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**‘A guide to the Employment Law Implications of the COVID-19 Emergency**

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**By:**

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1. **Introduction**

The massive Coronavirus Bill, 2019-2021 has completed its Parliamentary stages, though it is inevitable that there will be other legislation and governmental announcements. Most of it is not directly relevant to employment, but it has focused our minds on the wide range of issues, which the current emergency is generating. Many are unprecedented, so applying established legal rules is especially difficult. Forecasting what a hypothetical ET would decide on given facts is equally difficult, though one suspects employers faced with uncertainties, complexity and rapid changes will not be judged too harshly! Well; one would hope so. Unlike contract law, statutory employment law is based on notions of ‘reasonableness’ and fairness, which should prove helpful.

One of the difficulties with the current situation is that there are so many variables affecting workplaces. For example, in some cases, government action and now legislation will impact directly on the employer, requiring them, for example, to cease to trade or operate. To keep going would be unlawful. In other cases there is ‘guidance’ often backed up with considerable political and media pressure, that businesses should not continue to operate; in yet other situations, businesses/employers can keep operating but are ‘urged’ to get staff to work from home. Throughout, much is unclear and employers have been left to make their own decisions.

There are then the ‘worker’ variables. They have been ‘discouraged’ from travelling to work or working generally, but not banned. They themselves have been urged to self-assess, in terms of their own health and possible risks to others. With the lack of testing facilities for the virus, and pressure on advice facilities, it is likely that many will stay away from work. The situation is clearly unlike that for ‘normal’ sickness absence situations whereby the employer can expect a ‘sick/fit note’ from an employee and then deal with payment issues. And then we have staff that are Carers, especially of ‘high risk’ people and they are told to go home even though the business is still operating. So, as with many schools and other social facilities closed, we have two ‘workforces’-those that carry on at the usual workplace and those at home, to whom special rules may apply.

Throughout, the driver of policy has been to prevent further infections and protect lives and advice has been largely ‘medical’. It can sometimes be hard to fit other issues-not least employment law issues, into this context.

2. Some things to keep in mind

Aside from the newness of the situation, sometimes confusing or even contradictory ‘guidance’ we have to bear in mind the following;

1. We already have tried and tested legislation on a number of topics of relevance. For example, the 1965 Redundancy Payments Act dealt with ‘redundancy’ itself, but also with employer duties regarding lay-offs and short time working etc. ,.We have health and safety legislation that establishes a clear set of rules, including duties where a worker suffers a ‘domestic emergency’ and clarifies the situation where a worker is entitled to stop work because of risks to health. In addition, the employer has the right to suspend on medical grounds where there are risks to them (Or others?). If this is done, for example because the employee is vulnerable as having underlying health problems making them prone to become infected, under S 64 ERA they are entitled to full pay for up to 26 weeks. It is unlikely that S 64 had the virus in mind but the wording of the legislation suggests it might well apply. It is an expensive option so care should be taken.
2. Importantly we have much guidance from case law, especially involving the workings of the contract of employment. You have your own ‘express’ terms of contract, covering issues, such as rules relating to sickness absence, rules relating to communication of information and your developed practices regarding their application. The employment contract is not a static device and it can be amended to deal with special/new circumstances.
3. The legislation relating to the virus has clearly differentiated between employees and the self-employed/freelancers. They have their own income protection scheme, which to an extent tracks the employee scheme but in other ways is different. For example, the self-employed can continue working during the ‘leave’ period and the administrative rules are different. However, we are where we often end up. How do you differentiate the employee and the self-employed? Some have questioned whether test is referable to tax law or to employment law? My feeling is that an employment law approach would be applied.
4. Some have questioned whether the long-standing contract rule relating to ‘frustration’ could apply. If it did the contract ends automatically with the parties carrying their costs/losses. In effect, the contract is destroyed because it is impossible to perform, due to an ‘intervening act’(Government legislation). Most commentators think the contract ending this way is unlikely-not least because there is provision for financial support for those affected. But the matter is as yet open.
5. Redundancy is an option, especially where the business is unlikely to recover. But be careful with selection. Zero hours contracts and the like would seem to provide the option to not offer any more work. Fixed term contracts may be due to expire during the emergency. Failure to renew, in principle, creates an unfair dismissal, though it can be justified. Be careful, here ,because the fixed term Employees Regulations also require non- discrimination regarding them. So, if other employees doing the same job have been retained, the non- renewal may be risky.

3. Working from Home

Depending on your contracts, this may require the agreement of the employee. This is not the Furlough situation-see below. We know that a number of issues have arisen over working at home. Can you demand it? How relevant is government exhortation? Can employees refuse? The starting point is the contract of employment and how change is made-with agreement or jus with notification. This can be the case where you are using a written contract as opposed, technically, to a ‘mere’ statement of terms.

The first question is whether home working is viable. If you are running a restaurant, transport company, in construction etc., clearly not all jobs can be done off premises. So, working from home is not an option! For the rules here, see Section 4 below.

Where it is viable, especially where the employee has health issues, including possibly mental health issues, the advice is that work should be undertaken at home. What this amounts to is a temporary variation of contract term as regards ’place of work’. It may be wise to create a short written and signed agreement to the change, with any caveats/ requirements you might like to add.

What if an employee says they have no facilities at home and anyway do not think that it is practical? They want to continue to work at your premises? You have some strong arguments for refusal, such as health and safety and your duty of care, though you would be wise to explore with the employee whether you have any other options and to check whether working at home would increase risks.

Where homeworking is viable there needs to be some detail set down. You may or may not have a ‘remote/home/tele’ working policy, so some ‘ground rules’ may need to be established. Be clear about what you expect, e.g. as regards working hours and if, possible, do it with their express agreement. But also establish any other ground rules, such as a right to contact them during agreed working hours, right to check work quality, the completion, maybe, of time sheets, and, as said above, the extent to which flexibility is possible.

It may be prudent to remind employees who are reluctant to change that there are implied terms in contracts, especially, the one of ‘mutual trust and confidence’, and, arguably, to co-operate. Especially regarding health and safety provisions. Where working at home has been put in place as a temporary variation of contract, unless you act to the contrary, all other contract terms remain in operation, e.g. as regards paid holidays, leave for other reasons and it will clearly count as a period of continuous employment. Statutory protections remain available. Where pay is variable, e.g. much is commission based there may well be concerns by employees that income has suffered. Others may be affected by the increased difficulty of retaining contacts and networks; yet other may feel training has been disrupted. Given that government advice was very strong, it is unlikely employers will be held liable for these types of shortfalls. It is inevitable that in situations such as these there will be ‘winners and losers’

4. Where working from Home is not viable

Most jobs cannot be performed at home. If there is no work to do, in legal theory, the right of the employee to pay remains, providing they are ‘ready and willing to work’, unless the contract says otherwise. So; some action needs to be taken. The requirement to self-isolate/stay at home does not affect these rules. If the employer wants the contract to continue, the ‘subsidy scheme’ (Furlough)from the government is available to provide 80% of ‘wage costs’(Including pension contributions, NIC)-though details are still being worked out. It is important to be transparent about using this scheme.

It appears that the policy objectives of the scheme are (1) to prevent the spread of the virus-hence the encouragement of isolation at home and reduction in travel , and (2) to support employee retention and lessen disruption to the labor market/skills supply etc.

‘Furlough’ is an established scheme from the USA, though our phrase, ‘unpaid leave of absence’ seems perfectly adequate! There is no requirement to top this up to 100%. Some may feel that failure to do so might be a breach of trust, though unlikely.

This scheme for government payment is seen as a means of retaining staff and an alternative to termination of the contract .It is also far more generous than SSP. It also appears to apply to part-time work and fixed term contracts.

So; from a contractual point of view, the contract can continue but the obligation to work is waived. In effect, this unpaid leave, whereby the contract and its terms remains ‘alive’ but the obligation to work and then be paid in the normal way is waived. Having the involvement of employees in the changes and its implications is very important and a legal requirement. It appears that if the employee undertakes other paid work while on ‘unpaid leave’, the right to payment is lost. It has to be said we have little case law on ‘unpaid leave’ and this is a very special scheme where there is even less to go on. So; the duty on the employer is to first, decide what to do; second to discuss and explain the scheme to employees and third to ensure its efficient introduction. It would also be wise to set in place a ‘keep in touch’ policy.

It should be noted that although many commentators have said Furlough is new to the UK, this is not entirely correct, as unpaid leave has been long established, and for a variety of reasons, such as extended sick leave, study leave, some forms of compassionate leave, along with some statutory ‘leaves’ such as ordinary parental leave However, where hours have been reduced or other changes made to the contract, the subsidy does not apply. It is likely, therefore, that these employees will be worse off than those ‘Furlough-ed’.As many have pointed out, this may well be the basis of resentment, though my reading is that it will not normally give them any enforceable rights by those aggrieved.

 It goes without saying that if choices are being made by employers these should not be in breach of the Equality Act-be careful with age and disability discrimination in particular. For example, by retaining male or white employees on unpaid leave, while making redundant others in protected groups. Employees will be well aware of their options-this leave or likely redundancy and they will be watching carefully!

In terms of unpaid leave where it is applied, it is important to consider whether all the other terms of contract continue to apply and if not, which ones do not apply. What is the position regarding the company car/phone/gym membership etc. etc. confidentiality, data protection and other sensitive issues.

5. Other responses

Depending on the area of work, it may be that it is not viable to continue to employ people on their current contracts, albeit it with some government subsidy.

First, some staff may be willing to be offered part-time/reduced hours or changed duties so as to retain their employment. Some staff may anyway be well informed about social security protections and support. A combination of part-time work and social protections may well work for many staff, though payment delays look likely to be inevitable.

Contracts may already allow for such changes, but if not it can only be with agreement. However, refusal to make the change is problematic. They can try to claim constructive dismissal but even if successful an unfair dismissal claim might be capable of defense in terms of SOSR(I do not see a statutory defense for this situation though it might be helpful in other situations). Information regarding both ETs and the EAT indicates that they, too, are virtually in lockdown, so the chance of cases being heard quickly is remote.

Reducing pay seems problematic too. The National Minimum Wage provisions have not been misapplied, so they continue in force. But what of higher earners? They can be negotiated with and it seems bonuses could be withheld-they are generally referred to as ‘discretionary’ and the risk would be of an unlawful deduction if the bonus had been paid regularly come what may. Withholding a pay rise, especially if taken from a collective agreement or other scheme probably has more reputational risks than legal risks.

Clearly the easiest contracts to manage are zero hours or the like contracts. If there is no obligation to provide work this cannot be a breach-but again be careful of equality laws.

For some employers whose businesses have been especially badly affected, they will consider they have no option but to dismiss staff. The definition of redundancy-work has ceased or diminished or is ‘expected to’ or the need for work of a particular kind has ceased or diminished clearly can apply in many cases. The employer, having received a notice of a redundancy claim can issue a counter notice that within four weeks work will resume for at least thirteen weeks. Given the unpredictability of the pandemic, this might be viable for some employers.

If redundancy is seen as the preferred or perhaps only response, correct procedures must be followed. Redundancy could also follow(At the moment) the time limited Thurlough scheme. Or, an employer can simply become insolvent-something the government is aiming to avoid.

6. Other issues

What other questions might there be?