

# **Covid 19 and the return to work: problems, practice and pitfalls**

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# Agenda

**1: Health and safety considerations**

**2: Discrimination and harassment**

**3: Family-friendly rights; disciplinary  
and grievance policies**



# Introduction

- **The latest Government position**
- **Specific workplace guidance**
- **Regional variations**

# Health and Safety at work

- General and sector-specific guidance
- The common law duty of care
- The implied contractual term to provide a safe a suitable work environment
- The legislative framework

# H&S Key Legislation (1)

- Section 2(1) Health and Safety at Work Act 1974:

*“It shall be the duty of every employer to ensure, so far as it reasonably practicable, the health, safety and welfare at work of all his employees.”*

- Breach is a criminal offence and can be relied on in civil proceedings

# H&S Key Legislation (2)

- The Management of Health and Safety at Work Regulations 1999 (Regs 3-6, 7, 8, 10, 12, 13)
- The Workplace (Health, Safety and Welfare) Regulations 1992 (Regs 5, 6, 9, 10-12, 17, 20-25)
- The Personal Protective Equipment at Work Regulations 1992 (Regs 4-7, 9, 10)
- The Control of Substances Hazardous to Health Regulations 2002 (Regs 6, 7, 10, 12, 13)

# Guidance v H&S Law

- Interplay between the Government guidance and the applicable H&S law
- Inconsistencies and how to address them

# Reg 4 - PPE Regs

- (1) ..... every employer shall ensure that suitable personal protective equipment is provided to his employees who may be exposed to a risk to their health or safety while at work except where and to the extent that such risk has been adequately controlled by other means which are equally or more effective.
- (3) ..... personal protective equipment shall not be suitable unless —
  - (a) it is appropriate for the risk or risks involved, the conditions at the place where exposure to the risk may occur, and the period for which it is worn;
  - (b) it takes account of ergonomic requirements and the state of health of the person or persons who may wear it....
  - (c) it is capable of fitting the wearer correctly, if necessary, after adjustments within the range for which it is designed;
  - (d) so far as is practicable, it is effective to prevent or adequately control the risk or risks involved without increasing overall risk.....



# Managing the return to work

- The risk assessment process: identifying and managing risks to H&S
- Not a one-off task - need for flexibility
- Effective implementation
- Monitoring and review
- Consultation with workers / reps
- Gaining employee buy-in / support

# Issues for consideration - examples

Work from home

Working hours / shifts

Entry and exit

Population density

Ventilation

Workspace / distancing

Work equipment

Cleanliness and hygiene

Common areas

Showers and changing rooms

Drinks / catering

Work-related travel

Third party attendances

Getting to/from work

Health / symptom monitoring

Moving around

Segregation / worker `mini-pods`

The work activities

Communications & meetings

PPE

Ventilation

Toilets / hand hygiene

Lockers / storage of belongings

Rest areas / facilities

Deliveries

Emergency planning

# What`s in the Legal Minefield?

- H&S detriment / dismissal – S.44/100 ERA
- PID claims – S.47B/103A ERA
- Breach of contract / constructive dismissal claims
- Discrimination – various EqA claims

# Health and Safety – S44(1) ERA

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

(2) For the purposes of subsection (1)(e) whether steps which employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

# H&S claims

- Employee refusals to return / walk-outs / refusal of certain duties etc
- A day 1 right available to employees
- Serious and imminent danger – broadly interpreted
- Belief elements likely to be key
- Disciplinary action / dismissal – high risk
- The only answer – consultation/communication/agreement and buy-in
- Record-keeping

# PID Claims

- Health and safety one of the six categories – S47B(1)
- Wider range of potential claimants
- Potential interim relief claims
- If in doubt – assume PID and act accordingly
- Deal with concerns quickly and proactively
- Ensure other employees / agents understand – no detrimental treatment permitted.
- Record-keeping

# Performance of the contract / management prerogative v implied terms

- Implied terms:
  - Safe / suitable working environment
  - Trust and confidence
- Resolving the tensions – where will the balance lie?

# EqA Claims

- Disabled and pregnant employees will require separate consideration and potentially, additional steps to be taken
- NB: potential for H&S concerns to also amount to protected acts for victimisation purposes.



# Discrimination and harassment

## Concerned with issues/potential claims that might arise out of:

- Requiring workers to return to the physical workplace from homeworking
- Decisions to end or continue furlough

# Discrimination and harassment

## Government position on return to workplace

- Could start happening imminently
- Most recent announcement on lockdown restrictions (w/e from 13.5.20) did not actually change them re work, BUT ... shops now opening from 15 June
- Further announcements likely in near future

# Discrimination and harassment

## Extension of Job Retention Scheme

- Latest HMRC Guidance (14.5.20): runs to end July
- August – October: Part time work permitted (details tbc)
- No new employees on furlough after end July
- Many big decisions put off to October

# Discrimination and harassment

## Problems

- (a) Factory or shop wants to re-open; employer considers safe systems devised and in place. Bring back from furlough?
- (b) Office based employer wants to start bringing people back into the office. Some WFH, some on furlough

*[Redundancies: not this webinar!]*

# Discrimination and harassment

Decisions to be made in logical order:

- (1) Bring back those currently on furlough?
- (2) Whether to ask those coming off furlough, to come back into the workplace?
  - = Will consider “Risk Groups” for employers, asking both questions re each

# Discrimination and harassment

Key groups where issues likely to arise:

- **Pregnant** workers
- **Disabled**/shielding (with relevant disability)
- Those with **child care problems**

= May well want to stay on furlough or WFH

# Discrimination and harassment

## Pregnant workers

- If suits both parties: continued furlough not likely to pose problem of discrimination
- She might want to end furlough, to restore full pay. If bringing others back, excluding because pregnant = s.13 or s.18
- **Workplace?** WFH best; extra caution/risk assessment: reg.16, MHSW Regs 1999

# Discrimination and harassment

## Disabled/shielding: ending furlough?

- If relevant disability increasing risk: tricky issues
- Initial conflict between TD and HMRC Guidance on shielding appears resolved: assume furlough permissible
- Not obvious detriment/less favourable treatment to be required to RTW from furlough *per se*



# Discrimination and harassment

- Employee might want to end furlough with others to restore full pay. Excluding because disabled/unable to return to workplace = probable s.13 or s.15
- RTW likely to be working from home
- If cannot WFH, might have to keep on furlough, but consider topping up pay as reasonable adjustment/to avoid unfavourable treatment

# Discrimination and harassment

## Return to workplace?

- Policy of asking to return to workplace = PCP
- Substantial/particular disadvantage for s.20/s.19
- Probable duty to make adjustments; reasonableness going to justification
- Discussion required

# Discrimination and harassment

## After 30 June?

- Shielding technically ends. Courts/tribunals not likely to adopt bright line
- But will affect eg reasonableness of adjustments to some extent

# Discrimination and harassment

## Those *living with shielders*: return to workplace?

- Discrim by association (***EBR Attridge Law v Coleman (No 2) IRLR 10 (EAT)***) prob. limited to direct/harassment
- Would need to be targeted for RTW in some way to succeed. Eg on 1 July?
- Might well have s.44/s.100 ERA 1996 claims instead
- Just let them continue working from home

# Discrimination and harassment

## Childcare issues

- May want to stay on furlough, or WFH (as applicable)
- Claims? Poss. Indirect v women, but:
  - Disadvantage: can/should we still assume women do most childcare?
  - Objective justification may be a problem:  
Discuss/consult!

# Discrimination and harassment

- Other women may want to *return* from furlough
- Plenty of reasons: esp. higher earners. Dangerous to make assumptions about women with children
  - Risk of direct discrim (s.13)

# Discrimination and harassment

## Harassment

- Tensions likely to be running high; balancing competing interests
- Careful what you say!
- Potential for s.26 claims, even where no detriment or less favourable treatment

# Discrimination and harassment

## Protection from Harassment Act 1997

- 1(1A) A person must not pursue a course of conduct –
- (a) which involves harassment of two or more persons, and
  - (b) which he knows or ought to know involves harassment of those persons, and
  - (c) **by which he intends to persuade any person** (whether or not one of those mentioned above) –
    - (i) **not to do something that he is entitled or required to do**, or
    - (ii) **to do something that he is not under any obligation to do**
- (3) Subsection (1) [or (1A)] does not apply to a course of conduct if the person who pursued it shows ...
- (b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or
  - (c) **that in the particular circumstances the pursuit of the course of conduct was reasonable**



# Discrimination and harassment

- Employer with reluctant workforce: seeks to press them into returning to the workplace
- County Court claim; if small claim (up to £10k), no costs shifting
- Vicarious liability: ***Majrowski v Guy's & St Thomas's NHS Trust [2006] IRLR 695 (CA)***
- Possibility of injunction: ***Iqbal v Dean Manson Solicitors [2011] IRLR 428 (CA)***

# Discrimination and harassment

## Advantages for C (problems for R):

- No protected characteristic needed
- No detriment or dismissal
- No resignation (constructive dismissal)
- Just need course of conduct (2 instances) and sufficiently serious conduct: “calculated” to cause alarm or distress; “oppressive and unacceptable”:  
***Veakins v Kier Islington [2009] IRLR 132 (CA)***

# 'Family friendly' rights

- **Examples:**
  - Pregnancy and maternity rights: see H & S and discrimination law
  - Parental leave
  - Dependants leave
  - Right to request flexible working
- **Interaction with other areas:**
  - Implied term of mutual trust and confidence
  - Express contractual rights
  - Discrimination law

# Parental Leave

- Requirements:
  - Employee
  - 1 year's continuous service
  - Max. 18 weeks per child; 4 weeks per child per year
  - 21 days' notice required
  - Possibility for employer to postpone
  - Taken in periods of a working week
  - Unpaid
  - Protection from detriment/dismissal
- Areas to consider:
  - Contract may provide greater protection
  - Return to work
  - Interaction with restructuring/redundancy

# Dependents leave

- Requirements:
  - Employee (no need for qualifying service)
  - Action 'necessary' for specific reasons, including (s. 57A(1) ERA):
    - (a) to provide assistance ... when a dependant falls ill ...*
    - (b) to make arrangements for the provision of care for a dependant who is ill ...*
    - (d) because of the unexpected disruption or termination of arrangements for the care of a dependant ...*
  - Time off must be 'reasonable'
  - Employee must tell employer 'as soon as reasonably practicable'
  - Unpaid
  - Protection from detriment/dismissal
- Areas to consider:
  - 'Unexpected'/'reasonable' during Covid-19

# Right to request flexible working

- Requirements:
  - Employee
  - 26 weeks' continuous employment
  - Formal requirements for qualifying request
  - Can cover part-time; homeworking; different times/hours
  - Deal with in a reasonable manner (see *ACAS Code of Practice*)
  - Refusal only on specified grounds
  - Protection from detriment/dismissal
- Areas to consider:
  - Operating a 'reasonable' procedure during the pandemic
  - Interaction with discrimination

# Disciplinary and Grievance Policies

- Updating policies to reflect the current situation:
  - Changes to procedure (remote hearings/social distancing in meetings)
  - Changes to substance (specifying Covid-19-related grounds of misconduct)
- Contractual/non-contractual

# Conducting a fair process during Covid-19

- Interaction between disciplinary/grievance process and furlough
- Steps to ensure fairness of the procedure:  
*ACAS Disciplinary and grievance procedures during the coronavirus pandemic*
  - Remote investigation and data protection?
  - Right to be accompanied?
  - Effective participation?
- Approach to Covid-19-related misconduct
  - Perspective of the person raising a grievance
  - Perspective of the person being disciplined