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# EMPLOYMENT LAW BULLETIN

MARCH 2020

## Welcome to the March edition of our Employment Law Bulletin.

This month has seen unprecedented changes in so many areas of our lives, not least of which have been the necessary changes to employment practices in light of the Covid-19 risk and the roll out of government support for organisations struggling with the consequent turn down in work.

We start this month with a summary of the Job Retention Scheme for furloughed workers, some details of which were published by HMRC on 26 March. We also cover the key announcements relevant to employers from the budget earlier this month.

In an article published before the UK went into lock-down, we consider employers' duty to protect the health and safety of workers and how the rules on sick leave and pay apply during the Covid-19 crisis.

In a brief break from the current crisis, we look at the interesting case of ***Human Kind Charity v Gittens*** in which the EAT considered whether a manager had fundamentally breached the employment contract when she covered up her own wrong-doing in an investigation report.

And our question of the month for March looks at the adaptations employers might have to make to their HR processes during the Covid-19 restrictions.

We are always interested in feedback or suggestions for topics that may be of interest to you, so please do get in touch.

## Forthcoming events:

- **Employment Breakfast Briefing Webinar - Unfair dismissal: an update**  
7 April 2020, Webinar  
**For more information or to book** ▶
- **SAVE THE DATE: Employment Law Update for Charities**  
2 June 2020, Hilton City , Leeds  
**For more information or to book** ▶
- **SAVE THE DATE: Employment Breakfast Briefing**  
4 August 2020, Radisson Blu, Leeds  
**For more information or to book** ▶

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*Wherever you see the BALII logo simply click on it to view more detail about a case*

## Government publishes more details of Job Retention Scheme for furloughed workers

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Scheme is open to all employers but those receiving continuing public funding to cover wage costs are not expected to use the scheme.

HMRC published on 26 March 2020 further details of the [Job Retention Scheme](#). This provides some much needed clarity for employers considering furloughing workers.

HMRC has confirmed that the scheme will last for at least three months starting from 1 March 2020 and will be in operation by the end of April. The scheme is open to any employer, including charities and public authorities, which started a PAYE payroll scheme on or before 28 February 2020. It will apply to casual and zero hours workers, along with salaried staff, as long as they were on the PAYE payroll on or before 28 Feb 2020. Employees can be furloughed for a minimum of 3 consecutive weeks.

### **What will employers receive on the Job Retention Scheme?**

Employers who place staff on furlough will receive a grant from HMRC to cover “the lower of 80% of an employee’s regular wage or £2,500 per month, plus the associated Employer National Insurance contributions and minimum automatic enrolment employer pension contributions on that subsidised wage”. Employees’ pay will continue to be subject to deductions for PAYE and employee National Insurance contributions.

For salaried staff, pay will be calculated as at 28 February 2020. For more details of how the pay of staff with variable hours will be calculated, please see below.

The guidance states that employers can also make claim against the wage costs of enhanced contractual maternity, adoption, paternity or shared parental pay through the scheme.

### **How will pay be calculated for those with variable pay?**

There are a number of ways of calculating the pay of staff on variable hours. If the employee has been employed for twelve months prior to the claim, employers can claim for the higher of the same month’s earnings from the previous year or average monthly earnings from the 2019-20 tax year. If the employee has been employed for less than a year, employers can claim for an average of the employee’s monthly earnings since they started work. Where the employee began work during February, employers should work out a pro-rata monthly average based on their earnings to date.

### **Do we have to pay the National Minimum Wage or National Living Wage (NMW)?**

The NMW will not apply to furloughed workers because they will be carrying out no work during the furlough period. However, employees can be required to undertake training during furlough and, if so, the guidance states that they should be paid at least NMW for that time.

### **Does it apply to publicly funded employers?**

Although the scheme is expressly available to all employers, including those in the public sector, the guidance states that it is expected that the scheme will not be used by many public sector organisations or by non-public sector organisations which receive public funding as they are in the main continuing to work and to be funded as normal during the crisis. However, where public funding has ceased for particular roles because of the Covid-19 crisis, such employers may well wish to access the scheme.

## Who can be put on furlough?

It is important to note that the scheme is intended for use where employers do not have work for particular workers because of the Covid-19 pandemic. Furloughed employees will not be allowed to work for the organisation but will be able to carry out voluntary work as long as they do not provide services to or generate revenue for their employer. Employees who have been made redundant can be rehired and placed on furlough. Employees on sick leave can be moved onto furlough once they are fit to work and those who are [shielded](#) (those who have received specific medical advice to stay at home for 12 weeks) can be placed on furlough.

Employers do not need to make any distinction between workers and employees. The scheme covers those paid through payroll. Self-employed workers are being supported under other schemes for which details are still awaited.

## Communicating with employees

Employers will need to discuss the proposal with staff and gain their voluntary agreement to being placed on furlough. Letters should be sent to staff to confirm they are being placed on furlough. It is important to make clear that this is a temporary change to the employment contract which is subject to review and subject to the rules of the Job Retention Scheme.

## Unanswered questions

There will of course continue to be many unanswered questions about the practicalities of the scheme. HMRC has promised further detail in due course.

There is no detail in the guidance at present, for example, on whether holiday will accrue during periods of furlough and, if holiday is taken during the furlough period, on the rate at which it should be paid. The question of whether someone on maternity or equivalent leave can give notice to return to work early and be placed on furlough is not covered. There also continues to be ambiguity about whether employees who are not sick but who are self-isolating for some reason (but who are not on the shielded list) could be placed on furlough.

The guidance makes clear that employers will be responsible for calculating the amount being claimed and that HMRC retains the right to retrospectively audit all aspects of the claim. It is difficult at this stage to know what information will be sought from employers for any such audit. It is therefore important that careful records are kept, including a paper trail of organisation decision-making and communication with employees.

## Budget 2020 for employers

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Changes for employers to note.

Yesterday saw Chancellor Rishi Sunak deliver Boris Johnson's government's first budget. As well as making provision for the emergence of the coronavirus, the budget confirmed national minimum wage (NMW) increases.

### Coronavirus

Points designed to address employment issues as a result of coronavirus:

- The cost of up to 14 days' statutory sick pay (SSP) for coronavirus-related absence will be covered for businesses with fewer than 250 employees

- SSP will be made available to all those advised to self-isolate even if they haven't yet presented with symptoms
- For these purposes a medical notification for employers will be made available via NHS 111 in place of a GP's fit note
- Access to SSP will not be extended to the self-employed or those earning under £118 a week, but the government intends to make access to benefits easier for these people
- The rate of SSP itself will increase to £95.85 from £94.25 on 6 April 2020

### **National minimum wage**

- The national living wage (NLW) (i.e. for those aged 25 and older) will rise to £10.50 an hour by 2024, compared to £8.21 at present
- The NLW rise may be extended to those aged 21 and over by 2024, but the Chancellor has warned this will only happen 'as long as economic conditions allow'
- From 1 April 2020 the national minimum wage ('NMW') rates will be

<b>National living wage</b>	<b>Standard rate</b>	<b>Development rate</b>	<b>Young workers</b>	<b>Apprentice rate</b>	<b>Accommodation offset</b>
(25+)	(21+)	(18-20)	(16-17)		
£8.72	£8.20	£6.45	£4.55	£4.15	£8.20

### **Apprenticeship Levy**

The government has said that it will look at how to improve the working of the Apprenticeship Levy to support large and small employers in meeting the long-term skills needs of the economy. In the meantime, the government has said it will ensure that sufficient funding is made available in 2020-2021 to support an increase in the number of new high-quality apprenticeships in small and medium-sized businesses.

### **Neonatal Leave and Pay and Caring Responsibilities**

The government has said it will create an entitlement to Neonatal Leave and Pay for employees whose babies spend an extended period of time in neonatal care. This will provide up to 12 weeks' paid leave to parents.

In addition, the government will consult on the design of a new in-work entitlement for employees with unpaid caring responsibilities, such as for a family member of dependants.

### **Employment Allowance and National Insurance Contributions**

The government has said it will help small businesses to take on extra staff by delivering a commitment to increase the Employment Allowance to £4,000. This will mean businesses will be able to employ four full-time employees on the NLW without paying any employer National Insurance contributions.

### **Comments**

Commentators have noted that the government's proposals to tackle the effects of coronavirus will do little to nothing to help organisations with 250 or more staff, nor will they help agency

workers or the self-employed. The modest increase in the rate of SSP may not encourage eligible employees to take sick leave, which means employers still face tricky decisions about whether to offer full pay whilst employees are off sick for coronavirus or because they are self-isolating.

Whilst the proposals to increase the NMW to £10.50 an hour by 2024 has been widely welcomed, concerns have been expressed that the rise could disproportionately raise the costs of northern businesses and hit the social care sector hard if social care funding is not increased to meet this burden.

## Coronavirus: what employers need to know

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Advice for employers on how to approach coronavirus and related employment issues

As the novel coronavirus Covid-19 continues to spread employers are growing increasingly aware of the direct and indirect impact this may have on their employees and the work place.

Substantial guidance and information is available from websites such as [the government's website](#) and [ACAS](#), which detail the precautions employers should consider and what action they should take if, for example, a member of staff is suspected to have, or is confirmed to have, Covid-19.

This note aims to highlight the main points of consideration for employers. However employers should note that circumstances may vary depending on individual contractual arrangements with employees. Given this is an evolving situation we should all remain alert to further guidance from the government, the World Health Organisation and Public Health England, as well as updated guidance from ACAS.

### What risks does coronavirus represent?

It is reported that Coronavirus is more serious than the common flu in the sense that it has to date demonstrated a higher mortality rate amongst those affected. Particularly at risk are those with a suppressed immune system, the elderly and those with conditions such as cancer, chronic lung disease and diabetes. Accordingly, measures adopted in the workplace to respond to Covid-19 may also affect these groups of people.

Commuting to work and time spent in the workplace presents the risk that those who are infected with the virus may pass it on through prolonged close proximity exposure. Separate to the public health risk issues, this risk of exposure and infection is important to employers because they have a duty to ensure, as far as reasonably practicable, the health, safety and welfare at work of their employees and anyone else who may be affected by the employer's business, including customers and other members of the public.

### What can employers do to comply with this duty?

The most important factor to bear in mind is communication. Employers are advised to tell their employees what actions and precautions they plan to take in a given set of circumstances and (if relevant) how that will affect the employee.

The risk of infection in the workplace may be reduced if employees can work flexibly, if that suits the particular employer's business operations. Many employees will agree to work flexibly to help maintain business and to protect the health of colleagues. However, compelling flexible working can be more complex. Employers should review their terms and conditions and consider whether, if necessary, they have the contractual right to impose changes to working

hours, location of work and duties, without having to obtain the consent of employees or consult with them in advance.

Employers also need to review whether they have the necessary resources to accommodate flexible working, such as laptops, remote secure access to office systems and mobile phones.

Flexible working will not be available for all employees. Many organisations will need to maintain an effective workforce in order that they may maintain their services. If so, employers need to consider public health guidance on ensuring workplaces are cleaned appropriately to limit the risks of the virus spreading at work. This will include providing employees with the facilities to wash their hands regularly either with hot water and soap or with hand sanitisers and tissues.

For some employers, such as those in the care sector, such measures simply reinforce existing practice.

Some employees might feel they do not want to go to work because they are afraid of catching Covid-19, or as an employer you may be particularly concerned about an employee who you consider to be vulnerable. Employers should discuss health concerns with their employees. If the concerns are genuine, for example an employee with an existing chronic lung condition or recently recovering from chemotherapy treatment, employers should aim to protect the health and safety of their employees by offering flexible working where appropriate. If alternative arrangements can not be made but the employee does not want to attend work they may take the time off as holiday or unpaid leave; alternatively their GP may consider they are not fit to attend work and supply a Fit Note. However, in the absence of an agreed arrangement, if an employee refuses to attend work it could result in disciplinary action.

### **What are the rules on pay?**

Employers will need to check their contractual arrangements to consider the specific situation with their staff, but most will fall into the following categories:

#### *Sick Pay*

If the employee is absent from work through sickness then they are entitled to be paid either statutory sick pay (SSP) or contractual sick pay as normal.

If an employee self-isolates because they are given a written notice to stay at home, typically issued by a GP or by NHS 111, then they are deemed to be incapable of work and so are entitled to SSP. As of 5 March, the government has said that, where the individual is entitled to SSP, it will be payable from day one of the absence. This means individuals are now entitled to an additional three days' SSP. Whether they are entitled to contractual sick pay will depend on individual contractual arrangements.

On the other hand if somebody chooses to self-isolate, and/or is not given that written notice, then they are not entitled to SSP. This may lead to employees coming to work because they want to be paid and spreading the virus if they have it. Therefore ACAS recommends in such circumstances it is good practice for employees to be treated as on sick leave and for employers to follow their usual sick pay policy or agree for the time to be taken as holiday.

#### *Normal pay*

If the employee is fit but asked by the employer not to come to work and to remain at home, the employer will be contractually obliged to pay the employee as normal, unless the terms of the employee's contract allow for the employer to lay them off and the circumstances warrant



it. Lay off provisions may apply where there is a drop off in trade as the economic fall out of the virus impacts more widely.

Employers will need to be flexible with their sickness reporting procedures. For instance, if staff are in quarantine, they will be unable to visit a doctor to obtain a Fit Note and it may take some time for written notices to be completed. For this reason employers should consider what, if any other evidence, they will need for sickness absence purposes. For example, this could be advice from services such as NHS 111 or a combination of advice from government organisations (such as the Foreign and Commonwealth Office) and evidence of travel to highlighted areas (e.g., hotel and restaurant receipts showing they were in a location requiring them to go into quarantine).

#### *Time off to look after a dependent and similar rights*

Employees are entitled to time off in an emergency without pay to look after a dependent. This statutory right may apply if an employee needs time off to care for children when their school closes down, or to care for a dependent who is sick or who needs to go to hospital or to be quarantined.

Some employers may enhance the statutory time-off entitlements with their own policy, including additional pay. Those policies will need to be complied with.

Other statutory rights and contractual benefits may be relevant, such as Parental Leave although the relevant formal process, including notice provisions, may not fit well with the urgent nature of responding to an outbreak of Covid-19.

Above all, an employer always has discretion to enhance any entitlements and relax any formalities in its usual procedures to help maintain flexibility in its response to any outbreak. Where those affected may have a disability then the employer must always bear in mind its obligations in relation to reasonable adjustments.

Employers will also have picked up some of the reports in the press around the way in which certain nationalities have been targeted due to the location of the initial outbreak or localised exclusion areas. Whilst this has been focussed on those of Chinese descent, high risk areas now include wider Asia, North Italy and Iran. In addition, it is to be anticipated that in-work issues will continue to arise, and potentially escalate, because a colleague may have a common cold. Such issues must be dealt with by an employer as part of its normal processes to protect employees who may be a target and to manage conduct and behaviour of those perpetrating such acts.

#### **Other considerations**

Although the UK has not, at the time of writing, started to restrict public gatherings it is worth noting that other European countries have started to ban larger gatherings in an effort to limit the spread of the virus.

Employers will need to keep an eye on developments and consider the impact this might have on certain planned events and whether travel to events both nationally and internationally is advisable. This may affect staff social events, client events and also impact on industry events that are planned to take place this year.

In addition, employers need to plan for the expected impact on their business operations as customers, clients and service users are also affected by the spread of Covid-19. For some employers that will mean less demand as customers stay away. For others, such as those in the care sector, it will mean increased pressure and demand for support at a time when their ability



to meet needs will be impacted by the unavailability of key staff.

### **Comment**

As the situation with coronavirus Covid-19 develops, the most useful thing an employer can do is work out what options it has to manage its workforce both in the best interests of maintaining its operations but also in the best interests of the health of staff.

By identifying what options are open to it in terms of flexible working and the resources needed to implement this, an employer will be better prepared to deal with the situation as it develops.

Special attention must be given to those staff who are at increased risk from the effect of coronavirus and thought should be given to how those staff can be protected and supported. However employers will need to be careful not to implement measures which put those employees who are at increased risk (i.e. arising from their existing health issues) at a particular disadvantage as this could amount to discriminatory action.

Above all, communication with employees about what the employer proposes to do, at present or in the future, will be key to reassuring employees. In addition, planning for the effect of coronavirus Covid-19 will be key to reassuring service users that your organisation will still be able to support them.

## **Manager's dismissal for false investigation report which covered up her own misconduct was not wrongful**

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Dishonesty in investigation report was a fundamental breach of contract.

Wrongful dismissal occurs where an employer dismisses an employee in breach of the employment contract. A summary dismissal (a dismissal without notice) will be wrongful if the employee has not committed a "repudiatory" breach of contract. A repudiatory breach by an employee is one that gives the employer the right to choose to end the contract or to affirm it. That is, where the breach is of a term which is fundamental to, or goes to the heart of, the contract. Putting it simply, the employee's conduct has to be serious enough for the employer to treat the contract as terminated.

Wrongful dismissal awards will be limited by the amount the employee would have been paid in their notice period or (if longer) the time it would have taken to carry out any contractual dismissal procedure.

The key question for a tribunal in a wrongful dismissal claim is whether the employee committed a repudiatory breach of contract and so whether the employer was entitled to dismiss the employee without notice. A recent EAT case has considered whether an employee's dishonesty about her own misconduct was a fundamental breach of contract and grounds for summary dismissal.

### **Case details: [\*Human Kind Charity v Gittens\*](#)**

Ms Gittens was employed as an Area Manager for the predecessor organisation to Human Kind Charity (the Employer). She was responsible for a team of 30 people and a budget of £1 million. She was not a member of the senior management team, a company director or a trustee. Ms Gittens' team had the use of an iPad on which mobile data charges accrued. A bill for £8,523 in

data charges was received by the Employer. Ms Gittens was asked by her line manager to carry out an investigation into how this amount had been incurred. Ms Gittens stated that she was not the right person to carry out the investigation as she had allowed the iPad to be used and that she had not been aware of the data charges accruing. She offered her resignation but was persuaded to withdraw it and to undertake the investigation.

Ms Gittens stated in the investigation report that she could not narrow down the bill charges to any one person and did not think it fair for anyone to be blamed for the bill as there had been no intentional wrongdoing. The line manager did not consider the investigation report adequate and commissioned an investigation by another person. Ms Gittens then admitted that the iPad had been in her possession when the charges had been incurred.

Ms Gittens was summarily dismissed for gross misconduct on grounds of dishonesty and the resulting breach of trust and confidence in relation to her role as a senior manager. She brought claims for wrongful dismissal (for her notice pay), unfair dismissal and race discrimination. The latter two claims were dismissed by the tribunal.

The wrongful dismissal claim was, however, upheld. The tribunal determined that Ms Gittens did not have any contractual obligation or fiduciary duty (for example as a company director) to disclose her own wrongdoing. It considered that Ms Gittens had not therefore committed a fundamental breach of contract entitling the Employer to dismiss her summarily. This was the case even though the tribunal found there was “some dishonesty” in the investigation report and that it “was not true” that the charges could not be narrowed down to one person (i.e. the claimant).

The EAT did not agree. It considered that the tribunal was wrong to focus on whether the employee had a contractual or fiduciary duty to disclose her own wrongdoing. In this case, the employee had been found to have made a dishonest statement in her investigation report. The EAT commented that there is an important distinction between an employee remaining silent about their own wrongdoing and making a positive statement which is dishonestly untrue. The EAT was clear that someone who submits a false investigation report about their own wrongdoing cannot be protected by any “right to remain silent” or a right not to incriminate oneself. The claimant’s dishonesty was conduct likely to destroy or damage the relationship of mutual trust and confidence between employer and employee and so it was a fundamental breach of contract entitling the employer to dismiss without notice.

### **Is there an obligation for an employee to disclose their own wrongdoing?**

There is no general obligation for an employee to disclose their own wrongdoing. However, the employment contract may include an express or implied duty to disclose in certain circumstances. There may, for example, be a duty to disclose any safeguarding risk to vulnerable adults or children (which would include a risk posed by the employee themselves). An example of such a case was explored in our recent article: [Q v Secretary of State for Justice](#).

Employees in a senior position in the organisation may be found to have an implied contractual duty to act in the best interests of the organisation and so to disclose their own wrongdoing.

An employee who is also a director or a trustee will owe a fiduciary duty to the employer and will therefore have to confess their own misconduct.

### **What is the difference between wrongful dismissal and unfair dismissal?**

It is important to note the distinction between wrongful dismissal and unfair dismissal. Wrongful dismissal is dismissal in breach of contract. There is no qualifying length of service for a wrongful dismissal claim. Unfair dismissal is dismissal in breach of the statutory right not to

be unfairly dismissed, based on an examination of the reasonableness of the dismissal process and the decision to dismiss. The general rule is that unfair dismissal claims cannot be brought before the employee has two years' service, although there are a number of key exceptions to this rule.

It is possible for a tribunal to decide that a dismissal was wrongful but not unfair (as the first instance tribunal did in the above case). This is because a tribunal will apply different tests to these two claims.

The test for **wrongful dismissal** is an objective one. This means that it is for the tribunal to decide for itself whether the claimant breached a fundamental term of the contract and entitled the employer to terminate the contract without notice. In doing so, the tribunal can even take into consideration facts which were not available to the employer at the time of the dismissal.

The test for **unfair dismissal** is a subjective one. This means that the tribunal will ask whether the decision to dismiss was reasonable and (in misconduct cases) whether it was based on the employer's honest belief in the misconduct after a reasonably thorough investigation. For unfair dismissal, the tribunal is not allowed to make a judgment based on its own view of whether the employee should have been dismissed. Rather it must judge whether the employer's investigation and decision was within the band of reasonable responses of a reasonable employer. In some cases, the tribunal may consider the dismissal to have been rather harsh but still to fall within the spectrum of reasonableness.

When considering conduct dismissals, employers should (alongside ensuring the dismissal decision and process are fair and reasonable) think carefully about whether the conduct amounts to gross misconduct, that is behaviour which is likely to destroy or damage the employer's trust and confidence in the employee. Such behaviour will be a fundamental breach of contract. If the reason for dismissal does not amount to a fundamental breach, contractual or statutory notice (whichever is the longer) should be given by the employer.

## **Question of the month: how should we adapt company policies in the face of coronavirus?**

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Employers need to consider how they will adapt to make sure policies and procedures are applied appropriately during the current circumstances.

Those employers that have shifted to remote working will be forced to consider the virus's impact on their day-to-day operations and how to continue operating as best as they can with staff working from home and/ or with social distancing measures in place.

Remote and home working are not new, although the current circumstances are without modern precedent. Managing a remote working relationship can take some getting used to and will require flexibility and patience on the part of both employees and employers; more so in light of the sudden shift away from what was only days ago normal and familiar working practices for many.

This article looks at some of the key areas for consideration.

### **Health & Safety and Welfare**

The employer retains the obligation to ensure a safe place of work. Risk assessments are a part of that but it is unlikely that these can be completed given the sudden shift. None-the-less employers should still check:

- that employees feel that the work they are to do from home can be done safely; and
- the availability of any necessary equipment, and any reasonable adjustments.

Existing home work policies will usually cover issues relating to the provision of equipment, insurance, and any relevant financial contributions to internet provision, and to telephone and utility bills. Insurance in particular is important, as noted above, the employer still has a statutory responsibility for the safety of employees. That includes reminding employees of basic hygiene in stopping the spread of Covid-19.

Mental health and wellbeing are equally important. The shift to home working will impact on individuals in different ways depending on their personal circumstances. Existing protocols will need to adapt to ensure that out of sight is not out of mind. There is a greater responsibility on managers to maintain regular contact with employees, including so as to ensure employees are not left feeling isolated and unsupported.

As a part of home working arrangements employers will also need to reconsider their position on facilitating and encouraging social interaction between their employees. The ‘water cooler’ discussion does not naturally arise in a home working situation so some effort is needed to engineer such interactions. There are a range of online platforms which can assist with ensuring positive communications.

### **Flexible Working**

The current Covid-19 restriction will naturally create anxiety and stress for employees. A particular element relates to childcare responsibilities which may also impact on the availability of employees to work from home.

As a part of establishing safe working conditions an assessment of working arrangements may be appropriate. Formal procedures exist for requesting flexible working, including dependent and other family leave entitlements. Employers retain a discretion to fast track such processes, to be proactive in raising the issue (rather than waiting for an employee to trigger the procedure) for example as part of the home working risk assessment, and to agree working structures which do not fit the employer’s normal pattern, such as wrap around working hours to accommodate domestic arrangements.

### **Holidays**

Employers will need to check the specifics of their holiday policy, but many will make it clear that the employee must use their holiday in the holiday year in which it accrues and that this cannot be carried over to a following holiday year unless this is as the result of disability (and reasonable adjustment), sickness, a period of family leave (i.e. maternity, paternity or adoption leave) or at the employer’s absolute discretion.

Although employers can choose whether or not to agree to holiday requests, this has to be measured against the employee’s right to take holiday and a request should only be refused for a good reason. Refusing holiday requests at any time may create tension. It is important to try and manage expectations as much as possible.

However there is currently a risk that employees will save their entitlement to the end of the holiday year, which means that employers could face logistical issues later with multiple conflicting holiday requests.

It is possible for employers to require employees to take statutory leave. As a starting point, employers should check the contract of employment to see if there are any contractual requirements for doing so. If not, employers will need to adhere to the statutory obligations in

the Working Time Regulations 1998.

The regulations allow employers to require employees to take holidays on specified dates, provided that the employer provide notice in advance which is at least twice as long as the period of leave being imposed. There are no prescribed forms of notice, but as best practice employers should write to employees to set this out.

It appears that the most sensible thing for employers to do is to raise the issue of holiday with staff as early as possible, highlight the rights of the parties and forewarn employees that if they save up their holiday entitlement then they may struggle to take it when the current situation lifts.

On 27 March the government announced a relaxation of the Working Time Regulations to allow employees who have not taken all of their statutory annual leave entitlement due to COVID-19 to carry it over into the next 2 leave years. This change will apply to the 4 weeks annual leave granted by the regulations that can not normally be carried forward to another leave year. It is intended to ensure “staff can continue working in the national effort against the coronavirus without losing out on annual leave entitlement” and therefore is most likely to apply to key workers in sectors such as healthcare and food sales and distribution. Employees in other sectors may be expected to take annual leave as normal.

Many employers will plan to use the government’s Coronavirus Job Retention Scheme to keep employees on their books even though they have no work for them. At present, in the absence of specific government guidance on the point, it appears that holiday entitlement will accrue for the period the employee is placed on furlough leave. Holiday pay is calculated on a weeks’ pay and therefore it appears this should be paid at the normal rate. As such some employees may prefer to take paid leave at 100% of their normal pay whilst they can, if the alternative is to be furloughed at 80% pay or a lower percentage if they earn significantly more than the average salary cap of £2500 gross per month.

## **Disciplinary, capability and grievance procedures**

### Generally

No doubt there will be many employers who either were about to start or were already undertaking one or other of these procedures when the recent measures came in, requiring staff to stay at home.

The most immediate resolution to help employers proceed as planned will be for employers and staff to engage remotely via phone or video calls. However, not all employees will have the means to properly conduct these procedures remotely and indeed some may not have the desired privacy at home to properly conduct meetings and give or discuss evidence.

It may be possible to conduct elements of these processes via correspondence (e.g. written representations to be taken in to account by a disciplinary panel meeting virtually), though this may slow the process down and extra care will need to be taken to ensure the employer is taking the employee’s evidence or points of view on board.

This guidance note is intended for application to employees who are working remotely/at home. It is not yet clear whether the proposed government Coronavirus Job Retention Scheme will permit employers to carry on with these procedures whilst the employee subject to them is furloughed. It is a requirement of the scheme that the employee is not permitted to be undertaking any work for the employer while furloughed and yet participating in one of these procedures is likely to be deemed work. In the absence of specific guidance it is advisable to complete outstanding processes before furloughing employees unless you are prepared to

shelve the process temporarily.

### Disciplinary

Particularly with disciplinary procedures that may result in dismissal, employers will need to ensure that as far as possible the final decision and the process leading to that decision is fair, taking all current circumstances into account. These circumstances will include, for example, the coronavirus restrictions, government and medical advice, the impact of the virus on the employer and the employee and the resources of the employer. Also relevant is the issue of whether the employer can reasonably wait the lifting of current movement restrictions.

To ensure a fair process in these circumstances, employers will need to focus on two main areas.

The first is the treatment of evidence. Given the current situation, offices and systems may be inaccessible meaning the proper sourcing and circulation of evidence is impossible. In a disciplinary situation, if current restrictions genuinely impact on the ability of the employee to understand and respond to the allegations, employers are best advised to pause the process. Where dismissal is contemplated it is especially important that the relevant decision makers have all relevant information available.

The second area is procedure. Employers should cater for employee representatives to participate on phone and video calls and to allow ways for the employee and their representative to confer privately. Likewise, employers need to ensure that the employee has the full opportunity to make their case in defence and to receive, review and comment on evidence. For some employers this will be relatively easy to do electronically, for others a view will have to be taken on what systems are in place, including post, to allow for this. Documents which include sensitive information should be sent securely, whether by email (password protected or encrypted) or by post (by special delivery). You should be aware of the [changes to Royal Mail services](#) due to coronavirus, which may impact on when documents are received.

### Capability

The current situation will no doubt cause significant difficulties for employers who have put underperforming employees on performance improvement plans ('PIPs'). As employees switch to working from home there will inevitably be a period of transition needed for all employees to adapt to this and productivity is likely to be varied throughout.

Employers therefore need to consider what impact remote working will have on the employee's ability to meet the targets set out in the PIP and the support provided to them more generally. Thought should be given to amending those targets or extending the review period to take account of the effect of switching to remote working, particularly if the process is moving towards a decision to dismiss.

### Grievances

A lack of access to evidence and inability to circulate information could also delay a grievance procedure. Ordinarily employers should avoid delays in grievance procedures and where delays are unreasonable, this could lead to employee resignations and claims for constructive dismissal. However, in situations where evidence is temporarily inaccessible, it will be inappropriate for employers to conclude the process.

For this reason employers will need to think carefully about whether evidence and information is accessible, whether it can be circulated and then document the situation in case an employee should decide to resign as a result of delay. It would also be useful to explain the position to the employee and to reassure them that as soon as it is possible to do so, the employer will proceed with the process.



Following this process will assist an employer's defence if an employee seeks to show that through delay the employer has committed a repudiatory breach of the employment contract. It will also make it harder for the employee to successfully claim constructive dismissal, particularly as the onus will be on the employee to prove the breach.

Perhaps more so than with disciplinary procedures, where the employee should have access to and fully understand the evidence against them, employers need to be mindful that if systems become accessible (for instance if the employer's IT department are able to make relevant systems accessible) then grievance procedures should be resumed at that point.

### **Absence management**

Employers must be clear as to how they will categorise absences from work and what they will pay employees. For example employees who are sick (either with Coronavirus or other reasons) will be absent on sick leave and receive SSP and contractual sick pay where it applies. Likewise if employees are self isolating on the advice of NHS 111 or because they or someone else in their household has Coronavirus symptoms they will be on sick leave and paid accordingly.

Employers may decide to adjust absence management procedures, either amending the point at which triggers take effect, or the actions taken as a result of an employee meeting a trigger, when absences are caused as a result of self-isolation or sickness absence resulting from Coronavirus

While taking a view on how to adjust absence management procedures in general, employers should also be mindful of the statutory obligation to make reasonable adjustments for employees who have a condition which amounts to a disability in terms of the Equality Act 2010. This duty may apply in handling the absence of an employee with a condition that amounts to a disability where that employee is acting on government advice to shield themselves for 12 weeks and as a result they can not work.

The government guidance for employers on claiming employee's wages through the Coronavirus Job Retention Scheme confirms employers can not furlough employees on sick leave or those self-isolating until they are fit to work. However employees who are shielding for 12 weeks in line with public health guidance can be placed on furlough.

### **Conclusion**

The overall takeaway should be that employers do not need specialist coronavirus policies in place to adapt to the current circumstances. Rather, employers need to consider how best to maintain and adapt current procedures and policies.

This will depend on the communication and support systems in place to allow both employers and employees to comply with the procedures. Where staff handbooks are non-contractual, employers may vary policies and procedures to meet the current circumstances and, to the best of their ability, communicate the changes to the workforce.

If policies and procedures are contractual, employers will need to take more care in how they approach their adaptations as a result of the virus. Any change to contractual terms, particularly those that are less favourable to the employees, should be agreed with employees in advance otherwise the proposed changes may result in grievances and potentially resignations. However in such uncertain times the likelihood of employees resigning and then successfully bringing a claim for wrongful or unfair dismissal is low providing the proposed changes are necessary, reasonable and communicated to the work force so far as possible.



Employers should take advice on their individual circumstances – particularly where changes will affect 20 or more employees or collective agreements are in place. Clearly, there is only so much employers can do with regard to adjusting disciplinary, capability and grievance procedures before they run the risk of either making an unfair decision or invoking a resignation from an employee. Employers are best advised to try and perform these procedures as they normally would and in accordance with existing policies, but substituting available technology where possible and ensuring that the procedure as a whole is fair.

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