



Virtual event: Covid-19 update from an employment law perspective



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Covid-19 update from an employment law perspective

3 November 2020

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Thank you



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Key topics we will focus on today:

- Furlough and the Job Support Scheme
- Returning to work
- Varying terms
- Redundancies
- Agile and flexible working
- Discipline and grievances



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Furlough and the Job Support Scheme

What next?



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Extension to the Job Retention Scheme

- The current furlough scheme (Job Retention Scheme) has been **extended until December 2020**
- All employers with a UK bank account and UK PAYE schemes can claim the grant. Neither the employer nor the employee needs to have previously used the furlough scheme.
- Government will pay **80%** of employees wages up to a cap of £2,500
- Employers will pay employer National Insurance Contributions (NICs) and pension contributions - for the hours the employee does not work
- **Top ups** allowed
- Flexible furloughing allowed
- Employee must be on PAYE before 31 October 2020



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Job Support Scheme Open

- Will now open in **December 2020**, but this could change
- Employee must work at least **20%** of their usual (pre furlough) hours. Paid normal wage for these hours by employer
- For each hour not worked, employees paid up to two-thirds (**66.67%**) of their usual wage. Employer contributes **5%** (capped at £125 per month). Government will contribute the remaining **61.67%** (capped at £1541.75 per month).
- Employers have to pay employee **up front** and reclaim government contribution in arrears from **8 December 2020**
- Employers will have to **pay NIC's and pension contributions** on the full amount paid
- **Top ups** allowed.



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Job Support Scheme Closed

- Job Support Scheme has been expanded for businesses **legally required to close**
- Will mainly affect businesses in the hospitality sector in areas under **“tier 3”** restrictions
- Government will pay **two-thirds** of wages, up to a maximum of £2,083.33 a month
- Employers will not have to contribute to salary, but can **top up**
- Employers need to cover NICs and pension contributions



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Job Support Scheme – Employer Qualification

- All **SMEs** are eligible if some, or all, of their employees are working reduced hours
- SMEs = **less than 250 employees** on 23 September 2020
- **Large businesses** must complete a **Financial Impact Test**
- Financial Impact Test - turnover has **remained equal or fallen** due to COVID-19



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Job Support Scheme – Employee Qualification

- Working at least **20%** of their usual hours
- Employees on PAYE payroll before 23 September 2020
- Employees do not need to have been furloughed
- Employees will be able to undertake training voluntarily in non-working hours
- Written agreement agreeing to changes needed



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Job Retention Bonus

Employers can claim a **Job Retention Bonus** of £1,000 per employee from **1 February 2021** provided the employee:

- Has been furloughed and continues to be employed without a break in service
- Has received **an average** of £520 a month between 1 November 2020 and 31 January 2021
- Is not under notice of dismissal for any reason (as at 31 January)

The grant is payable to and can be retained by the employer



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Returning to work



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Working in the age of coronavirus

- Staff previously encouraged to return to work where possible
- Government produced 14 sector guides on '**working safely during coronavirus**' and separate guidance for reopening schools and colleges – these are frequently updated
- Schools/colleges re-opened for face to face teaching from **1 September**. Will stay open through November lockdown
- **New national lockdown** - Staff told to 'work from home if you can' from **5 November** but anyone who can't should 'go to their place of work'



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Reluctant returners

Right for employees not to suffer detriment/dismissal for exercising their right to leave the workplace

Danger wider than a feature of workplace – can come from other people

- There must be **actual danger** (objective test)
- The seriousness and imminence of the danger is a matter for the employee's **reasonable belief** (subjective test)
- Cases don't deal with the risk of infection from other employees or the use of public transport whilst commuting
- Only take action when confident it is justified. There will be case law – do you want to be part of it?



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High risk groups

- Must protect those who are higher risk of infection/and or an adverse outcome
- Shielding programme ended on **1 August** for most people – should work from home unless that's not possible. Otherwise must get **safest on site role**
- Higher risk groups include:
 - Older males
 - Anyone with a high BMI
 - People with pre-existing conditions
 - People from BAME backgrounds



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Working from home – health and safety

Equipment

- Quick H&S checks during lockdown need to be updated – new arrangements expected to last for six months
- HSE requires you to carry out a full workstation assessment (can be done remotely) and **'provide workers with appropriate equipment and advice on control measures'**
- Ensure compliance with display screen equipment rules. May have to provide desk, chair, screen etc if the employee doesn't have suitable equipment – will belong to you unless you agree otherwise
- Some employers contribute to the cost of equipment – and agree who owns what (may be tax implications for employee)



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Working from home – health and safety

Lone working can negatively impact on employees' work related stress levels and their mental health

- HSE **Stress Management Standards** include factors which if not managed properly can lead to work related stress
- Good support may be more difficult to achieve remotely so you may have to be creative
- Need to maintain **good contact** – it should not just be about work tasks
- Managers need to recognise when someone might be having difficulties and **intervene** early



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Changes to terms and conditions



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Changing terms and conditions

- What changes do you want to make?
- Do you have an express contractual right to make the change even if the employee doesn't agree?
- Language must be **unambiguous** and **clear**
- Must still act reasonably – trust and confidence key



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No contractual right to vary?

- Consult & seek agreement
- Unilaterally impose changes
- Dismissal and re-engagement

Is collective consultation required?



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Redundancy



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Redundancy defined

s139 ERA 1996: An **employee** is dismissed by reason of redundancy if the reason for the dismissal is:

- The employer ceases/intends to cease carrying on the business in which the employee worked
- The employer ceases/intends to cease carrying on the business in the place the employee worked
- The business needs fewer people carrying out work of a particular kind



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Process – key steps



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Redundancy and the end of furlough

- The end of the furlough scheme may be relevant to issue of fairness of redundancy dismissal
- Employers must consider alternatives to redundancy, such as the Job Support Scheme
- Job Support Scheme is less affordable than current furlough scheme, employers must now contribute at least 25% of wages
- Increased cost of Job Support Scheme may mean redundancies are reasonable



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Notice and redundancy pay

- Usual rules apply – employees entitled to **notice** prior to being made redundant and a **redundancy payment** if have worked for two years or more
- Can notice pay/redundancy pay be based on furlough pay?
- Can furlough grant be used to pay employee notice pay/redundancy pay?
- Can employee be made redundant whilst on the Job Support Scheme?



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Flexible working



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Flexible working applications

Requests to work from home for all or some of contracted hours

- If you agree, you don't need to go through the full flexible working application process – just deal with the formalities (variation of contractual terms)
- If have doubts or unresolved questions about whether it will work **use the statutory procedure** and stick to the time limits [**3 months** unless agree to extend]
- Do you need to set down extra conditions? Why?
- Should you impose a **trial period**? [Generally only necessary if WFH on an extended basis imposes obligations/disciplines that were not necessary during lockdown]



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Flexible working applications

Before turning down an application, consider the risk of these claims:

- **Direct discrimination** (eg; turning down a request from a man where would have granted to a woman)
- **Indirect discrimination** (eg; if routinely turn down applications, may affect more women than men)
- A failure to make **reasonable adjustments** (where someone is disabled)
- **Constructive unfair dismissal** (turning down request could amount to a fundamental breach of contract)



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Scenario – Reluctant Returners and Flexible Working

Fly Away is a travel agency whose employees have been working from home for the last 6 months. They decide that their employees **cannot work from home** and ask them **to work from the office**. They receive the following responses:

- **Karam**

- Does not want to return to the office.
- Lives with disable parent who was required to shield.
- Concerned about risk of Covid-19 in the office.
- Believes he can work well from home, but his performance has dropped slightly whilst out of the office.

- **Lucy**

- Does not want to return to the office.
- Lives an hour away from the office and does not want to commute again.
- Says she can use additional time in the mornings to increase productivity.
- Lives alone and has no underlying health conditions.



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Discipline and grievances



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You still need to manage the everyday stuff

Discipline and grievances:

- Suspensions should be for no longer than necessary (issue of trust and confidence)
- Proceed as normal without ‘unreasonable delay’ (with adjustments for social distancing or remote meetings)
- Can still investigate/hold meetings with people who are furloughed – doesn’t amount to work
- Risk of undermining implied duty of trust and confidence if delay unreasonably



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Remote hearings

- Technology – need **reliable platform** and time to test beforehand
- Documents – still have to **provide in advance** of investigation or hearing – number/size of downloads may need to be considered if don't have time to post everything out
- Privacy/confidentiality – need method for allowing conversations between participants (interviewer/panel) and employee and companion – **chair should be able to control proceedings**
- Housekeeping/rules – mute when not speaking; try and avoid noisy environments; ask employee to **confirm no-one else is there** (to coach or support them) and that they are **not recording** the meeting



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Q&A



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