COVID-19 AND THE EMPLOYMENT RELATIONSHIP

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(1) Introduction

1. The present pandemic is likely to have far-reaching and unforeseen consequences. This note aims to address some of the more probable effects of COVID-19 on the employment relationship (and more specifically its termination).

(2) Unfair Dismissal

2. This section deals with steps which may be taken by employers where their businesses face disruption as a result of COVID-19. The focus of this section is on the unfair dismissal legislation. In particular, it addresses:

   2.1. The circumstances in which a dismissal is likely to be either substantively or procedurally unfair;

   2.2. The rights of employees in relation to lay-off periods / short-time working.

(a) Unfairness

3. The obvious reason for dismissal in response to COVID-19 is a redundancy situation (which is a potentially fair reason). Redundancy situations are defined in Section 139 of the Employment Rights Act 1996 as (in terms) situations where the employer's whole business is closing, where the particular workplace of the employee is closing or where there is a diminution in the requirement for employees to carry out particular work. The impact of COVID-19 is likely to fall squarely within one of those situations. Thus, as long as the employer is not using COVID-19 as an excuse to remove particular people from its work-force (i.e. as long as the redundancy situation is genuine and the selection of the particular employee was not for automatically unfair reasons such as discrimination), the first hurdle of substantive fairness is likely to be met.

4. That is not the end of the matter. A redundancy dismissal must also be procedurally fair – i.e. the decision to dismiss the employee must not be outside the range of reasonable responses. That means, in all situations, a proper consultation process must usually be followed, the employee should be fairly selected and opportunities for redeployment should be considered (see e.g. *Langston v Cranfield University* [1998] IRLR 172 which emphasises the importance of these steps). In situations where over 20 people are proposed to be made redundant within 90 days, there are further statutory requirements which must be met (including collective consultation). An employer should also abide by its own redundancy procedure whether it is contractual or not (if it is contractual, a failure to comply could result in a claim for damages but even if it is not, a failure to comply is relevant to the reasonableness of the dismissal).

5. Of course, COVID-19 is likely to have a far more immediate impact than other events giving rise to redundancy situations. However, given the emphasis placed on the need for consultation (e.g. Lord Bridge said in *Polkey v AE Dayton Services Ltd* [1987] 3 All ER 974 "*in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative…*"), Tribunals are unlikely to view COVID-19 as a good enough excuse for bypassing usual consultation – particularly since consultation may be particularly helpful in present circumstances, for example employees / unions may well be more flexible with regard to temporary lay-offs or reduced working hours.

6. The recent announcement that the government will pay employees' wages (within certain limits) is also likely to impact the Tribunals' approach to redundancy dismissals. While it is not likely to be relevant to whether or not there is a redundancy situation (because it does not completely remove the burden of employment from the employer and accordingly an employer is still likely to be able to prove a business need for redundancy), it will be relevant to whether an employer has taken adequate measures to avoid redundancy (since the effect of the announcement is that it will be much easier to keep employees on the payroll) and accordingly whether the redundancy is procedurally fair.

(b) Lay-off / Short-time Working

7. Both laying-off and short-time working are mechanisms which, if used appropriately, can help an employer in times of difficulty. A lay-off period is one where an employer does not pay an employee for a period of time (and does not therefore require the employee to work). Short-time working (where an employee works for fewer hours than usual and is only paid for those hours).

8. Unless the relevant employment contract contains a provision whereby an employer is entitled to lay-off its employees for periods of time (or impose short-time working), such action is likely to be a breach of contract. Such a term could be implied (see e.g. *Marshall v English Electric Co Ltd* [1945] 1 All ER 653 where a term allowing the employer to lay-off its employees was implied by reason of the normal practice of the employer and the custom of other employers in the same trade) but a Tribunal is not likely to imply it without strong evidence of such a practice (see e.g. *Neads v CAV Ltd* [1983] IRLR 360 at [50] where Pain J noted that such a term will only exist in "*very limited circumstances*"). Of course, even if there is such a power, the employer's exercise of it is likely to be subject to the *Braganza* limitations (i.e. it must be exercised rationally and reasonably: see *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661).

9. Assuming an employer decides to go ahead with laying off employees (or imposing short-time working), it has three courses of action:

   9.1. If the employer is not contractually entitled to do so, the employee can resign and claim they have been constructively dismissed. In such circumstances, the employer can still argue that the dismissal was not unfair, as long as there was a fair reason for their action (i.e. the equivalent of a redundancy situation) and it was within the range of reasonable responses. Accordingly, before taking any decisions regarding laying-off or short-time working, it is advisable for an employer to follow a detailed selection and consultation procedure (as they would in a normal redundancy situation).

9.2. If the employer is entitled to do so (or the employee decides to waive the breach and consent to the lay-off or short-time working), the employee can either:

9.2.1. Chose to terminate their employment contract, at which point they will be able to claim a statutory redundancy payment as long as the lay-off period / period of short-time working lasted long enough. The relevant periods are in S.148 of the Employment Rights Act 1996:

> (a) for four or more consecutive weeks of which the last before the service of the notice ended on, or not more than four weeks before, the date of service of the notice, or
> (b) for a series of six or more weeks (of which not more than three were consecutive) within a period of thirteen weeks, where the last week of the series before the service of the notice ended on, or not more than four weeks before, the date of service of the notice.

9.2.2. Choose to continue in employment, in which case they cannot receive a redundancy payment.

(3) Contractual Matters

10. In addition to the statutory remedies for unfair dismissal, employers and employees should bear in mind that employment remains fundamentally a contractual relationship.

11. At the heart of every contract of employment is an implied mutual duty of trust and confidence, a breach of which is likely to be regarded as so serious as to justify the aggrieved party in treating the employment as terminated with immediate effect. That means that if an employer treats their employees in a way apt seriously to undermine the relationship of trust and confidence on which the employment is founded, the employee may be able to treat themselves as constructively dismissed and bring a claim for damages for, for example, the pay they would have received if they had worked their notice period and potentially any bonuses they may have lost out on. These can be high-value claims. Equally, an employee who behaves in a way apt seriously to undermine that relationship may find themselves liable to immediate dismissal, without notice pay.

(a) Potential Claims by Employees

12. Difficult situations like the present one throw up challenges on both sides of the relationship, some of them likely to be novel. But some well-established examples seem likely to remain relevant, above all as concerns wages:

13. Above all, employers must continue to pay their employees or risk being in fundamental breach of contract. In *Bournemouth University Higher Education Corp v Buckland* [2011] QB 323, Lord Justice Sedley said that, as a commercial reality, if a failure to pay wages 'is due … to a major customer defaulting on payment, not paying the staff's wages is arguably the most, if indeed, the only reasonable response to the situation'. But, crucially, he added that the law would still regard it as a 'fundamental breach' of the contract of employment, justifying the employee in treating themselves as constructively dismissed.

14. If an employer unilaterally reduces employees' pay, that is likely to lead to the same result. However great the financial pressures to which the COVID-19 pandemic gives rise, it will rarely be advisable to reduce employees' pay without either following a previously-agreed contractual procedure or seeking the consent of the employee(s) concerned. As Lord Justice Judge said in *Cantor Fitzgerald International v Callaghan* [1999] ICR 639, where 'an employer unilaterally reduces his employee's pay, or diminishes the value of his salary package, the entire foundation of the contract of employment is undermined'.

15. Employers will also have difficult choices when it comes to paying bonuses. Of course if an employee has a contractual right to a guaranteed bonus, or one calculated according to a contractually agreed formula, then a failure by an employer to honour that entitlement is likely to have the same effect as a simple failure to pay wages. But many employees' bonuses will be paid on a discretionary basis. In such cases there is nothing wrong in principle with an employer deciding that there is simply not enough money available to pay bonuses at the usual rate or indeed at all. What is required, though, is that the employer make the decision rationally and based only on relevant considerations. Affordability is of course going to be a relevant consideration. But if bonuses are being—or could be—paid

then employers must be careful to ensure that decisions about whether and how much to pay are made according to fair and consistent criteria for all employees.

(b) Potential Claims by Employers

16. The COVID-19 pandemic has been hugely disruptive of working patterns already. It is likely we are only beginning to see its effects play out in practice. That said, potential employee misconduct may be expected to change more in form than in prevalence in these new circumstances.

17. As a matter of principle, though, little has changed. Above all, if misconduct is serious enough then it will justify termination of the contract of employment just as much as it ever did; the pandemic furnishes no general excuse for misconduct.

18. Matters may be made less clear where the alleged misconduct consists in a breach of a policy put in place to deal with the effects of the pandemic. Employers have had to put in place many such policies and quickly to govern matters such as attendance, access to information, data security, and the otherwise proper use of IT when working remotely. The contractual force of such policies may differ and employers should check—and take advice on—whether a suspected breach of a new policy gives grounds for termination or indeed disciplinary action falling short of that. The key questions will be not just the nature of the conduct but whether its terms amount to contractual obligations in and of themselves, so that a breach of the policy puts the employee in breach of contract in and of itself. Alternatively, the policy may lack that full contractual force but nonetheless be illustrative of the standards of conduct the employer expects; in that case, breach of the policy may still amount to a breach of other terms of the contract, including, in the most serious cases, the implied term of trust and confidence so as to justify immediate termination of the contract of employment.

19. A particular concern likely to be on employers' minds at the moment is the possibility that the disruption of normal IT protocols coupled with the decreased level of supervision that may be possible while employees work from home en masse may lead to widespread downloading of sensitive and commercially valuable material. But employees will continue

to owe duties, implied even if not express, to the employer not to abuse its confidential information. That is so even if, as may become likelier in a difficult economic situation, an employee takes large volumes of confidential information not with a view to joining a competitor but to setting up shop on their own. Provided the information in question is indeed confidential and there is a sufficient case that the employee is likely to misuse it (often demonstrated by the access of large amounts of information unrelated to the employee's tasks) the Courts are expected to remain available to assist employers by issuing injunctions to protect their confidential information.

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