Covid 19 Employment Law Series
I: An Introduction

Andrew Sugarman: 24.3.20

Introduction

1. Following the Prime Minister's historic lock down announcement last night, 23 March 2020, employers and employees across the country will be wondering what the implications are for their businesses, employment and income.

2. Employment lawyers will be wondering the same following the announcement this morning from the Presidents of the Employment Tribunals that all in person hearings listed before Friday 26th June 2020 are to be converted to case management hearings by telephone or other electronic means. These are uncertain times and the pace of change is extraordinary.

3. This paper is the first in Parklane Plowden's proposed "**Covid 19 Employment Law Series**". Members of our Employment Team intend to produce, over the coming weeks and sadly it seems months, a series of articles looking at some of the implications of the pandemic on working life and relationships. This first paper is intended to highlight in limited detail some of the topics and issues that employers and employees are likely to be thinking about and needing to address following last night's announcement.

4. Future articles will look in more detail at particular issues, starting with an article about home working and substance abuse written by Gareth Price, to be published in the coming days.

The Lock Down

5. At 20:30 on 23 March 2020, Boris Johnson announced a package of measures that constitute the greatest restriction of liberty this country has ever seen in peace time. In terms of

employment, and continuing what might now be regarded as an undesirable habit, he ambiguously announced that the lockdown would not apply to

> "Travelling to and from work but only where this is absolutely necessary and cannot be done from home."

6. It was not clear whether that was intended to mean:

   a. *the work* in question needs to be absolutely necessary e.g. work being done by "keyworkers"; or

   b. *the travel* needs to be absolutely necessary to get to work i.e. it is acceptable to travel to do an "ordinary" job that simply cannot be done at home.

7. In other words, is it ok for an electrician to venture out to replace a light fitting in a customer's home for aesthetic reasons (because s/he needs to continue to earn a living); or can they only go out if there are some dangerous exposed wires creating a fire risk that it is necessary to remedy?

8. A cynic might say the ambiguity is deliberate. The Government is trying to strike a balance between protecting the health of its citizens, and being seen to do so, and mitigating damage to the economy. The lack of reference to keyworkers or any attempt to explain what might be regarded as "absolutely necessary" work suggests the intention is that people should work at home when they can but if they cannot, they are permitted to attend work even if the work they are doing is not regarded as absolutely essential i.e. they are not keyworkers.

9. The Government published guidance on Gov.Uk[1] later last night making clear, I thought, the exception applied in scenario b i.e. it applied to all work where homeworking was not possible:

> "Travelling to and from work, but only where this absolutely cannot be done from home"

10. However, a later "Emergency Covid 19 Alert" issued by the Government suggested the opposite:

[1] https://www.gov.uk/government/publications/full-guidance-on-staying-at-home-and-away-from-others/full-guidance-on-staying-at-home-and-away-from-others?mc_cid=797dc2f154&mc_eid=a9ac8178aa

> "The only reasons you may leave home are…to go to work (if you're a key worker)"

11. That however has now been replaced with another more recent "Emergency Covid 19 Alert" which reads:

> "The only reasons you may leave home are…to go to work (but work from home if possible)"

12. In a well-publicised tweet last night, the Mayor of Manchester Andy Burnham said he had spoken to No 10 who had confirmed:

> "…people CAN leave home to work – as long as they fully observe the 2m distancing rule. Seems to me to be in conflict with the big #StayAtHome message. But that's the official policy"

13. It seems Messrs Johnson and Cummings have slipped from their tried and tested policy of clear messaging: one might ask is anyone "taking back [or in] control" right now?

14. The difficulty with an approach of deliberate (or indeed accidental) ambiguity of course is widespread uncertainty. Are all employers entitled to ask their employees to attend at work or only those in key areas? Do all employees need to turn up to work today until told otherwise?[2] What should they be paid if they are off? How does one define a business activity that is necessary in any event?[3] To what extent is homeworking really possible for a particular business? What about those looking after children who are off school? How much pay are employees entitled to if they are not at work?

15. There are no easy answers to a number of these questions and different businesses will, and will need to, approach matters in different ways.

16. However, some of the issues ought to be borne in mind when decisions are being made about how to proceed. It should be remembered that despite the exceptional times, unless specifically deviated from, ordinary employment law rights and rules continue to apply.

[2] As an aside, all barristers on the North Eastern Circuit were told last night by the Circuit Leader not to turn up to court today.
[3] Mike Ashley, everyone's favourite pantomime villain, appears to be of the view that selling discounted Lonsdale bags is an essential activity his staff should be engaged in at the moment.

Home Working

17. Whether there is a contractual right or not to request or require home working, it is likely to be regarded as a reasonable management instruction at the current time. It is also not likely to be one generally objected to.

18. Employees asked to work at home are entitled to receive their normal contractual pay, unless the contract provides otherwise - which is highly unlikely. Many employers will have Homeworking Policies already. Others may wish to adopt one forthwith.[4] Such policies ought to cover issues such as hours of work, expenses, health and safety, use of equipment, data protection and information security.

Furlough: The Coronavirus Job Retention Scheme

19. I have already been asked to advise on a number of occasions about this issue and anticipate it will now shoot to the top of many employers' agendas.

20. The Coronavirus Job Retention Scheme was announced by the Government on 20 March 2020. It is a startling intervention from any government, let alone a Conservative one. It is intended to support employers to keep employees in employment rather than have them be made redundant, and involves the government paying a large proportion of the wages of those not working:

    a. It applies to all employers, small or large, charitable or non-profit, limited companies or sole traders;

    b. It applies if employees are placed on 'furlough'[5] leave rather than being dismissed;

    c. The government has undertaken to reimburse 80% of wages of a furloughed employee up to a maximum of £2,500 per month;

[4] Chambers can assist with such provision if required.

[5] Furlough is not an existing employment law concept and is not defined within the corpus of employment law statutes. In essence, it means employees are sent home but kept on the payroll, though not required to work, essentially a quasi-medical suspension.

d. It will apply to employees on the payroll on 1 March 2020;

e. Payments will be available from the end of April but backdated to 1 March;

f. The scheme will be open initially for 3 months but may be extended.

21. To access the scheme, the Government have said that employers need to[6]:

a. Designate affected employees as "furloughed workers" and notify employees accordingly: this is however "subject to existing employment law" and "depending on the employment contract, may be subject to negotiation";

b. When the new portal is live, submit information about the employees who have been furloughed and their earnings.

22. Given this scheme does not replace or modify employment law rights between employer and employee, ordinary employment law principles apply. That means an employer cannot reduce an employee's pay[7] whether they are required to work fewer hours or no hours, without express contractual authority to do. There is a common law right to tell employees not to attend at work but, absent a contractual right, no right not to pay them. Therefore:

a. The contract must expressly permit such a change; or

b. There must be fresh agreement between employer and employer to implement the change.

23. The latter is the route most employers will wish to take. One would think given the current pandemic and in the face of what must otherwise be a risk of redundancy, most employees would be more than willing to agree to "furloughed worker" status if in effect it means staying at home (hopefully the sunshine will continue), not working but continuing to receive 80% of pay up to £2,500 per month.

[6] https://www.gov.uk/government/publications/guidance-to-employers-and-businesses-about-covid-19/covid-19-support-for-businesses#support-for-businesses-through-the-coronavirus-job-retention-scheme

[7] Whether down to 80% or indeed to any other level.

24. Guidance given to employees[8] suggests that that they must not undertake work for their employers whilst "furloughed". It also suggests that employers do not need to top up the remaining 20% of pay though, again, that is subject to the contractual position and possibly negotiation.

25. At present there are many unanswered questions in relation to the operation of the scheme, such as:

    a. What happens if the business cannot be resurrected at the end of the scheme's operation or cannot be sustained for long thereafter?

    b. Is the £2,500 figure gross or net?

    c. Does the £2,500 cap relate to the employee's salary or the money the HMRC will reimburse?[9]

    d. What pay will be covered: benefits, bonuses, overtime?

    e. How does it interact with sickness? Can a sick worker (who would otherwise be entitled to full contractual pay or perhaps SSP) be furloughed?

26. What is clear is that this is likely to be an attractive option for many businesses and employees. It is key to remember that contractual rights cannot be ignored. Particular thought will need to be given to those who earn more than £3,125.00 per month given 80% of their pay will be more than the money the government intends to refund. Employers will also need to think carefully about how they their word agreements with employees e.g. are they promising to pay 80% of normal pay or is the promise conditional on the employer being refunded by the government? If the latter, given the wages will be paid by the employer, does the employer really intend to claw back wages paid? How?

[8] https://www.gov.uk/government/publications/guidance-to-employers-and-businesses-about-covid-19/covid-19-guidance-for-employees

[9] It is almost the figure the Government are willing to reimburse.

Varying Contractual Rights: Reducing Pay and/or Hours

27. As above, the starting point is that absent a contractual right to reduce hours and/or pay, unilateral variation by the employer will constitute a breach of contract. Such a right would ordinarily be found in the contract itself but could, in probably exceptional circumstances, be implied as a result of custom and practice.

28. Sometimes contracts seek to reserve to the employer a general right to make variations to terms from time to time as it sees fit. Depending on drafting, such clauses can be effective but should not be thought by employers as automatically giving wide unfettered rights to change contractual rights to the detriment of employees. Tribunals and courts take a strict approach to the interpretation of such clauses: clear and unambiguous wording is usually needed to create a power to unilaterally vary terms. Further, the scope of express clauses can be limited by implied ones, such as the implied duty not without reasonable cause to act in a manner calculated or likely to destroy or seriously damage mutual trust and confidence.

29. As Lord Woolf MR said in ***Wandsworth LBC v D'Silva*** [1998] IRLR 193

> The general position is that contracts of employment can only be varied by agreement. However, in the employment field an employer or for that matter an employee can reserve the ability to change a particular aspect of the contract unilaterally by notifying the other party as part of the contract that this is the situation. However, clear language is required to reserve to one party an unusual power of this sort. In addition, the court is unlikely to favour an interpretation which does more than enable a party to vary contractual provisions with which that party is required to comply.

30. Variation clauses which identify the particular terms that can be varied are far more likely to find favour than widely drafted general variation powers.

31. If there is no such right, unilateral variation will give rise to potential claims from employees for:

    a. Unlawful deductions / breach of contract;

    b. Constructive dismissal if they resign in response and have 2 years' service.

32. It would probably be a brave (foolish?) employee who chose to resign in response to a reduction in hours / pay in the current climate.

33. Absent a contractual power to vary, there are therefore 3 main options open to an employer wishing to reduce hours and pay:

    a. Get agreement with the workforce: that may pose practical difficulties at this particular time with many employees not even present in the workplace;

    b. Absent agreement, impose the terms unilaterally: this however comes with the aforementioned risks of claims for breach of contract / constructive dismissal. Indeed, if an employer imposes radically different terms and conditions unilaterally and the employee continues to work under protest, the correct analysis may in fact be that there has been a dismissal by the employer and immediate re-engagement, giving rise to a right to claim unfair dismissal (a "***Hogg v Dover***" dismissal, per ***Hogg v Dover College*** [1990] ICR 39);

    c. Dismiss and re-engage on new terms and conditions: any employer wishing to do this would need to act very carefully and ensure they act fairly, properly consulting and having a sound business reason for the change, lest they risk successful claims of unfair dismissal.

    d. Moreover, if more than 20 employees are affected, the collective redundancy consultation provisions found in the Trade Union and Labour Relations (Consolidation) Act 1992 may apply. The provisions found therein relating to consultation periods may be difficult to comply with given the urgency of the current crisis. It ought not to be assumed that the "special circumstances" defence found in s188(7) TULR(C)A will definitely apply either.

34. Agreement is obviously preferable if that can be achieved. Consultation is key whatever route employers choose. Many employers have embarked on this process already and are using technology to assist them. Others will find that more difficult.

Statutory Lay Off/ Short Time Working

35. If there is a contractual right or fresh agreement to send employees home with reduced (or no) pay, or a right to reduce their normal working hours, employers and employees ought to be aware that employees may acquire a right to a redundancy payment in any event by reason of the little used statutory provisions relating to lay off and short time working.

36. Before turning to the statutory provisions, it is worth noting that if there is right to lay off / impose reduced hours, it is not usually subject to any implied contractual reasonableness term limiting its duration.

37. "Lay off" is often used colloquially to mean redundancy. That is not however its technical statutory meaning. In s147(1) of the Employment Rights Act 1996, an employee is taken to be "laid off" if:

    a. he is employed under a contract on terms and conditions such that his remuneration under the contract depends on his being provided by the employer with work of the kind which he is employed to do, but

    b. he is not entitled to any remuneration under the contract in respect of the week because the employer does not provide such work for him.

38. Short-time working on the other hand applies, per s147(2):

    "…if by reason of a diminution in the work provided for the employee by his employer (being work of a kind which under his contract the employee is employed to do) the employee's remuneration for the week is less than half a week's pay."

39. The statutory provisions are fairly labyrinthine. The key points are:

    a. A redundancy payment will only be available for employees who have 2 years' service;

    b. Employees must be laid off or kept on short-time working for the required length of time, namely

i. 4 or more consecutive weeks[10]; or

ii. A series of 6 or more weeks (of which no more than 3 are consecutive) in a 13 week period.[11]

c. The employee must serve a written notice on the employer stating an intention to claim a redundancy payment ("notice of intention to claim")[12];

d. The employer can counter serve notice within 7 days of the notice of intention to claim if it wishes to contest a liability to pay. If so, a Tribunal decision is required;

e. The right to the payment is not triggered unless the employee resigns by giving the notice required under the contract and does so within 3 weeks of giving the notice of intention to claim, the employer's counter notice or the Tribunal's decision on the reference;[13]

f. A redundancy payment as a result of lay off/short-time working is not payable if the employee is dismissed by the employer (though an "ordinary" redundancy payment may be payable);

g. A redundancy payment under these provisions is not payable if on the date the notice was served by the employee, it was reasonably to be expected that the employee would, not later than 4 weeks after that date, enter a period of employment of not less than 13 weeks during which he would not be laid off or kept on short time for any week.[14]

40. Employers "laying off" employees pursuant to the new "furlough" arrangements with the aim of utilising the Coronavirus Job Retention Scheme provisions ought to be aware of these existing lay off provisions for they *could* theoretically lead to an unforeseen liability to make redundancy payments should the threshold criteria apply *and* should an employee serve the

[10] S148(2)(a) ERA 1996
[11] S148(2)(b) ERA 1996
[12] S148(1)(a) ERA 1996
[13] S150 ERA 1996
[14] S152 ERA 1996.

relevant notice and resign. The likelihood of that happening in the current climate is however probably very slim.

41. An employee laid off or on short time working may also be entitled to a Guarantee Payment under s28 Employment Rights Act 1996. In essence, this is the current furlough scheme and it provides next to nothing for employees.

42. The definitions are a little different from the redundancy provisions:

> Where throughout a day during any part of which an employee would normally be required to work in accordance with his contract of employment the employee is not provided with work by his employer by reason of—
>
> a. a diminution in the requirements of the employer's business for work of the kind which the employee is employed to do, or
>
> b. any other occurrence affecting the normal working of the employer's business in relation to work of the kind which the employee is employed to do,
>
> the employee is entitled to be paid by his employer an amount [a Guaranteed Payment] in respect of that day.[15]

43. There is little point spending too much time on this in this paper because the entitlement is frankly measly:

    a. The daily entitlement is £29 (£30 from 1.4.20);

    b. It applies only for 5 "workless days" in a 3 month period;

    c. Thus, the current maximum payment per employee is £145 over a 3 month period.

44. The contrast with the proposed provisions of the Coronavirus Job Retention Scheme is stark.

[15] S28(1) ERA

Redundancies

45. With many businesses being forced to temporarily close and others choosing to, it is likely that many workers are redundant, as defined by s139 Employment Rights Act 1996, either because their employer has ceased or intends to cease to carry on the business for the purposes of which the employee was employed or, more likely, the requirements of the business for employees to carry out work of particular kind generally or in the place where the employee was employed have ceased or diminished or are expected to do so.

46. The purpose of the Coronavirus Job Retention Scheme is of course to avoid redundancies and many businesses will want to do so anyway. However, some may not or may not be able to do so.

47. Any dismissal for redundancy will need to be carried out fairly in the ordinary way lest the employer risk a claim for unfair dismissal. As such, despite the crisis, employers ought to

    a. Adequately warn;

    b. Properly and fairly consult, individually / with unions as appropriate;

    c. Adopt fair selection criteria;

    d. Apply the criteria fairly in a fair process;

    e. Consider alternative employment (if appropriate).

48. Employers making redundancies will become liable for statutory and/or contractual redundancy payments in the ordinary way. As above, if more than 20 staff are affected, the collective consultation provisions will likely apply and ought to be followed as far as possible. The financial risks to employers from large protective awards are considerable.

Pay: SSP / Contractual Sick Pay

49. If an employee does not attend work because they are following advice to self-isolate because they are experiencing coronavirus symptoms or because they live with someone with

symptoms, after some initial confusion, it is now clear they are going to be entitled to statutory sick pay.

50. With effect from 13 March 2020 the Statutory Sick Pay (General) (Coronavirus Amendment) Regulations 2020, which amend the Statutory Sick Pay (General) Regulations 1982, provide that someone is deemed incapable of work where he is:

> "isolating himself from other people in such a manner as to prevent infection or contamination with coronavirus disease, in accordance with guidance published by Public Health England, NHS National Services Scotland(d) or Public Health Wales(e) and effective on 12th March 2020."

51. It is worth noting that these are deeming provisions. Contractual sick pay schemes may not have similar deeming provisions and thus may not catch those isolating but who are not presently unable to work through sickness. Query whether employers would wish to encourage such employees to attend the workplace by depriving them of contractual sick pay.

52. Employees can of course self-certify for 7 days. After 7 days, the Government has launched "Isolation Notes" which can be accessed through NHS website/ 111 online and avoid the need for employees to visit their GPs to obtain fit notes.

53. Statutory sick pay is currently paid at £94.25 per week. There has been much discussion about the adequacy of that sum but there is, as yet, no proposal to increase it.

54. The government announced on 11 March 2020 that SSP will be made available from day 1 rather than day 4. The Chancellor also announced the Government will reimburse small employers (<250 employees) any statutory sick pay they pay to employees, for the first 14 days of sickness. There are provisions in the Coronavirus Bill currently making its way through Parliament enabling the Secretary of State to make Regulations to being into effect these promises.

55. It remains the case that if an employee does not attend work when otherwise required because they are generally worried about catching the virus (and they are not in vulnerable group specifically advised not to attend to work), it would appear they are not entitled to statutory sick pay (nor are they likely to be entitled to contractual sick pay.

56. Whether an employer could fairly take disciplinary action (or would wish to) in the face of such non-attendance may depend on other factors, such as whether the employer has put in place sufficient measures to protect employees, such as to enable workers to comply with other advice on social distancing and hygiene.[16]

Annual Leave

57. In essence, the normal rules apply. Employees may prefer to take this rather than get paid SSP.

58. Employers cannot require employees to take holidays if they are sick. If they are not sick, and depending on the terms of contracts, employers may require workers to take holidays, if the correct notice is given. If a contract is silent on the notice to be given, an employer should give twice as much notice as the period of holiday leave. This may provide an attractive solution to some employers.

Discrimination Issues

59. A number of discrimination issues may arise and specific advice ought to be sought given the potential unlimited compensation exposure and the complex nature of the issues that can arise.

60. For example:

    a. Reasonable Adjustments[17]: those with underlying health conditions that amount to a disability will require reasonable adjustments. That may include allowing such employees to comply with medical advice from Public Health England to shield or self-isolate, even if they are not presently ill;

[16] By way of example, as a chambers, we recently made a decision that in order to properly comply with our duty of care to our pupil barristers, we should not require them for the foreseeable future to attend in person hearings in courts and tribunals, where we have no control over the environment and adequacy of the risk reduction measures in place. They are to conduct remote hearings only for the foreseeable future.

[17] S20/21 of the Equality Act 2010

b. Indirect sex discrimination: with schools closed, it is likely more mothers than fathers who ordinarily would be at work may find themselves into the role of primary care giver. An employer who does not take their needs into account may find itself on the wrong end of an indirect sex discrimination claim;

c. Age discrimination: the over 70s have been given different advice from most of the rest of the population. If an employer does not have regard to that, there is again a risk of an indirect discrimination claim;

d. Pregnancy discrimination: pregnant women have been given different advice too. Employers ought to avoid putting pregnant women in a difficult position and may need to treat such employees differently given their different health and safety needs;

e. Race discrimination: there are unfortunately some horrifying, despicable but thankfully isolated examples of ignorant racist attacks relating to Covid 19.

Time Off to Look After a Dependent

61. "Employees" are entitled to time off to look after dependents in the case of emergency or an unexpected event such as when the dependent falls ill or because of the unexpected disruption or termination of arrangements for the care of the dependent[18]:

    a. This is unpaid leave unless the contract says otherwise;

    b. Dependents include spouses, partners, children, parents but also a person who would rely on them for help in the case of an accident or emergency such as an elderly neighbour;

    c. The time off must be reasonable for the situation – there is no statutory minimum or maximum;

[18] Section 57A Employment Rights Act 1996.

d. The employee must tell the employer as soon as reasonably practicable the reason for the absence and how long s/he intends to be absent;

e. This is likely to be relevant given the school closures as of 20 March 2020.

Conclusions

62. The above is by no means an exclusive list of the employment issues that Covid 19 is throwing up, nor is it an in-depth analysis of those issues. It is intended to provide food for thought for employers and employees at what is a very difficult and novel time for everyone.

63. Needless to say, if the team at Parklane Plowden can assist in any way with such issues, or if you have any suggestions about topics that you would like to see covered in our forthcoming Covid 19 Employment Law Series, you know where we are: at home, probably teaching Geography badly to our kids.

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https://www.parklaneplowden.co.uk/barristers/andrew-sugarman