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# SBT

**LEGAL**

**EMPLOYMENT LAW: REVIEW OF THE YEAR 2020**

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# Employment Law: Review of the year 2020

I have written various updates for SBT over the year and these have of course been dominated by COVID 19 and the effect it has on the employment relationship.

By Alex Jones, Managing Director, 365 Employment Law

## Legal

Most of the talking points throughout the year followed difficult decisions that employers had to make, relating to the health of their staff, and the economic consequences of COVID. Those short term issues have now turned into long term issues as the long term effects, some positive, some negative on working conditions take hold.

### 1) COVID 19 and Furlough

Prior to late March 2020, the concept of furloughing in staff in the UK

employment relationship simply did not exist. In response to the economic challenges the COVID pandemic was presenting, the Chancellor, Rishi Sunak, introduced the concept of paid furlough leave for staff, to essentially place them in hibernation for a period of time, and to assist business through any closures, reductions in turnover etc.

Certain areas were heavily impacted, including catering and hospitality, temporary recruitment, and travel and tourism. The impact was immediate. As the pandemic took off in March, I had employer client's from various areas, but particularly those from the

sectors I mention, faced with huge drop in turnover (almost overnight), and the need to make immediate redundancies and in some cases, in order to avoid that, negotiate pay reductions by consent with staff. The Coronavirus Job Retention Scheme (CJRS), then put a lot of those decisions on hold.

The CJRS introduced the concept of paid furlough, when in simple terms, employers could inform staff they were not needed in the workplace, keep their jobs open, and recover 80% of their salary (capped at £2,500) from HMRC. Initially, employers had to

either place staff in furlough, or keep them in work. They could not split the two options until later in the summer.

The problems I saw, both for employers and employees, was that the scheme was essentially a rebate from HMRC, and this was fundamentally misunderstood by a number of employers. The scheme did not change employment rights, it did not change existing contractual obligations, and it certainly did not allow employers a unilateral right to inform staff that they were being placed on furlough. This opened up a number of challenges and claims, relating to unlawful deduction from wages, how to deal with staff who refused agreement, claims arising for staff who had the changed terms imposed without consent, and attempts by employers to change other terms permanently at the same time.

The employers that dealt well with the furlough issue, avoided claims. They sought to negotiate furlough (following advice), with affected staff and reach an agreement on that furlough, both relating to being absent from the workplace, and on reduced pay, by consent. They were able to do that with a basic furlough agreement that was time limited and two way, and this avoided problems and claims.

### 2) Health and Safety in the workplace

Large parts of the economy started to reopen at the start of June, but large parts of the workforce were either not back at work, or working from home at that point. Those areas that almost immediately went back to full attendance, including factories and warehouse based business, had to consider what protections and systems they needed to put in place to protect staff. In many cases, systems were not been put in place, and lower paid staff were at times exploited and continue to be exploited.

The Health and Safety Work Act (HSWA) requires all employers to operate a safe system of work and we saw this applied in all workplaces, specifically related to Covid. The specific application of that to the return to work and Covid-19 had to be considered by employers. Employers should of course continue to assess this.

That should include a detailed risk management plan, that focuses on the specifics of their business/workplace and not just based on general guidelines eg 1 metre plus. Employers should think about the risk areas for possible transmission of COVID-19 and how those can be mitigated. A failure to do this could result in an investigation by the Health and Safety Executive in the event of an outbreak. In October, another work from home "if possible" declaration was made by the government, but unlike in March, it was not backed up by any legal requirement or sanctions.

Every workplace, should continue to assess, on a rolling basis, issuing relating to covid and their staff safety, including having protocols in place relating to what to do in terms of symptoms and an actual diagnosis.

Employers should appreciate that providing a safe workplace, can also extend to the worker's commute to work. Eg an office that dramatically reduces transmission risk is not enough, if workers attend the workplace, for example, via crowded



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public transport, and also their home working environment. Working out mitigation plans on an ongoing basis in that regard eg later starts, should be considered by all employers. Employers who engaged with their staff throughout the last 9 months, have found themselves in a much better place, than those who dictated expectations to them, especially when those expectations had no legal justification. Staff expectations will continue to be for more flexible and home working, and employers who offer that will be ahead of others in recruitment.

### 3) Working Parents

The balance of full and part time staff, working parents, maternity leave and discrimination is an ongoing situation that all employers have to deal with. As covid developed, Employers faced the situation where, as staff were brought back into the workplace, School and Nursery closures (even on a part reduced basis) affected workers ability to attend the office in accordance with their normal hours. The requirement to self isolate, and delays at times in getting access to testing, also increased this problem.



Employers may be inclined, if numbers need to be reduced through redundancies, to focus on those employees first. They should avoid this. This could open them up to discrimination and/or unfair dismissal claims.

#### 4) Disability Discrimination

Most employers will have members of staff who would be classed as having a Disability for the purposes of the Equality Act 2010. I have seen a focus from employers on those with a disability who are potentially directly affected by COVID19 eg with lung conditions. If an employee has a disability, the employer has a Duty to Make Reasonable Adjustments to assist with that disability in the workplace. Employers should consider what reasonable adjustments need to be made given the ongoing situation, and what they will do as and when lockdown's happen again, even at a local level. Eg An employee with extreme anxiety might consider working from home on a semi-permanent basis a means of avoiding escalation of their condition.

#### 5) Redundancy post Covid

Redundancies as a result of the economic fallout of the pandemic are happening and continue to be inevitable when the CJRS Scheme ends next year. Employers should always have a transparent and fair selection process, and should be cautioned against automatically assuming that employees placed on furlough previously should be top of the list for redundancy selection.

Employers should be as flexible as possible, and be alive to the possibility that the bar for reasonableness in any unfair dismissal claims will be lower, and justification for dismissal pre-Covid 19, will not necessarily be the same in the current environment.

#### 6) Whistleblowing Claims

I have seen a number of examples, where employees who have complained about their treatment relating to furlough, have then been dismissed. The employee will then be able to bring Protected Disclosure (Whistleblowing)

claims. I have one live case, where the employer put the employee (and others) on furlough in April, and informed them they would continue to work despite this. My client objected, and was subsequently dismissed, leading to various claims. Employers should be very careful in these circumstances!

#### 7) What to expect in 2021

Covid will continue to dominate staffing matters, with the same issues arising, including businesses closing and re-opening (and issues

connected with that) as lockdown cycles repeat, some locally, some nationally. This will lead to absence management, furlough, redundancies, and the health issues I mention above. The end of the CJRS in March, could also lead to large scale redundancies en masse in certain industries.

The other issue that will affect business, and how they deal with staffing issues, is Brexit. Whatever arrangements are in place on 1st January 2021 will lead to sustainability issues for many businesses, which in turn will lead to redundancies, and claims connected with that.

**Please always take advice.**

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