has symptoms of coronavirus, however mild, and is staying at home for 14 days;
- Someone who was staying at home because they lived with somebody with coronavirus symptoms but themselves then developed symptoms so must stay home for 7 days.
- 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.

**6.2. 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.

### **6.3. 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.

### **6.4. 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.

## **6.5. 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.

### **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. Currently, this provision is not yet 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.

## **6.6. 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.

### **6.7. 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, 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/>

### **6.8. How much is SSP per week?**

SSP is paid at a flat rate, currently at £95.85 a week.

### **6.9. 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.

**6.10. 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.

**6.11. 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 incapability 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.

No regulations have yet been made. However, [Guidance](#) has been issued by HMRC in respect of the anticipated rebate scheme. According to that Guidance the scheme will be quite limited. It applies only to the first two weeks of SSP and then only where the employee is unable to work because they:

- have coronavirus,

- cannot work because they are self-isolating at home
- are [shielding in line with public health guidance](#)

There are also limitations on who can use the scheme. The main one are 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.

## 7. CHILDCARE ([Claire McCann](#))

### 7.1. 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 employer can then recoup up to 80% of the employee’s wages under the Coronavirus Job Retention Scheme.

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 [Section 10](#) 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 the Covid-19 pandemic – 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 absent (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 on the Coronavirus Job Retention Scheme provides:

*Employees who are unable to work because they have caring responsibilities resulting from coronavirus (COVID-19) can be furloughed. For example, employees that need to look after children can be furloughed.*

The furlough scheme has obvious advantages for an employee in that it covers long-term and pre-existing caring requirements and is paid.

*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?*

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 [Section 10](#) on Whistleblowing.

## **7.2. 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 11 May 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." Where child-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);
- 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;
- 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, 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:
  - o 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.
  - o 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.



## 8. MATERNITY ISSUES ([Sally Robertson](#))

### 8.1. Can an employee be furloughed if they are getting SMP or any type of parental leave payment?

#### **Short Answer**

Yes.

#### **Explanation**

However, 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 Treasury Direction §8.7. So unless the employee is contractually entitled to an enhanced maternity or parental leave payment, there is no point in furloughing them.

An employer can claim under the CJRS to cover 80% of a contractual enhanced payment (up to £2,500 per month, per employee) to a social benefit such as SMP or a Shared Parental Leave Payment (ShPLP). However, the statutory element cannot be included in a claim under CJRS – see Treasury Direction §8.6. 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.

### 8.2. 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 15<sup>th</sup> 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 15<sup>th</sup> 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.

### **8.3. 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. 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 15<sup>th</sup> 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.

#### **8.4. 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 15<sup>th</sup> 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.

## 8.5. 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*). Selection for redundancy on grounds of pregnancy is unlawful. Similar protection is available for those on other types of statutory leave.

## 9. DATA PROTECTION ([Claire McCann](#))

### 9.1. 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.

#### **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<sup>8</sup> 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.*

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.

## **9.2. 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

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<sup>8</sup>[https://edpb.europa.eu/sites/edpb/files/files/file1/edpb\\_statement\\_2020\\_processingpersonaldataandcovid-19\\_en.pdf](https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_statement_2020_processingpersonaldataandcovid-19_en.pdf)

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) about its regulatory approach during the coronavirus public health emergency which suggests that a more pragmatic and flexible approach will be adopted.<sup>9</sup> 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.

### **9.3. 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

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<sup>9</sup> <https://ico.org.uk/media/about-the-ico/policies-and-procedures/2617613/ico-regulatory-approach-during-coronavirus.pdf>



home securely” which contains ten easy and practical steps to minimise the risk of data protection breaches from homeworking.<sup>10</sup>

#### **9.4. 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 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.

#### **9.5. 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

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<sup>10</sup> <https://ico.org.uk/for-organisations/working-from-home/how-do-i-work-from-home-securely/>

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.

**9.6. 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.*

**9.7. 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.

### **9.8. 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.

### **9.9. 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.

#### 9.10. 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 disabled after a fixed number of failed log-ins;
- Review the National Cyber Security Centre's Guidance on "*Phishing Attacks: Defend Your Organisation*"<sup>11</sup>
- Review the Information Commissioner's Office guidance on working from home, including on "Bring Your Own Device" ("BYOD").<sup>12</sup>

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<sup>11</sup> <https://www.ncsc.gov.uk/guidance/phishing>

<sup>12</sup> <https://ico.org.uk/for-organisations/working-from-home/>

## 10. WHISTLEBLOWING ([Schona Jolly QC](#) & [Dee Masters](#))

### 10.1. 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 whistleblower, 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").<sup>13</sup> This means that an individual should do more than simply articulate an allegation; the facts underpinning their concern should be explained.<sup>14</sup> 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).

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<sup>13</sup> 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).

<sup>14</sup> *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).<sup>15</sup>

- *Reasonable belief*: The individual must have a reasonable belief<sup>16</sup> that the disclosed information tends to show one or more of six specified categories of risk.<sup>17</sup> 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:
  - o 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.<sup>18</sup>

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<sup>15</sup> 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.

<sup>16</sup> 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.

<sup>17</sup> 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.

<sup>18</sup> *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 [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).<sup>19</sup>
  - 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).
  - A person whom a worker is authorised to disclose the information to by virtue of an employer sanctioned procedure (s.43C(2) ERA).

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<sup>19</sup> 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 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 [below](#), the whistleblower will be entitled to protection under the ERA from dismissal and other forms of detrimental treatment.

## **10.2. 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.

### 10.3. How should employers address a Protected Disclosure?

#### **Short Answer**

The ERA 1996 protects whistleblowers in two ways: certain individuals<sup>20</sup> 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 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:

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<sup>20</sup> 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).

### *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 [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.<sup>21</sup> 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<sup>22</sup> meaning that comprehensive and contemporaneous record taking is important so as to demonstrate the legitimate basis for any decisions.

### *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

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<sup>21</sup> *Fecitt v NHS Manchester (Public Concern at Work intervening)* [2012] ICR 372.

<sup>22</sup> 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.

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).<sup>23</sup> 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.

#### **10.4. What is the interplay between a Protected Disclosure and a Protected Act?**

##### **Short Answer**

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.

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<sup>23</sup> See *Martin v Devonshire Solicitors* [2011] ICR 352 (paragraph 12) and *Jesudason v Alder Hey* [2020] EWCA Civ 73 (paragraphs 64 – 65).

## **11. DIRECTORS AND CORONAVIRUS (Declan O'Dempsey)**

### **11.1. 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.

### **11.2. 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 be 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.

### **11.3. 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).

#### **11.4. 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.

**11.5. 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).

**11.6. 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.

**11.7. 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.

#### **11.8. 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.

**11.9. 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.

**11.10. 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. REMOTE HEARINGS ([Rachel Crasnow QC](#) & [Sally Cowen](#))**

### **12.1. How are Employment Tribunals operating during the coronavirus pandemic?**

The Coronavirus pandemic has plunged everyone into reliance upon remote access, video conferencing and electronic working. Everyone, is trying to get to grips with how to best continue work, using all the technology available.

The same applies to the courts and tribunals who have had to work quickly to set up appropriate methods to ensure that hearings can continue as quickly and easily as possible to avoid a huge backlog. Different regions of the Employment Tribunal are all moving towards using a remote video platform called Kinly and are utilising telephone hearings until then.

Different judges do not all take the same attitudes to these changes, nor do they share the same the ability to hold remote hearings along with electronic bundles, live evidence and screen sharing. After the end of June 2020, hearings are likely to be held by a 'mix and match' combination of in-person and online communication. Public hearings will allow the public to sign into the meeting, or facility will be made to watch by video link from another room.

### **12.2. Is it fair and/or realistic to expect a Litigant in Person to conduct their trial via video conferencing such as Kinly?**

Whilst lawyers get used to this new way of working and hone their skills every time they appear remotely, the people who will not have as much experience of this type of hearing are Litigants in Person ('LIPs').

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 hearings over the internet 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. Taking the initiative will ensure that a fully informed decision can be made by the ET as to whether and how to conduct a remote hearing.

### **12.3. What kind of issues should be focused on where one of the parties is a LIP?**

- Whether the LIP has appropriate hardware to conduct the hearing – trying to conduct a trial via a smartphone will not be suitable on Kinly.
- Ensuring that the LIP has access to a computer/laptop and a stable internet connection will be vital. Where LIPs say they do not possess either the right computer or a decent connection, the ET and any lawyers present will need to be creative about finding solutions: could the Respondent lend a LIP Claimant a laptop?
- Whether the LIP feels confident in their ability to join meetings and cope with the technology. Conducting ones' own litigation as an 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.
- Whether the LIP can prepare and follow the proceedings with an electronic bundle, or will need a paper bundle – this depends on the answers to both the previous questions.
- Many barristers/solicitors conducting remote hearings with electronic bundles will use two separate laptops/tablets/screens to be able to see

the bundle and the hearing at the same time (a third may be required for witness statements). An LIP may not have access to two screens or two pieces of hardware. The difficulty of swapping backwards and forwards between the hearing and the bundle may make the hearing too cumbersome, slow or difficult to handle. A solution to this may be to produce the bundle in a paper format and send it to the LiP prior to the hearing (if the bundle is large the LIP may not have the facility to be able to print it themselves).

- However poor the relationship between the parties, Employment Judges will expect and welcome a positive and practical approach by the represented party in this regard.
- A strict timetable may be required by the ET so that the remote hearing can be accurately listed and better managed. A LIP is less likely to be able to estimate how long their questioning of a witness will take and may feel that they need to rely on the Employment Judge to assist with the time estimate.
- This too could lead to claims of Article 6 rights being infringed, where timetables are not realistic and enforced (or not) too stringently. Lawyers are only slowly realising how much longer evidence being given remotely takes. There will need to be a balance between accurate estimates given at the preliminary hearing stage and time management once at remote hearings.
- A greater degree of written documents as part of the preparation for a remote hearing. Employment Judges may be more inclined than usual to direct that a list of issues, points of agreement and written submissions as well as the usual witness statements, should be filed and exchanged before the hearing starts. Once again, LIPs may be disadvantaged by this as they will not have knowledge of appropriate layout or perhaps not a full understanding of appropriate content. The Employment Judge should ensure via a telephone preliminary hearing that the issues to be addressed by the Tribunal are understood by all the parties.

- It needs to be clear to the LIP that the list of issues exists to guide both parties as to the questions which the Tribunal will answer in its decision. LIPs are not usually expected to provide exposition of the legal principles and statutes, but if they follow the list of issues in their written submissions they will be able to answer all the relevant points which the ET will need to consider prior to making their decision. Again, a proactive approach by representatives in providing first drafts will be very much welcomed by Employment Judges.

#### **12.4. What other issues should arise when appearing in a Tribunal cases with LIPS?**

If the EJ orders that a remote hearing is to take place, then at the remote trial, the EJ will be in charge of the running of the proceedings, as usual. It is likely that there will be more breaks than usual during the remote hearing, to accommodate parties, the joining of witnesses and to give breaks from screens. Sometimes LIPs will be reticent about conceding that they need a break.

Representatives with an awareness of how much more exhausting remote hearings can be, should again take the initiative when needed in seeking frequent short breaks.

It is not yet clear how taking the oath will operate in a remote hearing. If it is necessary for an LIP and other witnesses taking the oath to swear upon a holy book, then the individual will have to ensure that they have the appropriate holy book to hand (unless rules are changed to accommodate this). Such availability must be checked in advance, ideally at the preliminary hearing.

Any LIP who does not feel that they will be able to cope with the technology or keep up with the case, should be made aware that they should address this at a preliminary stage, so due reassurance and

support can be given before a decision is taken as to the feasibility of a remote hearing.

If the hearing has actually started and the LIP finds that in practice they cannot cope, the Employment Judge will have to give immediate attention to whether the case can continue fairly, or if there is no option but to reconsider whether an “in person” listing is the only way of proceeding. Such part-heard adjournments should be avoided wherever possible.

### **12.5. Can an Employment Judge order some people to attend Tribunal and some to attend remotely?**

The incoming President of the Employment Tribunals (Judge Barry Clarke) has said that there may well be occasions where a trial consists of a combination of “in person” and remote video conferencing such as via Kinly.

Social distancing could dictate that, to keep once-crowded court rooms sufficiently empty, the parties (or their representatives) will be in the court room whilst the Employment Judge and witnesses and lay members may be online.

An even-handed approach between the parties will be key here, but if there is any reason why the LIP is not physically present and their opponent’s representative is, it is crucial to ensure that the LIP does not feel disadvantaged by not being in the tribunal room.

More commonly, the Employment Judge will need to explain why there is no disadvantage caused by their witness not being present in the room: again an even-handed approach will be reassuring (and vital from a natural justice perspective). All of these will be points which the tribunal must ideally address prior to trial.

## **12.6. Can LIPs derail the timetable by refusing to engage with remote hearings?**

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 Kinly hearing is unlikely to get a sympathetic ear 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. Judges 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.