

Employment Law: What to expect in 2021

By Alex Jones, Managing Director, 365 Employment Law

Legal

As the Covid 19 pandemic continues to dominate all matters related to staffing issues, how employment law will develop in 2021 is in some ways difficult to predict, but in others, we can already see the issues that will be discussed in most workplaces. Covid 19, combined with Brexit having now happened, and the direct and indirect fallout from that, and I can see certain issues coming up as the year develops:

1) COVID 19 and the end of 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

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.

There have been various extensions of the CJRS scheme, the last taking it until April 2021. Given the huge costs

of the CJRS, the vaccine rollout, and the warmer summer months, I cannot see the scheme being extended further, unless for example if a lockdown continues. Even if it is, it will be for a short period.

This creates a potential cliff edge for a number of businesses, particularly those that have essentially been in hibernation due to covid, such as hospitality businesses. This will mean that redundancy consultations will accelerate in the spring, with redundancies happening from late April onwards. Employers may not appreciate the consultation requirements, which become more detailed with 20 plus affected staff, and this will also lead to unfair dismissal 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. In the second lockdown in November, working from home was not a requirement, but a suggestion, leading to many workplaces being as normal. In the third lockdown this month, the position was in the middle. Certain workplaces that were not exempt previously, were for no obvious reason, exempt this time, the best example being estate agents.

I have advised on a number of employee enquiries, where the position their employer is taking, is that they are exempt from the work from home provision. This assumption in a number of case, also leads to the employer having the view that because staff are in the office, everything should be as previously. This is incorrect and will lead to claims against those employers. In certain situations, a COVID outbreak could lead to an intervention by the Health and Safety Executive.

The Health and Safety Work Act (HSWA) requires all employers to operate a safe system of work and this applies 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.

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 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 pandemic, 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) Vaccination requirements

A number of recent news reports have given examples of employers taking the view that staff will not be employed by them, or continue to be employed by them, without a covid vaccination. This unilateral path is a dangerous one for employers to take, and will lead to claims. The question that employers should ask themselves is, does this workplace require a covid vaccination to function safely, either towards staff or customers. As an example, a vaccination requirement for care

staff, who interact on a close and daily basis with the vulnerable, is not the same as those in an office. Employers should always take advice on specific circumstances. Terminating employment because of this issue could lead to Unfair Dismissal and Discrimination Claims, with the latter also applying to job applicants too.

4) Brexit and Employment Rights

Despite the governments protestations that workplace rights would not be diminished as a result of Brexit, they are now on a consultation path to removing some of those rights, specifically those in the Working Time Regulations (WTR). The simplicity of the discussion, ignores the reality, of removing those rights, which will be difficult, both politically and legally. As an example, the WTR requires a rest break of at least 20 minutes in every 6 hours. If this was removed in law, an employer would no longer be required to offer it, but what about existing employees? They could argue the break right was a contractual one. What about Health and Safety? The HSE could take the view that the removal of the right breached safety requirements. Finally, the issue of the duty of trust and confidence could come into play, any employer that denied a rest break, could be in breach of those obligations, and claims could arise accordingly.

It will be interesting to see how this develops, but my guess would be that the practical problems, combined with pressure, for example from Trade Unions, will mean this sits in the background for a long period.

Please always take advice on any staff related issues.

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