WRIGLEYS
SOLICITORS

# EMPLOYMENT LAW BULLETIN

**OCTOBER 2020**

## Welcome to the Wrigleys Employment Law Bulletin, October 2020.

With much of the country seeing increasing restrictions due to Covid-19, Chancellor Rishi Sunak announced on 22 October significant extensions to the Job Support Scheme which will to some extent replace the outgoing Coronavirus Job Retention Scheme. In our first article, we look at the support available under the scheme from 1 November for businesses which are legally allowed to remain open.

We consider recent Health and Safety Executive guidance which will be helpful for employers managing the needs of vulnerable and high-risk staff during the Covid-19 pandemic. The guidance also includes clarification on requirements for first aiders during the crisis and a reminder of employer's duties to protect the health and safety of those providing first aid at work.

We report on the recent EAT case of ***Ikejiaku v British Institute of Technology Ltd***, which has clarified when the Acas Code of Practice on Disciplinary and Grievance Procedures will apply in the context of whistleblowing.

We also look at the interesting case of ***BC and Others v Chief Constable of the Police Service of Scotland*** in the Inner House of the Scottish Court of Session. This throws light on when employees may or may not have a reasonable expectation of privacy when it comes to electronic communications. Here the courts considered whether the police service employer could use evidence from a WhatsApp group loosely connected with work as part of an internal disciplinary procedure.

And in our question of the month for October, we review the special protections in connection with maternity leave where redundancy or changes to contractual terms are proposed (including moving an employee onto the Job Support Scheme following maternity leave).

Please see details of our upcoming free webinars below. On Thursday 5 November, Employment law partner Sue King will be joining with charity law partner Sylvie Nunn for a timely webinar on "Operating your organisation in an uncertain, post Covid world" which promises to be highly relevant for charity and third sector employers. Our next Employment Law Brunch Briefing on 1 December will provide a summary of key developments in employment law during the last 12 months. I hope to see you there. You can also access previous webinars through our events page here.

The Wrigleys Employment team are continuously looking to enhance and improve our webinar offering and we would be interested to hear what topics you would like us to cover in our 2021 programme. This will allow us to make sure we are offering you an events programme that suits your needs. **Please follow the quick survey here.**

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

## Forthcoming webinars:

- **5 November 2020, Webinar**
  **Wrigleys' 29th Annual Charity Governance Seminar - webinar series**
  Not business as usual: operating your organisation in an uncertain, post Covid world
  ***Speakers**: Sue King and Sylvie Nunn, Partners at Wrigleys Solicitors*
  **Click here for more information or to book**

- **12 November 2020, Webinar**
  **Wrigleys' 29th Annual Charity Governance Seminar - webinar series**
  Post-Covid – protecting your contracts
  **Speakers:** *Sue Greaves, Partner and Mike Ford, Solicitor at Wrigleys Solicitors*
  **Click here for more information or to book**

- **19 November 2020, Webinar**
  **Wrigleys' 29th Annual Charity Governance Seminar - webinar series**
  Recruiting and retaining good trustees: harnessing opportunities and meeting the challenges presented by the pandemic
  ***Speakers:** Claris D'cruz, Consultant & Hayley Marsden, Solicitor at Wrigleys Solicitors*
  **Click here for more information or to book**

- **26 November 2020, Webinar**
  **Wrigleys' 29th Annual Charity Governance Seminar - webinar series**
  Round-up, good news and things you might have missed
  ***Speakers:** Nat Johnson, Partner at Wrigleys Solicitors*
  **Click here for more information or to book**

- **1 December 2020, Webinar**
  **Employment Brunch Briefing**
  What's new in employment law?
  ***Speakers:** Michael Crowther and Alacoque Marvin, Solicitors at Wrigleys Solicitors*
  **Click here for more information or to book**

## Recorded webinars:

- **Employment law update series: Flexible working: Part I - building a balanced society**
  16 June 2020, Webinar
  ***Click here for more information or to view webinar***

- **Employment law update series: Flexible working: Part II - re-organisation and flexible working**
  7 July 2020, Webinar
  ***Click here for more information or to view webinar***

- **Charities & social economy webinar series: Restructuring your organisation from the inside out**
  22 July 2020, Webinar
  ***Click here for more information or to view webinar***

- **Employment law update series: Equality in the workplace - transgender discrimination**
  4 August 2020, Webinar
  ***Click here for more information or to view webinar***

- **Employment law update series: Equality in the workplace - disability and reasonable adjustments**
  1 September 2020, Webinar
  ***Click here for more information or to view webinar***

- **Employment law update series: Equality in the workplace - atypical working, zero hours and ethical issues**
  6 October 2020, Webinar
  ***Click here for more information or to view webinar***

- **Wrigleys' 29th Annual Charity Governance Seminar: 'Serious incidents': what, why, and when to report**
  15 October 2020, Webinar
  ***Click here for more information or to view webinar***

- **Wrigleys' 29th Annual Charity Governance Seminar: Is your cat causing a breach of the GDPR? Data protection in the age of remote working**
  22 October 2020, Webinar
  ***Click here for more information or to view webinar***

– Alacoque Marvin, Editor **alacoque.marvin@wrigleys.co.uk**

# Contents

# Changes to the Job Support Scheme announced by the Treasury

Employers' contribution to the wages of workers on the scheme significantly reduced.

HM Treasury announced changes to the Job Support Scheme (JSS) on 22 October which may make a significant difference on employer take-up of the scheme. A new 'Job Support Scheme Open Factsheet' provides a good overview of the changes here. For more in-depth information, there is also the related "policy paper" which introduces new monikers for the JSS (to be known as "JSS Open") and the JSS Extension (to be known as "JSS Closed") here. We take a look at these changes below. Further guidance is expected at the end of October.

**What were the rules of the JSS?**

We explored the rules and eligibility criteria of the JSS in our article **The new Job Support Scheme: what is it and will it be enough?** Which is available on our website (here).

One of the key takeaways from the JSS was that if eligible workers worked a minimum 33% of their 'usual hours' they would receive 77% of their 'usual pay'. The employer was then able to apply for funding from the government, who would pay 22% of the usual pay up to a cap of £697.92, meaning the employer paid 55% of the worker's usual wages.

The level of support provided by the government has now significantly changed.

**What's changed?**

The minimum amount of time a worker must work to qualify for the JSS has now dropped to 20% of 'usual hours'. More significant is the change in the amount of support the employer and government give in respect of the unworked hours. Employers are now expected to pay 5% of the unworked hours cost up to a cap of £125 per month (reduced from 33% of the unworked hours cost), while the government will pay 61.67% of the unworked hours (increased from 33%) up to a cap of £1,541.75 per month.

According to the government's latest factsheet (linked above) the contributions and caps are based on a reference salary of £3,125 per month. On this basis, at the minimum eligibility requirements, workers will receive 73% of their usual wages for working 20% of their usual hours. However, as with the previous iteration of the JSS, the employer is still responsible for paying all Class 1 NICs and pensions contributions on the total pay.

**More clarity on important details**

The previous factsheet for the JSS suggested (though it wasn't clear) that the government did not want employers to top up the wages of any workers who were on the JSS, but the latest factsheet has confirmed that employers can top up the pay of workers' placed on the JSS at their discretion, meaning they can pay above the 5% / £125 cap towards unpaid hours if they wish.

In addition, the latest Factsheet confirms claims may be made from 8 December. As before, claims will be submitted via an online portal through gov.uk. Clarity has also been given to "fully publicly funded" organisations that they are not expected to use the JSS, but "partially publicly funded" organisations are eligible where their private revenues have been disrupted.

As far as we are able to tell, all other eligibility and terms remain, including that an eligible worker must show on an employer's Real Time Information submission via PAYE on or before 23 September 2020 and the requirement that no eligible worker must be made, or receive notice

of, redundancy for any period in which the employer will claim support under the JSS in respect of that worker.

Full guidance on the JSS has yet to be released.

**Comment**

These changes to the proposed JSS will no doubt be welcomed by employers from all sectors. When the JSS was initially announced it signalled a significant reduction in the amount of support from government to employers than was available under the Coronavirus Job Retention Scheme.

However, it appears that the government has now reassessed the situation given the current trend towards higher Covid-19 infection rates and increasingly tough measures being taken to lockdown areas of the UK.

Many employers will of course already be undertaking redundancy consultation and these significant changes to the scheme at this late stage may cause confusion for employees and employers going through that process. Employers who are proposing job losses should consider alternatives to redundancies and ways to reduce and mitigate their effect. It will therefore be important that employers reconsider whether the JSS now provides such an alternative for some of those who may have been at risk of dismissal.

# HSE publishes helpful Covid-19 guidance for employers

Health and Safety Executive guidance includes advice on supporting vulnerable workers and first aid cover during the pandemic

Employers have a statutory duty to protect the health, safety and welfare at work of their staff as far as is reasonably practicable. As the Covid-19 pandemic rumbles stubbornly on, employers are continuing to work incredibly hard to ensure their workplaces are Covid-safe. The Health and Safety Executive (HSE) has recently added to its range of useful resources for employers navigating the health and safety implications of Covid-19.

**Supporting high-risk, clinically vulnerable and clinically extremely vulnerable staff**

Government advice remains that those who can work from home should work from home. Where workers must attend a workplace, employers should ensure that risk assessments are in place, regularly reviewed and robustly implemented.

HSE has published helpful guidance on protecting vulnerable workers during the pandemic. The HSE guidance considers the implications for employers who are dealing with staff who are in a group which has been identified as high risk and staff who are "clinically extremely vulnerable".

Higher-risk and clinically vulnerable staff

HSE notes the findings of Public Health England's important review of disparities in Covid-19 risks and outcomes which found that people in the following groups are at higher risk of being infected by Covid-19 and/or of suffering an adverse outcome if they do:

- older males;
- those with a high body mass index (BMI);
- those with some health conditions such as diabetes; and
- those from some black, Asian or minority ethnicity (BAME) backgrounds.

Although the statistics show that people in these groups are at a comparatively higher risk from Covid-19, employers are not currently advised to put in place additional health and safety controls for such staff. However, employers should ensure that Covid-19 controls for all staff are stringently applied. HSE recommends that employers highlight for all staff the importance of following Covid-safe measures, in part to protect higher-risk staff. Employers should also speak directly to higher-risk staff to ensure they understand the importance of those measures. HSE recommends that managers discuss with staff in these groups any particular concerns they have about safety in the workplace.

Government guidance on social distancing lists the factors which make people "clinically vulnerable" to Covid-19. These include being aged 70 or over, having a chronic condition such as diabetes, taking immune-suppressants, and bring pregnant.

In line with the current guidance for all, clinically vulnerable workers are advised to work from home if they can. If this is not possible, employers should in any event ensure that their Covid-19 controls are robustly applied. The Government recommends that "extra consideration should be given to those people at higher risk" of Covid-19 by employers.

The HSE guidance provides a useful reminder to employers of their health and safety duties to pregnant workers which continue to apply and should take into account the risks of Covid-19 infection.

Clinically extremely vulnerable staff

Those with certain health conditions or who are receiving certain medical treatments which increase the risks of infection were advised to shield until the beginning of August. Public Health England guidance on shielding provides details of those who fall into this "clinically extremely vulnerable" category.

Where possible, HSE advise that clinically extremely vulnerable workers should work from home. This may mean employers offering alternative roles or duties where this is an option. If it is not possible to facilitate home-working, clinically extremely vulnerable workers can attend the workplace. In that case, employers must regularly review their risk assessment and "do everything 'reasonably practicable' to protect these workers from harm".

HSE recommends that employers speak with clinically vulnerable staff and those who live with someone in this category to discuss what will be done to make the workplace Covid-secure. Employers should involve these workers in steps being taken to manage risks so that they can share their ideas and provide feedback on whether certain measures will work in practice.

Anecdotal reports suggest that not all people who fall into this group received a shielding letter and employers should not take a failure to provide a shielding letter to mean that a worker is not clinically extremely vulnerable. It is also important to note that employers may have a duty to make reasonable adjustments where policies and practices disadvantage a disabled worker, regardless of whether they are categorised as clinically extremely vulnerable. Employers should seek advice from medical professionals where necessary to ensure they are informed about any disability and any particular vulnerability to the virus. Please see our previous article, **In a world of change, equality law still applies** (link here) for more information on the risks of discrimination in the workplace associated with Covid-19.

Although UK-wide shielding advice is now paused, it is reported that shielding could be advised again in those areas designated as Tier 3 (areas where the risk of infection is highest). In that case, it is likely that clinically extremely vulnerable people will be advised not to attend the workplace. In the absence of any equivalent to the Coronavirus Job Retention Scheme, it is likely that such workers who are not able to work from home will be on leave qualifying as sick leave for SSP purposes.

**First aid provision and the safety of first aiders**

HSE has also recently published guidance on first aid in the workplace during Covid-19 which advises that employers should review their first aid at work needs assessment and include risks to first aiders from Covid-19 in their risk assessment.

The guidance highlights the importance of speaking to your first aiders about the risk assessment and any concerns they may have about delivering first aid at the moment, particularly if they are vulnerable to Covid-19.

Advice is included on minimising the risks of transmission of Covid-19 while delivering first aid, particularly in relation to adequate PPE for first aiders and changes to advice on administering CPR.

Employers are advised to assess whether they have sufficient first aid cover for the workplace and to consider sharing first aid cover with another organisation, but only where those who provide cover have the knowledge, experience and availability relevant to the work environment in question.

Because of backlogs in first aid training, First Aid at Work and Emergency First Aid at Work certificates remain valid until 31 October 2020 or for 6 months from the date of expiry, whichever is the later. Requalification training should be completed by 31 March 2021. However, this extension only applies where an employer can show that it has made every effort to arrange training and continues to have adequate and appropriate equipment, facilities and first aid cover for their work environment.

**The risk of health and safety related claims by workers**

Where staff refuse to attend for work or leave work because they have health and safety concerns, employers should be aware that they could later face legal claims based on allegations that they were disadvantaged because of that refusal to attend. To be successful in this claim an employee would need to show that they were subject to a detriment or unfairly dismissed for refusing to work in circumstances of danger which they reasonably believed to be serious and imminent. To reduce the risk of such claims, it is important that employers listen to staff concerns, consult on and put in place a thorough risk assessment, and ensure that control measures are rigorously implemented and reviewed.

## Does the Acas Code of Practice on Disciplinary and Grievance Procedures apply where an employee has blown the whistle?

EAT confirms the Acas Code of Practice applied where a protected disclosure led to dismissal.

The Acas Code of Practice on Disciplinary and Grievance Procedures (the Code) is statutory guidance which employers should take into account. Although there is no legal requirement to follow the Code in every detail, tribunals will take the Code into account when deciding whether an employer has acted reasonably in its handling of any disciplinary or grievance issue. If an employer decides to depart from the Code, it should have very good reason for doing so, for example because of the particular circumstances of the employee or organisation in question.

Tribunals can adjust any award made to an employee by up to 25% for unreasonable failure to comply with the Code. This adjustment can lead to a reduction in the award if the employee has failed to comply, or an increase in the award if the employer has failed to comply.

**When does the Code apply?**

The Code applies to disciplinary and grievance processes. It does not apply to redundancy dismissals or to dismissals on the non-renewal of a fixed term contract.

Furthermore, case law suggests that the Code will only apply to dismissal processes where there are allegations of 'culpable conduct' such as misconduct or poor performance, requiring correction or punishment. This suggests that the Code would not apply to a capability dismissal process where an employee has a health condition which means they are not capable of performing the role, and there is no suggestion that poor performance is a matter of culpability or blame. There may, however, be difficult cases where there is a crossover between conduct and capability concerns where it would be safer to ensure compliance with the Code.

Where an employee is dismissed or subject to detriments following whistleblowing, the application of the Code will depend on the particular circumstances of the case. It will apply where the employer alleges culpable conduct and a disciplinary process ensues. It will also apply where the employee's whistleblowing comes under the definition of grievances: "concerns, problems or complaints that employees raise with their employers". In most cases, this would cover any whistle-blowing complaint raised directly with the employer.

The Employment Appeal Tribunal has recently considered whether the Code applied to the dismissal of an employee which was found to be because of whistleblowing.

**Case details:** ***Ikejiaku v British Institute of Technology Ltd***

The claimant had been employed by British Institute of Technology (BIT) since 2013. It came to light that BIT had failed to deduct tax and National Insurance Contributions (NICs) from the claimant's pay. In October 2015, the claimant disclosed to the Principal Director of BIT that he had contacted HMRC, that HMRC had confirmed that BIT was not deducting income tax and NICs in relation to his pay, and that it should have been doing so (the 2015 disclosure). In 2016, the claimant was asked by BIT to sign a contract as an "self-employed contractor". BIT argued that this was in order to clarify the terms on which the claimant was engaged.

In 2017, the claimant disclosed to the Principal Director that the Associate Dean had asked him to give a pass mark to students whom the claimant had found to have copied from each other (the 2017 disclosure). The following day, the claimant was dismissed. BIT stated that the reason for the dismissal was a reduced requirement for lecturers.

The claimant brought claims for automatic unfair dismissal and detriments on the ground of protected disclosures (whistleblowing).

The tribunal found that the 2015 and 2017 disclosures were protected disclosures. It found that the claimant had been automatically unfairly dismissed because of the 2017 disclosure.

The tribunal also found that the claimant had been subject to a detriment when the self-employed consultant contract was imposed on him in 2016, and that this detriment was on the ground of the 2015 disclosure. However, the tribunal determined that the claimant's detriment claim was out of time. This was because the imposition of the consultant contract was a one-off act and the claimant had brought his claim more than three months after this act had taken place.

The tribunal determined that the Code did not apply to dismissals because of protected disclosures and so did not award the claimant an uplift on his unfair dismissal award.

On appeal the EAT agreed with the tribunal that the imposition of the consultant contract was a one-off act with continuing consequences rather than a continuing act. In making this

decision, the EAT noted that the tribunal had found that the only detriment caused by the 2015 disclosure was the imposition of the consultant contract, and that a number of detriments relating to the consultant contract (such as non-payment of tax and NICs by BIT) were not causally linked to the protected disclosure. In fact they had also occurred before the 2015 disclosure took place. The EAT noted that in some cases, "continuing act" detriments can occur, for example where an employer puts in place a policy or rule because of a protected disclosure and the implementation of this policy from time to time has a detrimental impact on the employee.

The EAT did not however agree with the tribunal that the Code did not apply to the dismissal. It held that the claimant's protected disclosure on the day before his dismissal was a grievance, as it fell within the Acas definition of grievances as "concerns, problems or complaints that employees raise with their employers". The employer should therefore have taken the Code into account. The EAT remitted this point back to the tribunal to reconsider the question of the uplift to be applied to the award.

**Should employers deal with grievances which are raised just before or after termination of employment?**

Employers would be well advised to deal with grievances raised by employees even if they are raised shortly before or after termination. It is possible that dealing with grievances will help to avoid an employment tribunal claim being brought. If a claim is brought, it will protect the employer from the risk of any tribunal award being increased on the basis that it unreasonably failed to follow the Code.

If the grievance overlaps significantly with a dismissal or other appeal process, it may be reasonable to deal with the concerns raised as part of that appeal. However ignoring concerns raised at a late stage in a process or after termination is not best practice and will increase the risks of claims.

Employers should also follow their own relevant disciplinary, grievance and whistleblowing policies, bearing in mind their overall duty to act reasonably and fairly in the circumstances. They should also make reasonable adjustments to procedures for disabled employees.

Please see our previous article, Serious one-off incident of discrimination was correctly placed in the middle vento band on a case in which an employment tribunal awarded a 25% uplift to an employee who had raised a grievance following termination of their employment.

## Use of information from WhatsApp group for a disciplinary process was not a breach of privacy rights

Is there a lower expectation of privacy for those working in certain professions?

Employees have a right to respect for private and family life, home and correspondence under Article 8 of the European Convention on Human Rights (ECHR). This right is not absolute: it can be interfered with where doing so is in accordance with the law, necessary in a democratic society, and in pursuit of a legitimate aim, such as public safety, the prevention of disorder or crime and the protection of the rights and freedoms of others.

Strictly speaking, private employers are not bound by the ECHR like public authority employers are, but all employers should take the right to respect for privacy into account in disciplinary proceedings because a tribunal or court (as a 'public authority') must interpret employment rights in a way which is compatible with the ECHR. This means tribunals must consider whether ECHR rights have been infringed when determining a matter before them. For example, if a

dismissal is based on information obtained in breach of Article 8 ECHR it is likely to make it unfair.

There have been several recent cases in the ECJ and EAT which have grappled with the competing rights of individuals to privacy with the rights of employers to use information gathered from social media and other sources for conduct procedures. For example, the case of *Lopez Ribalda and Others v Spain* considered the right of a supermarket to covertly monitor its employees via CCTV when there was a suspicion of criminal activity in the workplace. See our article on this case, **When will covert monitoring of employees be lawful?** here.

The case earlier this year of *Q v Secretary of State* for Justice considered whether the probation service breached an employee's privacy rights when dismissing her in relation to the alleged safeguarding risk she posed to her own child. See our article, **Was a dismissal for failing to disclose the employee's own safeguarding risk to her child unfair and in breach of human rights?** here.

A recent case from Scotland has considered the privacy rights of several police officers in the context of their employer's use of WhatsApp messages as part of disciplinary proceedings. The high standards expected of police officers in their professional and personal lives were fundamental to the decision of the courts.

**Case details: *BC and Others v Chief Constable of the Police Service of Scotland***

Whilst investigating a crime, police discovered the existence of a WhatsApp group in which several members (and potentially all) were determined to be police officers. The group members shared several questionable posts, including discriminatory and derogatory content and photographs of crime scenes and people who had been detained, in clear violation of police procedure rules.

The police referred the information to the Professional Standards Department within the police service, who subsequently opened disciplinary proceedings against the officers. The officers brought a an application to the Outer House of the Court of Session arguing that the use of the information sent in the WhatsApp group in disciplinary proceedings was a breach of their Article 8 ECHR privacy rights.

The officers' case was dismissed on the basis that they had no reasonable expectation of privacy in respect of the messages exchanged over the WhatsApp group, that the police service had a legitimate purpose to refer the information to Professional Standards, that such action was proportionate, and that it was reasonable for the information to be used in internal disciplinary proceedings against the officers.

The police officers appealed the Outer House's decision.

**The appeal**

All the grounds of appeal were dismissed.

The Inner House agreed with the Outer House's conclusion that the police officers had no reasonable expectation of privacy in these circumstances and so their privacy rights had not been infringed. If the officers' right to privacy had been infringed, the court determined that such interference would have been lawful.

Considering the key question of the expectation of privacy, the court was not persuaded by the officers' arguments that the WhatsApp groups had been set up strictly in a friendship capacity, noting that the group names ('Quality Polis' and 'PC Piggies') had a clear link to their jobs, as did items of information posted to the groups. The court also noted that the officers bringing

the case said that they were not friends with all the group members and indeed were not entirely sure who all the group members were, implying they were professional and not private groups.

Importantly, police officers in Scotland swear an oath to uphold fundamental rights and treat people equally before the law. The oath also requires officers to uphold the honesty, integrity, authority and respect of the service in Scotland and to report discreditable conduct whether on or off duty.

The link between the WhatsApp groups and the officers' roles, the fact that their role was a public office, and that each knew the groups were comprised of police officers who had sworn a duty to report discreditable conduct, all reduced the expectation of privacy of the WhatsApp group messages in the eyes of the court.

The Inner House agreed with the Outer House's conclusion that a reasonable person would view the messages as 'blatantly sexist and degrading, racist, anti-Semitic, homophobic, mocking of disability[…]' and that the referral of the messages to Professional Standards was made on legitimate grounds of prevention and detection of crime and in order to uphold the reputation of the police service in the eyes of the public.

The court noted that the information had not been obtained by surveillance or deception, but in the course of regular police duties.

Finally, the Inner House concluded that the Outer House judge was correct to determine that the information could be used as part of a disciplinary process because the disciplinary process would allow the officers opportunity to explain their actions and defend themselves against allegations of misconduct.

**Comment**

Public office and expectation of privacy

This case is one of many which considers the Article 8 ECHR right to privacy in the context of law enforcement but is helpful in that it considers this question in the context of a public official's right to privacy in a conduct investigation by their employer and/or professional regulator. It confirms that the fundamental exercise when determining the expectation of privacy is to weigh up the right to privacy in the full context of the particular circumstances, including the position of the individuals concerned and the content of the information.

In this case, several factors combined to lower the officers' reasonable expectation of privacy in respect of the information they shared. The fact that police are public officials and are under a sworn duty to report conduct that may discredit the police service was also a key factor here, given that the WhatsApp group was clearly linked to their work and several, if not all, members of these groups were serving officers.

Interestingly, the Outer House of the Court of Session commented that an ordinary member of the public would have had a reasonable expectation of privacy in using a WhatsApp group, although this question was not examined on appeal and the Inner House cast some doubt on this conclusion.

Application to other professionals

There are numerous members of professional bodies who are subject to specific standards who are not public officials. For instance, solicitors are subject to an obligation to act in a way that upholds public trust and confidence in their profession and the wider legal system. This includes a broad expectation to act with integrity, honesty and without discrimination, in a private as well as in a professional context.

Teachers are subject to Teachers' Standards, part 2 of which requires that teachers 'uphold public trust in the profession and maintain high standards of ethics and behaviour, within and outside school'. This includes a requirement that teachers observe proper boundaries with pupils, have regard to their statutory safeguarding duties, and show tolerance of and respect for the rights of others.

By their nature, standards of this kind will draw into question an individual's conduct both inside and outside of the workplace, which may lead to disciplinary proceedings by an employer and in some cases referral to a professional regulator if their actions have breached those standards.

In these circumstances, an employer will therefore need to consider the Article 8 ECHR privacy rights of an individual when deciding to take internal disciplinary action and when disclosing that information to a regulator. Even where an employee may have a reasonable expectation of privacy, there will be cases where the nature of the conduct involved justifies an interference with that right, for example in a teaching context where there is a safeguarding risk.

## Can we make an employee redundant during maternity leave or offer changed terms on her return to work?

Employees on maternity leave have special protections which employers should be aware of as they make key workforce decisions in the coming months

Employers are currently making very difficult decisions about their workforces in the light of tightening Covid-19 restrictions and the change in Government support for employment costs from 1 November. It is vital that employers are aware of the particular protections which apply to those employees who are currently on maternity leave where changes may be made to their terms and conditions or where redundancy is proposed.

**Consultation during maternity leave**

It is very important to ensure that employees on maternity leave are included in any consultation process and given the opportunity to contribute to that process. Aside from the risks of an unfair dismissal claim due to an unfair process, a failure to consult a woman on maternity leave could also be unfavourable treatment because of pregnancy or maternity and give rise to a discrimination claim. At present, it may be reasonable to agree to remote consultation meetings. Please see our previous article, **How should we consult with employees during covid-19?** for further detail (here).

**Does an employee on maternity leave have the right to return to the same job on the same terms?**

If the employee returns after 26 weeks' leave or less

An employee who takes only ordinary maternity leave (OML), who returns before the end of OML, or who combines maternity leave with a period of shared parental leave where the total leave is 26 weeks or less is entitled to return to the same job in which she was employed before her absence. Her terms of employment must be the same as, or not less favourable than, they would have been had she not been absent, unless a redundancy situation has arisen.

This protection also applies where an employee has taken a period of parental leave of four weeks or less.

If the employee has taken more than 26 weeks leave

There are different rules where the period of leave is more than 26 weeks; that is where the employee has taken any period of additional maternity leave (AML), has taken shared parental leave

which when combined with maternity leave amounts to more than 26 weeks, or has taken a period of at least four weeks' parental leave on top of OML. In this case, if it is not reasonably practicable for the employer to permit her to return to the same job, she is entitled to return to a different job which is both suitable for her and appropriate in the circumstances. The terms and conditions of that job must not be less favourable than they would have been had she not been absent.

This protection also applies where an employee has taken a period of parental leave of more than four weeks.

Employers who are proposing to alter terms and conditions of employment on the employee's return from maternity leave should ensure that they can show that the change to terms would have taken place regardless of the maternity leave. If employers are seeking to change the terms of a number of employees (including some who are not on maternity leave), and there are clear business reasons for the proposed change, it is likely that employers would be able to show that the change would have happened in any event.

The risks are higher where the employee returning from maternity leave is the only employee whose terms are changing. In that case, the employee might argue that the change in terms is discriminatory and an unlawful detriment because of pregnancy or maternity.

**Can we move an employee returning from maternity leave onto the new Job Support Scheme?**

Making use of the Job Support Scheme (JSS) to subsidise employment costs entails a change to contractual terms (a reduction in hours and probably also a reduction in pay and benefits). Employers will need to seek an employee's agreement to these changes if they are planning to make applications under the JSS and this agreement should be recorded in writing.

As set out above, there will be a risk of claims where an employee could argue that they have been asked to accept less favourable terms of employment because they have taken maternity or parental leave. Employers who can show that the offer of reduced hours and pay would have happened regardless of the employee's absence will be able to defend such claims. It is therefore very important to have a strong business case for the use of the JSS and the offer of changed terms which is unconnected to any maternity or parental leave.

Please note that we are awaiting full guidance on the Job Support Scheme, including how it will interact with maternity and other types of leave.

**What if there is a redundancy situation during maternity leave?**

Acas has published useful guidance on managing redundancy for employees who are pregnant or on maternity leave.

If a redundancy situation arises during an employee's maternity leave and "it is not practicable by reason of redundancy" for the employer to continue to employ her under her existing contract, the employee is entitled to be offered a suitable alternative vacancy (where one is available) to start immediately after her existing contract ends.

This does not mean that an employee on maternity leave should not be included in a redundancy pooling and selection process. Case law indicates that protecting a woman from such redundancy selection could give rise to sex discrimination claims from men who are included in the selection process.

However, the protection will be triggered once the employee on maternity leave is provisionally selected for redundancy following a selection process. This will also be the case where the employee on maternity leave is effectively in a "pool of one" because no-one else carries out the

same work, or where there the role being carried out by this employee is deleted in a restructure. Only at that point will it not be practicable by reason of redundancy for the employer to continue to employ her under her existing contract. And so it is at that point that the employer must offer her any suitable alternative vacancy in priority to other employees. The employee must not be asked to go through a further selection process or interview for the role (although an employer may need to use a fair process to decide between employees where more than one of those at risk of redundancy is on maternity leave and the role is suitable for each of them).

Confusion can sometimes arise where an employer is proposing to reduce the number of people carrying out the same role and one of those is on maternity leave. Employers sometimes believe it is safer to keep the employee on maternity leave out of the selection process. However, in this case, the employer should carry out a fair selection procedure including the employee on maternity leave. If the employee on maternity leave is provisionally selected for redundancy from the pool, the employer should then consider if there are any suitable alternative roles for her. This will not include any of the pooled roles as those will be taken by the employees who scored more highly in the selection and they will not be vacant.

Employer should of course ensure that the selection criteria used in a redundancy selection exercise are fair and non-discriminatory. Any pregnancy or maternity-related absence should not be counted when considering absence records. Any performance-related criteria should also account for the impact of any periods of absence due to pregnancy and maternity on an employee's performance.

If a suitable alternative vacancy exists but is not offered to the employee on maternity leave, she will have a claim for automatically unfair dismissal.

It should be noted that this entitlement applies to any suitable alternative vacancy within the employer organisation itself, within any successor organisation (where there has been a change in the legal ownership of the undertaking in which the employee was employed), or within an associated employer (such as a group company).

What is a suitable alternative vacancy?

A suitable alternative vacancy is a role where the work to be done is both suitable and appropriate for the employee to do in the circumstances and where the capacity and place in which she is to be employed, and the other terms and conditions of her employment, are not substantially less favourable to her than if the employee had continued to be employed in her old job.

There are risks for employers is assuming that a role will not be suitable for a particular employee and there is an argument that it is safer for employers to offer the role where there is doubt about suitability. For example, if a role exists at a location some distance from the employee's current place of work but on the same terms and conditions, it would be advisable to make the offer. All employees who are at risk of redundancy and are offered an alternative role have the right to a statutory four-week trial period.

If an employee refuses an offer of a suitable alternative role, her dismissal for redundancy is likely to be fair. If that refusal is unreasonable in the circumstances, the employee will also lose the right to a statutory redundancy payment.

Key points for employers

- Ensure that those on maternity leave are included in selection procedures where these are carried out.
- Once the employee on maternity leave is at risk of redundancy, consider if there any suitable alternative roles.
- If so, make the offer of a suitable alternative role in writing.

Entitlement to SMP will continue after dismissal

Where an employee who has qualified for Statutory Maternity Pay (SMP) is dismissed, her right to SMP will continue as it is not dependent on employment continuing. Employers should therefore factor in this continuing payment when proposing dismissals during maternity leave.

**Proposed extension to redundancy protections for those on maternity leave**

At present the right to be offered a suitable alternative role applies only while the employee is on maternity leave. The Government is however intending to extend the period of protection so that it starts from the date the employee informs her employer in writing that she is pregnant to a date six months after the end of maternity leave. These proposals are expected to be included in a new Employment Bill which will be brought forward when parliamentary time allows.

If you would like to contact us please email
**alacoque.marvin@wrigleys.co.uk**

**www.wrigleys.co.uk**