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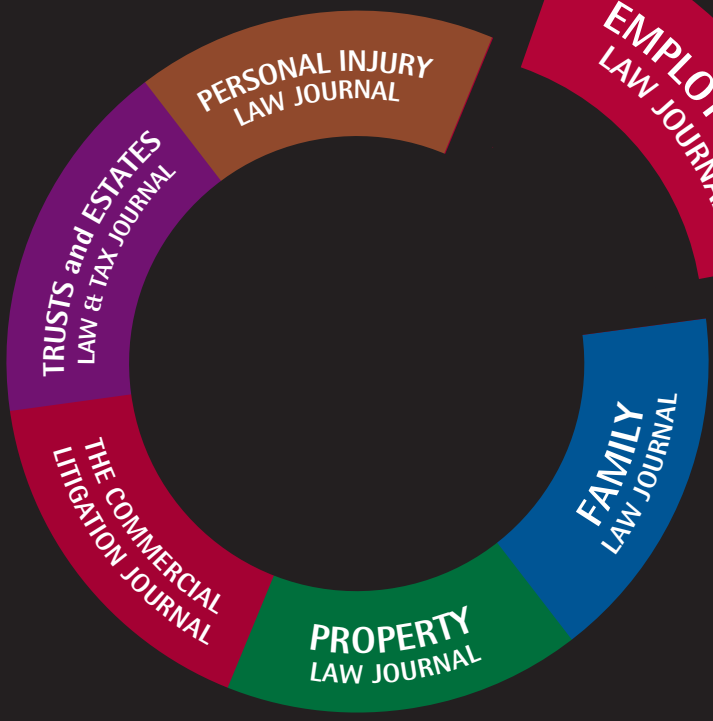

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Unprecedented measures for unprecedented times

Richard Kenyon and Edmund Chambers examine the intricacies of the government's coronavirus job retention scheme

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'The CJRS allows employers to maintain employment relationships by alleviating the financial pressure for dismissals. Workforces are kept in suspended animation until such time as the economy returns to a more normal state.'

There are no original adjectives left to describe the last few weeks. Never was an Easter weekend more welcome: a time to pause and take a deep breath. COVID-19 has taught us all the true value of that essential function. The sudden suspension of vast swathes of global business activity requires dramatic short- and medium-term planning at international, national and corporate levels to minimise health and economic casualties.

Universal basic income

In his book *The War on Ordinary People*, former Democratic Presidential aspirant Andrew Yang championed a universal basic income, or 'freedom dividend' as he puts it, whereby the US state would provide a non-means-tested annual income of US$12,000 for each American aged 18-64. This reverse income tax would bring any citizen with an annual income below the poverty line to a point just above it and provide a standard basic annual income which could be supplemented by income from jobs and investments. Yang does not claim this as an original idea, quoting proponents from Stephen Hawking to Warren Buffet. The freedom dividend would replace most other welfare programmes and, under Yang's version, the government would turn to a consumption tax (VAT) to generate income to fund the dividend. Yang sees this as a necessary move to combat the loss of jobs from the advance of artificial intelligence technology. However, a natural rather than an artificial enemy of Yang's 'ordinary people' – COVID-19 – is bringing this idea closer to reality.

Introducing furlough

Until only a few weeks ago, few in the UK had used the word 'furlough' but it has since become ubiquitous in noun, verb and adjective forms. For those who remember their school history, it has some resonance with traditional crop rotation and the idea of leaving a field 'fallow'. Furlough has no legal definition in the UK. It has been adopted by the UK government from the US to mean a state of agreed suspension (as in most cases this will need to be consensual) for an employee who might otherwise be at risk of being 'laid off' (by which the government seems to means redundancies, as well as temporary layoffs under the statutory scheme).

On 20 March 2020, the UK government announced the closure of all cafes, pubs and restaurants from that evening, with nightclubs, theatres, cinemas, gyms and leisure centres to follow as soon as reasonably possible. In the same press conference, the Chancellor launched the Coronavirus Job Retention Scheme (CJRS), through which the government committed to cover 80% of the wages of employees (subject to a cap of £2,500 per calendar month) who would otherwise be laid off as a result of coronavirus – or more precisely, as a result of measures taken to slow the spread of coronavirus. The CJRS allows employers to maintain employment relationships by alleviating the financial pressure for dismissals. Workforces are kept in suspended animation until such time as the economy returns to a more normal state and employees can return to work.

Although the CJRS provides a grant to employers rather than directly

to employees, the Chancellor began his statement on 20 March 2020 by speaking directly to workers (voters) and telling them: 'you will not face this alone'.

He later addressed employers and made a moral case for retaining workers:

> Let me speak directly to businesses... The government is doing its best to stand behind you – and I am asking you to do your best, to stand behind our workers... Please look very carefully at that support before making decisions to lay people off... We are starting a great national effort to protect jobs... Now, more than any time in our recent history, we will be judged by our capacity for compassion. Our ability to come through this won't just be down to what government or business can do, but by the individual acts of kindness we show one another.

Despite these comments, the initial lack of guidance on the CJRS resulted in some nervousness among employers. With the scheme being administered by HMRC, an immediate concern was how a hard-nosed revenue-collecting institution would approach a grant-giving function. Guidance for employers and employees was published on 26 March 2020 and updated on 4 April, 9 April and 15 April, which clarifies many aspects of the scheme but fails to address some key concerns.

Scope

The employer guidance states that the CJRS:

> ... is designed to help employers whose operations have been severely affected by coronavirus (COVID-19) to retain their employees and protect the UK economy.

That has led to some concerns over whether evidence might be required to demonstrate being 'severely affected' and what that might constitute. However, the information that must be provided to HMRC to make a claim for a grant does not require any such evidence. Also, the guidance goes on to state:

> However, all employers are eligible to claim under the scheme and the government recognises different businesses will face different impacts from coronavirus.

It seems unlikely that HMRC will want to engage in an exercise of second guessing business decisions and analysing financial performance. Indeed, it is perhaps self-evident that if workers can be furloughed, they are probably severely under-used and potentially at risk of redundancy. The business need for furlough is playing out more as a public relations issue, as several premier league football clubs (notably Liverpool and Tottenham) have found out to their cost. For most businesses in most industries, this is unlikely to be an issue, there being safety in numbers given the likely widespread use of the scheme.

In most cases, employers will not have a unilateral right to place employees on furlough. The government guidance for employees makes this point from the very beginning.

Another early thought was that the CJRS rules might include some sort of clawback if employees are made redundant within a certain period after the grant is paid. No such rules have been included. In fact, the guidance points out that employees retain their right to redundancy payments, along with their other employment rights, during furlough. It also provides that when the government ends the scheme, employers must make a decision, depending on their circumstances, about whether employees can return to their duties or whether it is necessary to consider redundancies.

Consent

In most cases, employers will not have a unilateral right to place employees on furlough. The government guidance for employees makes this point from the very beginning where it states:

> If you and your employer both agree, your employer might be able to keep you on the payroll if they're unable to operate or have no work for you to do because of coronavirus (COVID-19). This is known as being 'on furlough'.

That agreement should ideally be in writing so it is clear that consent has been obtained from each employee. *In The Matter Of Carluccio's Ltd (in administration)* [2020] – the first case involving the CJRS – the High Court noted that an employee's silence or inaction can eventually be equated with consent to a variation of the employment contract, especially when the variation benefits the employee. However, Snowden J declined to find that non-responding employees had consented to furlough, even when it was potentially to their advantage, because so little time had passed since the employees had been asked to consent and because some employees had objected.

Whether or not it has obtained consent in writing from the employee, to be eligible for the grant an employer must, in accordance with the guidance, confirm in writing to its employees that they have been furloughed. It must keep a record of this communication for five years. To confuse matters, on 15 April 2020, the Treasury published its direction to HMRC on the CJRS. This proves beyond doubt that the Treasury should stick to figures not words! The direction includes a statement at paragraph 6.1 that a furloughed employee is one whom the employer has instructed to cease all work in relation to their employment. According to paragraph 6.7, an employee has been so instructed by the employer to cease all work in relation to their employment only if the employer and employee have agreed in writing (which may be in an electronic form such as an email) that the employee will cease all work in relation for the employer. Where employers have not obtained such written agreement, it would be prudent to do so now.

The amount due to the employee in pay will be determined by the contract of employment, which is distinct from any grant the employer may obtain under the CJRS. Therefore, an employer must continue to pay the employee as normal unless something else is agreed. Many employers have decided that

they only want to pay their employees an amount which is equal to the grant they can obtain from HMRC. Those employers will need to obtain employees' consent to a cut in their pay, yet this key stage is surprisingly missing from the government guidance to employees, which misleadingly states:

> Your employer could pay 80% of your regular wages through the Coronavirus Job Retention Scheme, up to a monthly cap of £2,500.

In the current climate, some employees may feel a moral duty to help their employer and colleagues by accepting a cut in pay. Others may see no real choice between accepting a cut in pay with furlough and the alternative of a dismissal for redundancy in an atrocious jobs market. Nevertheless, employers should not casually overlook or ignore the need to obtain employee consent to contract changes.

Consultation

The CJRS does not override any existing employment law. Imposing contract changes where consent is required still runs a risk of claims for unlawful deductions and breach of contract or constructive dismissal for breach of express or implied terms. The employment tribunals may have been temporarily mothballed to a degree but they have not been abolished. Consultation may be expedited to get employees furloughed and onto the CJRS as soon as possible but should not be entirely overlooked. The risks are higher where 20 or more employees are affected, which may trigger the collective consultation obligations of s188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA).

Asking employees to agree to a change of contract so they can be furloughed with or without a pay cut (under the threat of dismissal if they refuse) may amount to 'proposing to dismiss as redundant' for the purposes of s188. The CJRS guidance provides:

> If sufficient numbers of staff are involved, it may be necessary to engage collective consultation processes to procure agreement to changes to terms of employment.

There may be an argument that furlough introduces a new step which, if presented to employees as an option, precedes any proposal to dismiss. There may also be an argument that even if the obligation to consult collectively applies, an employer can rely on the 'special circumstances' defence in s188(7). This might avoid the need for a consultation with appropriate representatives of affected employees that lasts the full 30 days (if between 20 and 99 employees are affected) or 45 days (if 100 or more employees are affected). That defence however, still requires an employer to:

> ...take all such steps towards compliance with that requirement as are reasonably practicable in those circumstances.

Employers ignoring these requirements completely may run the risk of protective award claims of up to 90 days' pay per affected employee.

Where s188 does apply, there is a concurrent obligation to complete an HR1 form and submit that to the Secretary of State for Business, Energy and Industrial Strategy under s193 of TULRCA. An employer (which may mean a body corporate and also individual managers) which fails to give notice to the Secretary of State in accordance with s193 commits an offence and is liable on summary conviction to a fine not exceeding level 5 on the standard scale. The HMRC furlough guidance makes no mention of completing an HR1 form.

Eligibility

To access the CJRS, an employer must have:

- created and started a PAYE payroll scheme on or before 19 March 2020 (the 15 April update of the guidance changed this from 28 February 2020);
- enrolled for HMRC's PAYE online service; and
- a UK bank account.

Previous versions of the guidance had suggested that being a 'UK organisation' was also an access requirement. However, there was a step away from this language in the second iteration of the guidance, suggesting that non-UK organisations may also apply for the scheme, provided they meet the above criteria.

The scheme is also open to public sector employers and publicly funded private sector businesses. However, the guidance makes it clear that, if an entity is primarily funded by the government, it should maintain its employees on full pay and should not look to take advantage of the scheme.

If an entity is primarily funded by the government, it should maintain its employees on full pay and should not look to take advantage of the scheme.

Full- and part-time employees and limb (b) workers, including foreign nationals (collectively referred to as 'employees' in this article) are eligible to be furloughed – as long as their employer provided a real time information (RTI) submission notifying HMRC of a payment for that employee on or before 19 March 2020. The third iteration of the guidance clarified that the grant will not be categorised as 'access to public funds' and, consequently, those on visas of any category can be furloughed without breaching their visa conditions.

The guidance specifically provides that (subject to specific conditions) the CJRS is also available to:

- apprentices;
- office holders, including company directors;
- LLP salaried members;
- agency workers;
- contractors with public sector engagements within the scope of the IR35 off-payroll working rules; and
- contingent workers.

Employees who were notified to HMRC by an RTI submission on or before 28 February 2020 and who were made redundant or 'stopped working' (presumably meaning for a reason other than redundancy) on or after 28 February 2020 but prior to 19 March 2020 can be brought within the CJRS. It is open to employers to rehire such employees before, on or after 19 March 2020, designate them as furloughed and claim a grant to cover their wages under the scheme. Unravelling and reclaiming any termination payments already made may prove more complicated. Employees who were made redundant or stopped work after 19 March 2020 cannot, however, now be rehired and brought within the CJRS.

The fourth update to the guidance has confirmed that those employees who transferred to a new employer after 19 March 2020 as a result of a share or asset acquisition can be furloughed, provided that either the TUPE or business succession rules apply to the change of ownership. Similar rules also apply to employees whose PAYE payroll was consolidated into another payroll in a group of companies.

Calculating the grant

Under the CJRS, employers can claim a grant equal to the lower of 80% of their employees' wages or £2,500 per calendar month. The reference earnings to calculate the grant will depend on whether the employees' pay varies.

For salaried employees, the reference salary will be their monthly wage in the last pay period before 19 March 2020.

During the period of furlough, employees will not be working and will generally not therefore be entitled to receive the national living wage or national minimum wage.

Tax and pensions

Employers remain liable to pay employer National Insurance contributions (NICs) and pension contributions on the amount they pay their staff during a period of furlough. Under the CJRS, they can apply for an additional grant to cover the employer NICs and minimum automatic enrolment employer pension contributions (3% of income above the lower limit of qualifying earnings) due on the amount of the grant.

If employers choose to top up wages above the grant, they must cover the cost of any employer NICs and automatic enrolment pension contributions on the top-up payment.

In addition, if an employer usually pays more than the minimum automatic enrolment contributions, it must, unless it amends the contractual terms governing its pension obligations, continue making these payments. It cannot recover such amounts under the scheme. As a minimum, any contractual amendments to pension terms will require employee consent. Depending on the nature of the scheme and the organisation's size and structure, the employer may require further consents from union representatives or scheme trustees and may need to observe minimum consultation periods.

The third version of the government's guidance confirmed that COVID-19 represents a 'life event', which could warrant changes to salary sacrifice arrangements. Therefore, provided the employment contract is amended appropriately, employees could switch out of their salary sacrifice scheme.

Employees will, while furloughed, remain obliged to pay income tax, employee NICs and employee pension contributions (unless they have opted out or ceased making pension payments). They will also have to pay other deductions, including the apprenticeship levy and student loan repayments. These amounts will be due on both the grant and any employer top-up.

However, if the employer calculated the reference salary based on the earlier guidance (which provided that the employee's wage at 28 February 2020 should be used), it may use that earlier calculation, if there is any difference.

For employees on variable pay, the reference salary will be as follows:

- if the employee has been employed for more than 12 months, the higher of their average earnings in the 2019/20 tax year or the equivalent month in 2019;
- if the employee has been employed for one to 12 months, their average monthly earnings since they were employed to the date they are furloughed; or
- if the employee has been employed for less than a month, their pro-rata earnings for the period they have been employed.

Reference earnings for employees returning from a period of statutory leave (including maternity, paternity, adoption, shared parental, sick and parental bereavement leave) is calculated based on their normal salary before tax or, if they have variable pay, their:

- same month's earnings in 2019; or
- average monthly earnings for the 2019-2020 tax year.

When calculating reference earnings, the employer can also take into account regular payments that they are contractually obliged to pay to their employees. These include 'past overtime, fees and compulsory commission payments'. However, salary sacrifice schemes, discretionary bonuses and commission payments and non-cash payments (whether discretionary or not), including taxable benefits in kind, are not to be included in the reference salary.

During the period of furlough, employees will not be working and will generally not therefore be entitled to receive the national living wage or national minimum wage. The only exception to this rule is where an employee is required to complete training while furloughed. In such a case, the employer would be obliged

to ensure that the employee is paid the appropriate minimum wage for their age group for hours spent training. This will necessarily have an impact on tax and pension contributions (see box below).

During the period of furlough

To take advantage of the CJRS, an employee must be furloughed for a minimum of three consecutive weeks.

During a period of furlough, employees are not permitted to do any work that generates any revenue for, or provides any services to, their employer or to a company 'linked or associated' with their employer. Whether furloughed employees have been genuinely not working is likely to be a key area of enquiry in any HMRC audit of an employer's compliance with the CJRS rules. Employers should consider measures including developing a furlough policy and cutting access to company systems to show the steps they have taken to prevent abuses of the scheme.

Employees are permitted to volunteer or complete training while furloughed, provided that this does not provide services to or generate revenue for, or on behalf of, their employer.

Employees with more than one job can be furloughed by one employer and continue to work for the other(s). They can also be furloughed by two or more employers separately (so that the aggregate amount in grants paid by HMRC for one individual exceeds £2,500 per month). Provided the employee's contract of employment permits this, they can take up new employment with a separate (non-linked or associated) employer while furloughed, and the original employer will continue to be eligible for the grant.

Following a period of furlough, it is open to the employer to furlough employees again or to require them to return to work. This is important, as it allows employers to use furlough leave to downscale and upscale their workforce in a fairly flexible way in line with business needs. It also means that employers can rotate groups of staff between working and taking furlough leave.

Interaction with other forms of leave and pay

Statutory sick pay (SSP)

If an employee is on sick leave or is self-isolating in accordance with NHS England advice (even if they are not displaying symptoms themselves), they will be entitled to SSP. Those individuals can nevertheless be furloughed. Employers can claim back from both the CJRS and the SSP rebate scheme for the same employee but not for the same period of time. Employees must be paid at least their SSP during periods of sickness, which may mean that certain employees should receive SSP if it is higher than furlough pay. The Treasury declaration appears here to be at odds with the guidance and seems to suggest that an employee who is receiving SSP cannot be furloughed until the period of sickness is over. However, if the employee is then furloughed, it seems to suggest, a subsequent period of sickness while on furlough will not break the furlough period.

Employees who are 'shielding' at home (those who have been designated as extremely vulnerable by the government and asked to self-quarantine) and those who 'need to stay home with someone who is shielding' can be furloughed.

Maternity, paternity, shared parental and adoption leave

The guidance provides that the usual rules for these types of 'family' leave still apply during a period of furlough. In general, therefore, the rate of pay during family leave will not be affected. However, if employees have a contractual, earnings-related right to enhanced pay while on family leave, the employer can recover 80% of this enhanced pay (subject to the £2,500 monthly cap) under the CJRS.

Where a person is due to start a period of family leave, they can be furloughed. This may affect the level of family leave pay they are entitled to.

Time off for family and dependants

Those employees who have to take time off because they have caring responsibilities (for example, because their children cannot go to school) may be furloughed.

During a period of furlough, employees are not permitted to do any work that generates any revenue for, or provides any services to, their employer or to a company 'linked or associated' with their employer.

Application for the grant

Employers can access the grant through an HMRC online portal, which the government anticipates will be operational from 20 April. Employers will be required to provide:

- their employer PAYE reference number;
- the number of employees being furloughed;
- the names, National Insurance numbers and payroll or works numbers for the furloughed employees;
- their self-assessment or corporation tax unique taxpayer reference or company registration number;
- the claim period (start and end date);
- the amount being claimed (for each period of furlough of at least three consecutive weeks);
- their bank account number and sort code; and
- a contact name and phone number.

Known unknowns

Although the amended guidance answers many of the most pressing questions, the position on holiday and furlough remains unresolved. Holiday will almost certainly continue to accrue during furlough since the employment relationship continues in the same way that it would do during other periods of absence such as long-term sick leave or garden leave. The outstanding points therefore are whether holiday can be taken during furlough and, if so, whether that would break the minimum required period of three weeks' furlough for a grant to be paid by HMRC. There is also the question of whether holiday should be paid at normal salary or at the reduced amount if employers have asked employees to accept a pay cut.

Holiday entitlement is complicated by the fact that for many employees the entitlement comprises three separate elements:

- the minimum four weeks' holiday required by the EU Working Time Directive;
- the additional 1.6 weeks' holiday required by the UK Working Time Regulations 1998; and
- contractual holiday, being anything agreed beyond these minimum statutory requirements.

We see holiday during furlough (as long as the lockdown continues in parallel) as most closely aligned with holiday during long-term sick leave where, in both cases, the employee is prevented from taking full advantage of the leisure time. If we are right, it would follow that, for EU holiday, an employee can choose to take this during furlough (and be paid for it at the normal rate of pay before any furlough-related reduction) but cannot be required to take it (see *Pereda v Madrid Movilidad SA* [2009]. For additional UK holiday, employers may be in a stronger position to insist that holiday is taken. For contractual holiday, what applies is what is agreed between the employer and the employee.

There has been no suggestion from HMRC that allowing (or indeed compelling) an employee to take holiday during furlough would break the continuous period of furlough or lead to a reduction in the grant. Although this is not official guidance, a tweet from HMRC customer support on 7 April suggested that furloughed employees are still entitled to take any booked or bank holidays and to receive 'their full salary' for that period of holiday. The advisers were unable to confirm whether employers could recover 80% of this amount from HMRC but it at least seems unlikely following this advice that holidays will break the period of furlough. Also, after four iterations of the government's guidance, all of which seem to be more about expanding rather than contracting the CJRS, it would be surprising to see any change which denied employers access to a grant over the issue of holiday.

There has been no suggestion from HMRC that allowing (or indeed compelling) an employee to take holiday during furlough would break the continuous period of furlough or lead to a reduction in the grant.

Acas has produced and subsequently revised non-statutory guidance which provides that furloughed employees are eligible to take annual leave as usual on their 'usual pay in full, for any holiday they take'. The guidance adds that employees:

> ... may also be able to carry over holiday [under the Working Time (Coronavirus) (Amendment) Regulations 2020] if they've been 'furloughed' and cannot reasonably use it in their holiday year.

This wording again suggests that holiday is compatible with furlough and that taking holiday will not affect the continuity of the furlough period. There may be valid reasons that mean a furloughed employee is unable to take their annual leave and, in those circumstances, it may be carried over; it is not the simple fact that the employee is furloughed that provides that reason.

How long will this last?

Following a commitment to review the lockdown arrangements three weeks after they commenced (on 23 March), the government announced an extension of at least three weeks on 16 April 2020. The overall message is that the lockdown should work to bring the infection rate down but is no quick fix. We are probably looking at the Autumn before there is some relaxing of social distancing measures ahead of a gradual return to normal.

Whether the government will extend the CJRS to cover all of that period remains to be seen. Until the scheme is up and running and the first run of grants are paid, the government is completely unaware of how many people have been furloughed and the actual cost of the scheme so far. When those numbers are clearer, the government will have a better idea of the potential number of redundancies if the scheme would close. The numbers, both in terms of potential human casualties and the scheme's cost, seem likely to be very sobering indeed.

For employers reliant on the CJRS, now is the time to be considering what would happen if the funding stopped or the grants were reduced. If the likelihood is that staff would be made redundant in numbers triggering collective consultation obligations, it would be prudent to put measures in place now to conduct those consultations (assuming that can be done without it amounting to any furloughed staff providing services for the employer).

When the Chancellor said that he was introducing 'unprecedented measures for unprecedented times', for once it was not just political hyperbole. ■

Pereda v Madrid Movilidad SA [2009] C-277/08 ECJ

The Matter Of Carluccio's Limited (in administration) [2020] EWHC 886 (Ch)

Create or update a homeworking policy

Tony Hadden and John Hunter conclude our series with a look at how to ensure homeworking arrangements are as effective as possible during the Covid-19 pandemic and beyond

Tony Hadden (pictured) is a partner and John Hunter is a solicitor in the employment and immigration team at Brodies LLP

'There is no specific legal entitlement to work from home but, given the law on flexible working and discrimination, employers must consider all homeworking requests carefully.'

Even before the Covid-19 outbreak, homeworking had become an increasingly common feature of working life in the UK. As the lockdown is showing, we are now in a position where millions of office and clerical workers and professionals can work from home with little impact on how they carry out their duties.

The benefits and convenience for employees are apparent. There are also potential advantages for employers in terms of overheads and productivity. However, there has been a patchy response to the need for widespread homeworking, with some organisations much less well prepared than others.

By imposing homeworking on millions of employees (for a few months at least), the Covid-19 pandemic has undoubtedly highlighted the urgency of redressing any failure to keep pace with more flexible working methods. It also poses interesting questions about what the return to 'normal' will look like and what changes we can expect.

Impact of Covid-19

According to the most recent pre-Covid-19 **figures from the Office for National Statistics** (ONS), of the 32.6m people in employment in the UK, around 1.7m people (5.2%) reported working mainly from home. Around 4m (12.2%) reported having worked from home in the week before being surveyed.

Analysis by the Trades Union Congress from 2019 (TUC) offers interesting findings about the demographics of home workers before the coronavirus outbreak:

- almost twice as many men as women were homeworkers;
- homeowners were 73% more likely to work from home than renters;
- older workers were more likely to work at home: 7.5% of 40-59 year olds said they regularly worked from home compared with 3.4% of 20-29 year olds;
- 4.3% of black and minority employees were working from home compared with 6.5% of white workers;
- 11.9% of managers were working from home, more than any other group;
- there were wide geographic variations: the South East was the regional leader – 6.8% of workers were mainly working from home and 17.6% had worked from home in the week before being surveyed – whereas in Northern Ireland, at the other end of the scale, the numbers were 3.8% and 7.7% of workers respectively;
- 230,000 disabled people were working from home; and
- a further 4m workers would want to work from home for at least some of the time but were unable to do so.

Overnight, the Covid-19 pandemic has resulted in a seismic shift. Fortnightly ONS statistics released on

16 April 2020 indicate that 45.8% of adults in employment said they were presently working from home.

Requests for homeworking, the law and the risks

When the current crisis is over, it seems likely that organisations will face a surge in requests from employees to continue working, at least occasionally, from home. There is no statutory definition of a 'homeworker' in employment law. Home working is, however, a recognised concept in health and safety law.

There is no specific legal entitlement to work from home but, given the law on flexible working and discrimination, employers must consider all homeworking requests carefully. They should look at why the employee is making the request. If the employee is asking to work from home as part of a statutory flexible working request, that process should be followed.

A claim for indirect discrimination is one of the main risks facing employers who reject a request to work from home. Despite the TUC's statistics, women are far more likely to request flexible working, which may include a request to work from home. While employers can only reject a flexible working request for one of the statutory prescribed reasons, defence of a discrimination claim requires objective justification, which the employment tribunals will assess by on a case-by-case basis. Employers will have to show that:

- the requirement to work from the office is necessary to achieve a legitimate business aim; and
- refusing homeworking is appropriate and proportionate to the achievement of that aim.

Employers should consider employee contracts, especially if these have been drafted prior to homeworking being implemented.

We anticipate employees pointing to the Covid-19 period in support of an argument that the aim is not legitimate or that the refusal is not appropriate or proportionate. The employer may find it difficult to rebut this argument if it continued to function during the lockdown while the whole workforce was working from home.

Giles v Cornelia Care Homes [2005] is an instructive example of the employment tribunals' approach to homeworking requests and indirect sex discrimination. In defending its refusal of Ms Giles' request, Cornelia Care Homes cited data protection and health and safety concerns, equipment costs, loss of control and fears that Ms Giles' childcare responsibilities might make her more prone to mistakes. The tribunal rejected these arguments and found the concerns about childcare to be 'based on wholly outdated stereotypical attitudes'.

Similarly, refusing a request may risk giving rise to a disability discrimination claim, in particular a claim that the employer has failed in its obligation to consider reasonable adjustments. Key factors which are likely to be relevant include:

- the extent to which homeworking would prevent the alleged disadvantage;
- the practicality of implementing the adjustment;
- the costs involved; and
- the employer's resources.

Getting your homeworking policy right

If an employer does not already have a homeworking policy, we have drafted a **temporary policy** for use during the Covid-19 crisis. Once the crisis is over, it would be worth drawing up a full homeworking policy or reviewing how effective any existing policy was and updating it if necessary, taking the following considerations into account:

Review the employment contract

Employers should consider employee contracts, especially if these have been drafted prior to homeworking being implemented. Provisions such as the employees' place of work, hours, salary and benefits, expenses and confidentiality requirements may need to be tailored.

Making a request

The policy should clearly set out the process for making a homeworking request, the criteria for consideration and how the employer will communicate a decision.

Monitoring performance

Employers will need to consider how they intend to monitor and appraise homeworkers. Having the right

Homeworkers' health and safety during the Covid-19 outbreak

It should be noted that the Health and Safety Executive (HSE) has confirmed there will be no requirement to carry out a risk assessment for temporary homeworkers during the Covid-19 crisis. Nevertheless, it would be advisable for employers to make efforts to reduce risks anyway so homeworkers can perform effectively. If there is no existing policy, organisations should issue a temporary policy along with practical guidance. In particular, they should consider how to maintain reporting and communication, what work employees can safely do from home and what control measures can be put in place.

The organisation can provide employees with enough information to complete their own basic risk assessment at home. The HSE has provided a **workstation checklist** and there is NHS guidance available on correct posture when working on **laptops** and at a **desk**. The Institution of Occupational Safety and Health has also produced **guidance on homeworking**, which includes various checklists. Employees should receive guidance on their working routine to avoid stress and poor mental health. If employees require IT equipment or ergonomic furniture, employers should facilitate this.

procedures in place is all the more important when employees are not receiving ongoing informal feedback in the office.

Data protection

There are significant implications for homeworkers arising from the General Data Protection Regulation and the Data Protection Act 2018. The policy needs to specify how homeworkers should comply with their obligations and how the organisation will support them to do so.

Health and safety

An employer is responsible for an employee's welfare, health and safety under s2(1) of the Health and Safety at Work etc Act 1974 and for assessing and controlling risks to homeworkers under regulation 3 of the Management of Health and Safety at Work Regulations 1999. The policy should set out the employer's and employee's obligations and how risk assessments will be carried out.

Equipment

The policy should state whether the employer will provide equipment to the homeworker under the arrangement. Deciding what equipment will be necessary can often be dealt with during the risk assessment. The policy should specify who will be responsible for installation and maintenance and for the costs of any damage beyond normal wear and tear.

Insurance

Insurance will be required for any equipment provided. The policy should detail whether this will be under the employer's policy or whether the employee will need to maintain cover.

Tax

Homeworking creates various tax issues. For example, homeworkers may be entitled to claim a deduction against taxable income for certain household expenses and travel. Tax charges can arise where the employer provides computer equipment and the homeworker uses it for non-business purposes. The policy should detail how the organisation will approach these issues and any other arrangements.

Ending the arrangement

It is important to set out how and in what circumstances the organisation or the employee can terminate the homeworking arrangement. Trial periods will be a useful first approach. Most employers will want to want to be able to terminate the homeworking agreement after giving reasonable notice.

The future

It remains unclear how long the Covid-19 restrictions will remain in place. It is important for employers currently relying on homeworking to have the correct policies in place. While most employees working from home will eventually return to the office, many are predicting we are at the beginning of a cultural shift in favour of homeworking, prompted, at least in part, by the response to the Covid-19 pandemic.

While predicting the future is a fool's errand, it seems certain that homeworking will become increasingly widespread. Putting in place a homeworking policy and framework which provides clarity, maximises benefits and minimises risks can only be a sound investment of time. ■

Giles v Cornelia Care Homes
[2005] ET/3100720/05

Furloughed employees and frustration of contracts

Howard Hymanson considers whether employers could successfully argue that Covid-19 has frustrated their contracts with employees and what the position is when they have put staff on furlough leave

Howard Hymanson is head of employment at Harbottle & Lewis. He would like to thank Jeremy Lewis at Littleton Chambers for his assistance with this piece

'The coronavirus and its impact on society and the economy is an extraneous change of situation which is taking place without employers or employees being to blame or at fault. It is therefore certainly capable of constituting a frustrating event.'

Many businesses are having to take the difficult decision to furlough staff in an attempt to avoid lay-offs and redundancies as the coronavirus crisis hits. In such an unprecedented situation, employers (and employees) will be asking what the legal implications are for their employment contracts and statutory rights.

Covid-19 has been a bolt from the blue. When an event takes place which was not reasonably foreseeable when a contract was made and which makes performance of that contract either totally impossible or radically different from what was originally envisaged, frustration of the contract can occur. As long as neither party is at fault, the doctrine of frustration treats a contract as being automatically discharged, so that the parties are no longer bound to perform their contractual obligations.

A party who fails to perform their contractual obligations, such as an employer who stops paying wages, will be liable to pay damages unless frustration has occurred. If Covid-19 were to frustrate a contract of employment, then an employer's contractual obligation to provide notice to an employee or worker would fall away.

The position is more nuanced when it comes to employee statutory rights. As the contract is automatically discharged, there is no 'dismissal' and so no unfair dismissal can arise. However, confusingly, the position is different when it comes to statutory redundancy. In this case, the right to claim a redundancy payment is likely to be preserved, due to the application of the Employment Rights Act 1996 (ERA) s136(5)(b).

This section provides that a dismissal will still occur:

> ... where in accordance with any enactment or rule of law – an event affecting an employer... operates to terminate a contract under which an employee is employed by him, the act or event shall be taken... to be a termination of the contract by the employer.

Pursuant to s139(4)(a), an employee in this situation will be dismissed by reason of redundancy unless the employer renews the contract or re-engages the person under a new contract of employment.

The government measures imposed as a result of Covid-19 are likely to constitute 'an event affecting the employer'. As *British Airports Authority v Fenerty* [1976] made clear, the fact that the same event may also affect the employee will not prevent that employee from being able to rely on it to claim a redundancy payment. Section 136(4) applies to an event frustrating a contract at common law as well as in circumstances where legislation may render further performance of the contract impossible.

Is Covid-19 a frustrating event at common law?

As Bingham LJ stated in *J Lauritzen AS v Wijsmuller BV* [1990]:

> The object of the [frustration] doctrine was to give effect to the demands of justice, to achieve a just and reasonable result, to do what is reasonable and fair, as an expedient to escape from injustice where such would result from enforcement of a contract in its literal terms after a significant change in circumstances.

It is clear that the coronavirus and its impact on society and the economy is an extraneous change of situation which is taking place without employers or employees being to blame or at fault. It is therefore certainly capable of constituting a frustrating event.

A tribunal is likely to adopt a multi-factorial approach, as favoured by most recent judicial authorities, when applying the test of frustration

The real question that emerges is whether the demands of justice are served by permitting reliance on frustration in the context of the special status afforded to employment contracts. This is especially pertinent given the likely inequality in the bargaining positions of the employer and employee compared with ordinary commercial arrangements between parties on a more equal footing. Allied to this question is the impact which the Coronavirus Job Retention Scheme (CJRS) is likely to have on this assessment.

The leading case on frustration in the employment sphere remains *Marshall v Harland and Wolff Ltd* [1972], which dealt with employee incapacity. Sir John Donaldson, the Master of the Rolls at the time, said that:

> Whilst it is true that 'frustration', to a lawyer, can have a technical meaning (although they, too, are often 'frustrated' in the popular sense) there is nothing technical about the idea that a contract should cease to bind the parties if, through no fault of either of them, unprovided for circumstances arise in which a contractual obligation becomes impossible of performance or in which performance of the obligation would be rendered a thing radically different from that which was undertaken by the contract.

In his decision, he listed the considerations relevant to determining whether performance was impossible or radically different. They include the terms of the contract, how long the employment is likely to last in the absence of sickness and the nature of the employment (whether the employee is the only person employed in that capacity and the employer's need to fill the post). The nature of the incapacity, its duration, recovery prospects and the period of past employment were also included.

The coronavirus context

The *Marshall* decision and other judicial authorities that have addressed frustration of employment contracts have primarily considered the doctrine in the context of issues that affect an *individual's* ability to work, such as illness or imprisonment. However, Covid-19 requires these issues to be viewed from a very different perspective. The context here is a worldwide pandemic affecting many UK employers simultaneously and severely limiting their capacity to provide work, pay wages and operate from their normal places of work.

Perhaps of greater direct relevance are the limited cases that have considered frustration in the context of dismissals of individual employees imposed on an employer by a third party, principally a key customer.

In *Stanley Wattam Ltd v Rippin* [1998], the Employment Appeal Tribunal (EAT) held that the action of a third party preventing the performance of the contract did give rise to a frustrating event. In that case, the employee had been hired out as a chicken sexer, her role being to determine the sex of day-old chicks. She worked at the site of one of the employer's major customers but was excluded from its hatchery premises after a dispute. As a consequence, she had little work to do, as other customers were based too far away for her to travel to. The EAT concluded that:

> In all the circumstances, we think that this is a classic case of a frustrated contract. It led to Mrs Rippin's exclusion from the hatchery, led to a situation where the respondents were unable to continue to employer her. As I have said it was not Wattam's fault nor arguably was it Mrs Rippin's fault. There were no alternative routes down which the employers were able to go in seeking ways of continuing Mrs Rippin's employment.

This decision was followed by the EAT in *Manpower UK Ltd v Mulford* [2003]. This was a similar situation in that Manpower was unable to continue to employ Mr Mulford at the premises of a third party, Easiwipes. The tribunal's decision had been that there was no frustration of the contract as it had erroneously concluded that there was an implied term that Mr Mulford would still be paid even if there was no particular work for him to do. The EAT noted that:

> If indeed there was a term of the contract between the applicant and Easiwipes entitling him to be paid, even if there was no work at Easiwipes, then... it would mean that the contract was not, as we are satisfied it otherwise would be, frustrated.

The EAT's decision in *Manpower* is relevant to a situation in which an employee is furloughed. This is because furloughed employees will continue to receive a significant proportion of their wages, even though they are not required to undertake work for their employer.

Applying the test of frustration

A tribunal is likely to adopt a multi-factorial approach, as favoured by most recent judicial authorities, when applying the test of frustration. The tribunal should put itself in the employer's position at the point at which the business treated the employment contract as having been frustrated and view the matter from its perspective at that time. Given that some reports suggest the Covid-19 crisis will persist for many months, some employers may be minded to view the situation as giving rise to a frustration of the employment contract.

The multi-factorial approach is illustrated by the following passage in

Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel) [2007]:

> Among the factors which have to be considered are the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of the contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances.

The assessment will need to take account of all the terms of the individual employment contract, in particular whether the employee had been furloughed and the proportion of normal pay topped up voluntarily. As *Manpower* suggests, employers are likely to find it harder to argue frustration if the employee has been receiving most or all of their pay despite doing no work.

Other highly relevant factors that will make it *less* likely that frustration has occurred include:

- a lengthy period of prior and anticipated future employment;
- a lengthy notice period; and
- the availability of other employees to undertake certain tasks.

Conversely, factors which may make a frustration event more likely to have occurred include:

- the existence of a short fixed-term contract; and
- an express freestanding right (or one that can be implied) for the employee actually to carry out work, as opposed to a right merely to receive payment of wages.

However, when it comes to any right to work, it would be strongly arguable that this right would be modified in many instances during the current crisis – for example, if an employee cannot work due to a workplace closure or without taking an excessive risk to their health. The situation would be less clear, though, where employees can work effectively from home or they undertake highly skilled jobs and need to work to keep those skills up to date and avoid atrophy.

In practice, most tribunals will probably be very slow to conclude that a contract has been frustrated, with the loss of statutory protection that would flow from such a finding. There is also an analogy with the sickness cases, in which the tribunals have tended not to find frustration if the employee may be capable of returning or needs to undergo re-skilling before returning to work (*Gryf-Lowczowski v Hichinbrooke* [2006]). The decision may well be more finely balanced where the business has to shut down or lay people off to survive. Employees on relatively short fixed-term contracts are arguably most at risk, as are those employees who are highly remunerated and refuse to accept having their contracts varied or to become furloughed.

It does appear, however, that the CJRS makes it less likely that employers will, at least in the short term, seek to rely on frustration and that the tribunals will find Covid-19 frustrates an employment contract. However, much will depend on the facts of the particular situation. ■

Most tribunals will probably be very slow to conclude that a contract has been frustrated, with the loss of statutory protection that would flow from such a finding.

British Airports Authority v Fenerty [1976] ICR 361

Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel) [2007] EWCA Civ 547

Gryf-Lowczowski v Hichinbrooke [2006] ICR 425

J Lauritzen AS v Wijsmuller BV [1990] 1 Lloyd's LR 1

Manpower UK Ltd v Mulford [2003] UKEAT 0148/03/MAA

Marshall v Harland and Wolff Ltd [1972] IRLR 90

Stanley Wattam Ltd v Rippin [1998] UKEAT 355/98/0110

High Court issues welcome rulings on furloughing staff in insolvent companies

Recent cases involving Carluccio's and Debenhams confirm the availability of the government-funded furlough scheme to companies in administration and their employees, report Ed Husband and Ambuja Bose

Ed Husband (pictured) and Ambuja Bose are partners in the insolvency and restructuring team at VWV

'Administrators can use the time and breathing space afforded by the furlough scheme to explore the various rescue options available for a distressed business.'

The financial impact of Covid-19 for many businesses has been and will continue to be significant. The government has provided a wide range of emergency measures aimed at supporting businesses and helping with the management of cash flow. These include business rates relief, deferral of tax payments, access to the Coronavirus Business Interruption Loan Scheme and the Coronavirus Job Retention Scheme (CJRS), also known as the furlough scheme.

The CJRS allows businesses to access government grants that will cover 80% of the salary (up to a total of £2,500 a month) of any workers the business has to place on temporary leave during the coronavirus crisis. It has been designed to help employers reduce staff costs, help cash reserves last longer and avoid businesses making permanent, wide-reaching decisions such as large-scale redundancies while lockdown restrictions and social distancing measures remain in place. The scheme went live on 20 April 2020 and has recently been extended to the end of June.

Unfortunately, these support measures have not been enough for some companies, which have had to take steps to rescue or restructure their businesses using insolvency processes such as company voluntary arrangements and administrations.

It was initially unclear if, and how, the furlough scheme would apply to companies in administration. However, the recently published cases of *Carluccio's Ltd (in administration)* [2020] and *Debenhams Retail Ltd (in administration)* [2020] have brought welcome clarity and practical guidance for businesses, insolvency practitioners, employees and other creditors alike.

How are employment contracts usually dealt with in administration?

As a starting point, a company's entry into administration does not terminate a contract of employment automatically. Employees' contracts of employment will continue until they are specifically terminated or otherwise repudiated (for example, by a failure to pay wages).

This continuity allows the administrators to explore a range of options to help achieve one of the three statutory purposes of administration and try and ensure the survival of a business in whole or in part.

If the administrators take certain positive actions in respect of employees 14 days after the administration commences, they are said to have 'adopted' the employment contracts pursuant to statute. Adopted employees gain 'super priority', which means that their ongoing wages (but

not arrears) are paid in advance of other administration expenses and in advance of other creditors.

In conjunction with the moratorium protection that an administration affords against creditor action, the continuity of employment means administrators may be able to rescue a distressed business by trading through insolvency or by finding a buyer for the business as a going concern, often on an urgent, accelerated basis.

Should they be placed on furlough after their employer goes into administration, employees can rest assured they will receive payment of those funds before other payments go out of the administration estate.

Carluccio's: helpful guidance

A recent case involving Carluccio's, the well-established chain of Italian restaurants which entered into administration at the end of March, provides some helpful guidance on how furlough leave may apply in this situation. The case confirms that administrators of insolvent companies have the right to apply to the CJRS and can propose variations to employees' contracts in order to place them on furlough.

Additionally, the High Court (Snowden J) made clear that when administrators receive government funds for furloughed employees, they can pay those funds to the employees as a super priority payment under para 99(5) of Schedule B1 to the Insolvency Act 1986. This means that furloughed employees will receive their 80% salary (capped at £2,500 per month) ahead of the payment of other administration expenses, including administrators' fees. The case confirmed that the act of applying to the CJRS for payments would amount to the adoption of contracts by the administrators.

As contracts are adopted in the format they were in immediately prior to adoption, *Carluccio's* suggests that in insolvency cases where funds are limited, administrators must ensure employees' contracts are properly varied to show consent to the capped provisions of furlough before they apply to the CJRS. The case suggests employees who were asked to vary terms but did not consent to furlough (or those varied terms) would not benefit from the priority payment because the administrators had not adopted their contracts. They would instead be treated as unsecured creditors in the usual way.

How does the *Debenhams* case differ?

Debenhams went into administration on 9 April 2020. Before this, the retailer had already placed most of its staff on furlough. Upon their appointment, the administrators sought to adopt a strategy commonly referred to as a 'light-touch' administration. This approach involves the existing management team initially staying in place, albeit under the administrators' direct control and supervision, while the future of the business is assessed. We anticipate that insolvency practitioners will use such light-touch administrations more widely when faced with otherwise viable businesses which have been affected by the unprecedented challenges of coronavirus.

As in *Carluccio's*, the administrators of Debenhams applied to the High Court for directions on how furloughing employees would work in practice. In this case, they sought directions to determine:

- how Debenhams' prior decision to furlough staff would affect the ranking of such payments compared to other administration expenses; and

- the adoption of contracts by the administrators (within the meaning of para 99(5) of Schedule B1 of the Insolvency Act 1986) – in particular, whether they could use the CJRS for staff previously chosen for furlough (and pay them in priority to other creditors) without adopting their contracts in full.

This is in contrast with *Carluccio's*, in which the administrators were seeking directions on the status of their own decision to furlough employees.

Another contrasting factor is that Debenhams did not appear to have previously asked its employees if they consented to the furloughing arrangements. In other words, the employment contracts may not have been effectively varied by the time the administrators took office.

In *Debenhams*, the High Court (Trower J) essentially agreed with the court's ruling in *Carluccio's*. He held that it is possible for companies in administration to avail themselves of the CJRS. However, applying to the furlough scheme and receiving the associated payments will be deemed to result in the administrators adopting furloughed employees' contracts within the meaning of the Insolvency Act. The judge seemed to acknowledge, though, that the administrators' inability to avail themselves of the

Furloughed staff and TUPE transfers

If the administrators subsequently secure a sale of the business, furloughed employees may be transferred automatically to the purchasing company under TUPE given that furlough leave does not break their continuity of employment.

Purchasers of a business and assets from administrators can continue to benefit from the furlough scheme for any employees who transfer under TUPE. This may make any distressed acquisition more attractive in what are otherwise uncertain times for many businesses.

Government guidance has now been updated to confirm that a new employer is eligible to continue furloughing employees of a business transferred after 19 March 2020. This is provided that either the TUPE or PAYE business succession rules apply to the ownership change.

CJRS without adopting contracts could force them to make accelerated decisions about redundancies. At the time of the hearing, 359 employees whom the administrators had written to about furlough and the variation of terms had failed to respond. If the administrators adopted these contracts without them being varied, they would have to top up furlough pay to 100% and without cap, increasing costs in the administration significantly.

What does this mean in practice?

Both decisions will help insolvency practitioners work more constructively with directors of distressed companies, employees and possible purchasers of businesses. It is to be hoped that this will allow businesses to be saved, thereby preserving jobs and maximising realisations for the benefit of creditors.

In particular, administrators can use the time and breathing space afforded by the furlough scheme to explore the various rescue options available for a distressed business. Where applicable, this will help them to market the business properly and complete any sale while preserving value in the business.

There might be circumstances when administrators will not want to adopt employees' contracts beyond the amounts reimbursed by the CJRS (for example if cash flow and funding are tight). However, prompt and effective engagement with employees, usually facilitated by existing management, should mean that permanent decisions about redundancy can be delayed.

Should they be placed on furlough after their employer goes into administration, employees can rest assured they will receive payment of those funds before other payments go out of the administration estate. However, this is only the case if they have responded positively to any variation of terms proposed by the administrators.

Businesses going into administration should therefore advise employees not to ignore communications from administrators as it could have a detrimental impact on their future payments. It could even lead to the administrators being forced to make an accelerated decision about redundancies.

Carluccio's Ltd (in administration) [2020] EWHC 886 (Ch)
Debenhams Retail Ltd (in administration) [2020] EWHC 921 (Ch)

Should businesses at risk of insolvency furlough staff?

Company directors must act in the best interests of the business' creditors in times of financial distress. Furloughing staff, even when insolvency may be inevitable, could assist in reducing the company's outgoings and give the directors time to take professional advice about their duties and the insolvency options available, while preserving value in the business for the benefit of creditors.

Businesses should, however, note the importance of obtaining agreement from their employees to variations of terms and furlough arrangements. They should properly document communications with employees (even if these are only by email) to assist any future administrators in making their decisions. ■

Complying with business immigration law during the Covid-19 pandemic

Joanna Hunt looks at the impact on employers of recent government changes to immigration policy in response to the UK lockdown and worldwide travel restrictions

Joanna Hunt is a managing associate in the business immigration team at Lewis Silkin

'One of the lasting legacies of Covid-19 may be its influence on how the immigration system assesses who should be allowed to come to the UK for work. This crisis has elevated the standing of low-skilled roles often filled by migrant workers.'

The last eight weeks have shown just how pervasive and disruptive the effects of a global pandemic are on our lives and our livelihoods. The immigration system is a key area that has been thrown into disarray. The restrictions placed on travel and the closure of visa application centres due to the lockdown have grounded an ordinarily mobile global workforce. The economic fallout from Covid-19 threatens the long-term future of foreign nationals working in the UK.

The sheer multitude of issues that Covid-19 has presented has left the Home Office on the back foot. It has hastily announced a plethora of concessions and amendments to immigration policy over the past few weeks, often without much warning or exposition. This article will cover the implications for employers and their migrant workers and suggests how the influence of Covid-19 may be felt for some time to come.

Future employees stuck abroad

The main issue for employers trying to hire an employee from abroad is whether the individual can secure the visa permission they need to start work in the UK on time. The spread of Covid-19 around the globe has forced countries to impose restrictions on inward and outbound travel, stranding many people. If job applicants are stuck in countries where they do not have nationality or a long-term residency visa, they may still be able to apply for a visa if there is a UK visa post in the country. The Home Office has recently extended the list of visas that can be applied for from any country and it now includes visit visas, Tier 5 (Youth Mobility Scheme or Creative and Sporting) visas, EEA family permits and the short-term student and Global Talent categories. If the visa is not on this list then applicants will have to wait the restrictions out.

A visa applicant who is able to submit their application will encounter another problem. Covid-19 has led to the closure of visa application centres both in the UK and abroad. Applicants need to attend an appointment at a centre to have their biometric data taken for their application to progress. Until the centres re-open or the Home Office waives this requirement, applications are on hold.

Covid-19 restrictions also mean many applicants are unable to gather the evidence that they need to support their visa application. Home Office-approved centres for sitting English language tests (often required for a Tier 2 General visa application) are shut. Also, individuals from certain countries who are applying for a visa of longer than six months and who must obtain a certificate to show they are free of TB may find this evidence inaccessible.

The end result is that there are growing numbers of foreign national workers unable to secure the visas they need to start work in the UK. The Home Office will issue visa waivers allowing individuals to travel if there are exceptional circumstances. If these apply, the first step is to contact the Home Office's Coronavirus Immigration Help Centre. For most workers, employers will have to push back start dates or explore remote working options as an interim measure.

The Home Office is currently working on its plan to transition from lockdown. With travel restrictions likely to remain in place for some time, there are indications that the government may prioritise the processing of certain visa types to avoid a rush of travellers into the UK. The backlog may take some time to clear.

Some visa applicants were lucky enough to secure their visas before the application process closed down. Many of these individuals will have been granted 30-day entry clearance vignettes which allow them to enter the UK during the period of validity. Once in the UK, they normally have to pick up a biometric residence permit (BRP), which will be endorsed with the expiry date of their leave to remain. The good news for those individuals whose vignettes have expired or will expire before they can travel to the UK is that they can email the Coronavirus Help Centre to request a replacement, which will be free of charge until the end of the year.

Foreign national employees outside the UK

Current foreign national employees may also be abroad, either stuck after borders closed or having left the UK out of choice to sit out the lockdown period at home. For workers on Tier 2 visas this presents potential issues. Firstly, the Tier 2 'cooling off' restrictions remain in place, which can prevent (subject to some exceptions) an individual applying for another Tier 2 visa for 12 months once their original one has expired. Employers should therefore encourage any Tier 2 workers abroad to return to the UK before their visa expires to ensure they can safely maintain their status and ability to work.

With travel restrictions likely to remain in place for some time, there are indications that the government may prioritise the processing of certain visa types to avoid a rush of travellers into the UK.

Secondly, employers should make workers aware that time away from the UK may affect future applications for indefinite leave to remain (ILR). A Tier 2 General visa holder must be absent from the UK for no more than 180 days in any 12-month period over a five-year timespan to qualify for ILR. It is highly likely that the Home Office will afford some discretion for absences due to Covid-19 but how it will exercise this discretion is not yet known. Employers should therefore advise visa holders to be cautious and to keep evidence of the reasons for their time abroad in case they need it in the future.

Foreign national workers in the UK

For foreign national employees who are in the UK and whose visa expires on or before 31 May 2020, the Home Office has provided some reassurance. If they cannot leave the UK due to Covid-19 travel restrictions or self-isolation, they can apply for an automatic visa extension up until the end of May 2020. They should make this request via an online form.

One point to note is that the legal basis of the extension is unclear. The extension does not confer leave under s3C of the Immigration Act 1971, so should the application be refused, the employee will become an overstayer if their visa has expired by the time they receive the decision.

It is therefore a better option, if available, for an employee to extend their visa formally or switch their immigration status into another category, which does confer s3C leave. The Home Office has offered a helping hand by making it easier for visa holders with visas expiring on or before 31 May to apply for a long-term visa category from within the UK which they can ordinarily only secure from abroad. For instance, an individual with a visitor visa can currently apply for a spouse visa or a Tier 2 General visa if their visitor status expires by the end of May. With visa application centres closed in the UK, applications can be submitted online but will be on hold for the time being.

Employers can support their migrant workforce by checking their visa expiry dates and discussing the options available with those affected. If the lockdown continues, the concession could be extended to individuals with visas expiring further into the summer.

The Home Office has also made it easier for Tier 2 and Tier 5 visa holders wanting to change employers. It is allowing them to start work in their new role before it approves their visa, provided they have a certificate of sponsorship for the new role and they have submitted an in-time, online application.

If the Home Office subsequently refuses the application, however, the employer will have to terminate employment. This will place many workers in the uncertain position of having to start work for a new employer without having the full visa permission secured. They may feel more comfortable delaying their start date until visa processing is up and running again.

Healthcare and NHS staff

Maintaining healthcare workers' right to work in the UK has never been more critical. The Home Office has responded by offering some healthcare workers and their families with a visa expiring before 1 October 2020 an automatic visa extension for one year. To qualify, they must work for the NHS or an independent healthcare provider in an eligible profession.

The Home Office will identify the eligible visa holders and has waived all the associated fees for these applications.

Right to work checks

The lockdown has forced businesses to adapt quickly to social distancing arrangements and, where possible, require employees to work from home. Remote working has meant that the government has had to adapt right to work checks for new starters. The Home Office guidance has previously allowed for right to work checks via video link using the online right to work check system for anyone who has a BRP card or status under the EU Settlement Scheme (EUSS). Manual right to work checks via video link are also possible for other forms of status, including UK passport holders, but only if the person conducting the check is in possession of the original documents.

Where these options are unavailable or unworkable, the Home Office is currently allowing employers to carry out an adjusted right to work check procedure. The employee must provide a scan or photo of their right to work documents and the employer holds a video call with them to check their appearance and the document. The employer should keep the electronic copy and mark it as an 'adjusted check undertaken on [date] due to Covid-19'. Rechecks will need to be done in line with the normal right to work procedure once the lockdown has finished and within eight weeks of the Home Office announcing that the adjusted procedure has ended.

Tier 2 sponsor licence holders

An employer must report a number of events in the lifecycle of a Tier 2 visa holder's employment to the Home Office via the sponsor management system (SMS). Failure to do so is serious as an employer can risk losing its sponsor licence, which in turn jeopardises the status of its Tier 2 workers. The Home Office has taken a pragmatic approach to some of these duties in light of Covid-19:

- it will not require employers to report if a Tier 2 worker is absent from work due to Covid-19;
- it is waiving the requirement for a sponsor to end sponsorship if an employee is absent from work without pay for four weeks or more;
- it will not require employers to notify it if any of their Tier 2 workers are working from home; and
- it will allow Tier 2 workers to have their pay cut to 80% of their salary or £2,500 per month (whichever is lower), even if this takes them below the current salary limits for the Tier 2 visa route.

Current foreign national employees may be abroad, either stuck after borders closed or having left the UK out of choice to sit out the lockdown period at home.

This final point means that Tier 2 workers can be furloughed, provided it is part of a firm-wide policy designed to avoid redundancies. Employers should still report this to the Home Office via the SMS. The reduction must be temporary and, once furloughing is finished, the salary must return to at least the original level.

All other reports on sponsor and migrant changes of circumstance should still be made as normal via the SMS. The priority service for processing these reports has been suspended, so it will take longer to amend any details on a Tier 2 licence, particularly when appointing new key personnel due to staff departures.

As the economic downturn bites, if a Tier 2 sponsor is restructured, ceases trading or becomes insolvent, this must be reported to the Home Office. If any Tier 2 sponsored workers are made redundant, this will also need to be reported to the Home Office and will lead to their visas being curtailed.

Future immigration policy

In spite of Covid-19 pushing Brexit off centre stage, the UK remains in a temporary transition period until the end of this year, at which point free movement for EEA and Swiss nationals will end. The government is showing no inclination, publicly at least, to extend the transition period and has recently restated its desire to implement its 'new' points-based system. The system provides no visa routes for 'low-skilled' workers, a deliberate omission as successive governments have seen little value in attracting this kind of labour, instead focusing on visa options for the so-called 'brightest and best'.

One of the lasting legacies of Covid-19 may be its influence on how the immigration system assesses who should be allowed to come to the UK for work. This crisis has elevated the standing of low-skilled roles often filled by migrant workers. Carers, hospital porters, warehouse pickers, shop keepers and agricultural workers have become some of the key workers that our country desperately needs to function. The Covid-19 pandemic shows that migrant labour of all skill levels is essential to the UK's future prosperity and security. We now need an immigration system which is workable, affordable and inclusive, so that when the next crisis hits, we have the workforce ready to respond. ■

Preparing to return to the workplace: key steps for employers

Catrina Smith and Amanda Sanders look at how to get employees back to work safely and minimise the risk of employment tribunal claims from individuals who are reluctant to return

Catrina Smith (pictured) is a partner and Amanda Sanders is a knowledge of counsel in the employment team at Norton Rose Fulbright

'One of the key ways to protect employees is to ensure that they comply with social distancing in the workplace.'

On 11 May, the UK government published its Covid-19 recovery strategy to manage England's transition from lockdown. One of the key areas is how to get people back to the workplace safely. Employers are therefore having to consider what measures they need to take to reduce or prevent the spread of Covid-19 in the workplace and to give people confidence to go back to work and reassure them that it is safe to return. To assist employers, the government has published guidance covering eight workplace settings which are allowed to be open. The guidance was developed in consultation with businesses, unions and industry leaders. However, returning to the workplace may also raise employment law issues that employers must consider.

Government guidance

The guidance sets out five key measures which employers should implement as soon as it is practical:

Work from home if possible

The advice still stands that employers should take all reasonable steps to help people to work from home. However, if the employee cannot work from home and the workplace has not been told to close, then the employee should go to work.

Carry out a Covid-19 risk assessment

Health and safety legislation and equality legislation require employers to assess risks to workers. Employers should carry out a Covid-19 risk assessment in consultation with workers or trade unions. The government expects that all businesses with more than 50 employees should publish the results of this on their website.

Social distancing

One of the key ways to protect employees is to ensure that they comply with social distancing in the workplace. This means that employers may need to reconfigure the workplace to ensure that a two-metre distance is maintained between employees. This may require staggering arrival times and controlling the use of lifts and staircases.

Manage the transmission risk where people cannot be two metres apart

Screens and personal protective equipment should be used where it is not possible to maintain a two-metre gap between employees. Other measures may be changing workplace shift patterns, dividing the workforce into completely separate teams or using back-to-back or side-to-side working.

Reinforcing cleaning processes in the workplace

This can include additional cleaning regimes as well as providing

handwashing facilities or hand sanitisers at entry and exit points.

Sectors covered

The eight workplace guidance documents cover:

- construction and other outdoor work;
- factories, plants and warehouses;
- other people's homes;
- labs and research facilities;
- offices and contact centres;
- restaurants offering takeaways or delivery;
- shops and branches; and
- vehicles.

Links to all the guidance can be found on the government website.

The government point outs that some employers will operate more than one type of workplace and will therefore need to use more than one guide to devise safe working arrangements.

The guidance provides a notice which employers should display in their workplace to show their employees and customers that they have followed the advice.

Although this is helpful guidance, there are many issues for employers to consider.

Employers should advise employees to notify them if they have, or someone in their household has, symptoms of Covid-19.

Health and safety obligations

An employer has a duty under both common law and statutorily to protect the health and safety of its employees and to provide a safe system and place of work. As part of that requirement, an employer should carry out a risk assessment as required under regulation 3 of the Management of Health and Safety at Work Regulations 1999. Employers should conduct suitable and sufficient assessments of the risks to employees who are at work and make appropriate arrangements for planning, organising the workplace, control, monitoring and review. The government and the Health and Safety Executive have provided guidelines on how employers can comply with their health and safety obligations. Employers should also be mindful of all their existing obligations.

Health screening and notification of symptoms

Employers should advise employees to notify them if they have, or someone in their household has, symptoms of Covid-19. Many organisations are also considering whether they can require staff to have their temperature screened when arriving at the workplace. They must balance the health and safety benefits against the fact that the results of any test will be a special category of data under the GDPR. There are therefore strict conditions that apply to collecting and processing the data.

Another issue is what an employer should do if the employee refuses to take the temperature test or to notify the employer of any symptoms. Taking any form of medical test is intrusive and in determining whether an employer's actions were fair, a tribunal would consider whether this was a reasonable requirement to protect employees' health and safety. This will depend on the risk assessment and whether the employer could have adopted any alternative process.

Who to select for the return to work

Most workplaces will only need a limited number of staff to return to the workplace. The guidance is clear that employers should not discriminate when selecting people to return. They therefore need to:

- understand and take into account the particular circumstances of those with protected characteristics;
- communicate with workers whose protected characteristics might expose them to more risk;
- consider adjustments for workers with protected characteristics; and
- be aware of individuals in an employee's household when deciding who should return.

In particular, employers should consider the following:

- Those who are clinically extremely vulnerable (those people who

Changing terms and conditions

Changing hours of work to stagger arrival at the workplace or creating new teams or different shift patterns may require changes to the employees' terms and conditions. The best way to proceed with this is to obtain each employee's express consent to the change. For furloughed employees, employers need to obtain their consent remotely. If it does not obtain express agreement, then the employer can terminate the contract and rehire the employee on new terms.

This process may require collective consultation under s188 of the Trade Union and Labour Relation Consolidation Act 1992. The legislation applies when an employer is proposing to dismiss as redundant 20 or more employees at one establishment in 90 days or less. The definition of 'redundancy' for these purposes is wider than the meaning in the Employment Rights Act 1996 (ERA 1996) and includes situations in which the employer intends to dismiss and re-engage employees on new terms and conditions.

If an employer fails to obtain consent for changes to working time and pay, this is likely to amount to a repudiatory breach of contract. The employee can then resign and claim constructive dismissal.

In addition to changing terms and conditions, employers may need to update relevant policies, such as sickness and health and safety policies.

have specific underlying health conditions that make them extremely vulnerable to severe illness if they contract Covid-19) are strongly advised not to work outside the home. The employer should therefore consider if they can work from home and, if not, furloughing will usually be appropriate. These employees are likely to be disabled under the Equality Act 2010, so employers have a duty to consider what reasonable adjustments to put in place for them.

- Those who are clinically vulnerable (those people who may be at increased risk from Covid-19, including those aged 70 or over and those with some underlying health conditions) have been asked to take extra care in observing social distancing. Employers should help them to work from home if possible, either in their current role or in an alternative role. If this is not possible, the employer should offer them the safest available on-site roles, enabling them to stay two metres away from others. If they have to spend time within two metres of others, the employer should carefully assess whether this involves an acceptable level of risk. Failing to do so could lead to disability or age discrimination claims.

- Employers have additional obligations to safeguard pregnant women's health and safety.

- Reports have suggested that older employees and black and ethnic minority workers have suffered disproportionate harm from the impact of the virus. Employers should balance trying to protect those workers against the risk of age or race discrimination claims if they furlough these workers on reduced pay or change their duties.

- Those who have childcare responsibilities may be unable to return to work at present and could bring sex discrimination claims if their employer fails to take this into account.

- Employers could face claims for associative discrimination if they require an employee to return when a member of their household is disabled and at high risk if they contract Covid-19.

Employers must therefore follow the medical advice and government guidance when deciding who should return to work.

Refusal to return to work

What happens when an employee has none of the above reasons to stay away from work but refuses to return? The best approach is to listen to the employee's concerns and consider them carefully. The employer should also explain the precautions which it has taken and try to reassure the employee. Dismissal (for refusal to comply with a lawful instruction) should be a last resort. If the employee reasonably believes that their workplace poses a serious and imminent threat to their health, they are protected from being subjected to any detriment or being dismissed for exercising their right not to return to the workplace (s44(1)(d) and s100(1)(d) ERA 1996). It is the employee's reasonable belief that is important, so the more an employer can do to show it complied with the government guidance and consulted and responded to employees' concerns, the less likely it is that a tribunal will deem the belief reasonable. It is unclear whether any concerns about public transport to get to the workplace, rather than about a serious and imminent threat in the workplace itself, would be protected (see *Edwards v Secretary of State for Justice* [2014]).

A claim under s100 ERA 1996 is for automatic unfair dismissal. Even if an employee cannot prove that there was a serious and imminent danger, they could still argue that there is a breach of the implied term of trust and confidence and resign, claiming constructive dismissal. This could apply, for example, if an employer seeks to force a working parent to return to work. Whether any dismissal is fair would be judged on ordinary principles and the employer would be expected to have considered alternatives to a return.

In any dismissal for refusal to return to work, the employer should also be concerned about the potential discrimination claims discussed above.

If an employee cannot return to work because they fall within one of the vulnerable categories or because of childcare commitments while the schools are shut, employers may need to think about alternative arrangements.

Alternatives to returning to work

If an employee cannot return to work because they fall within one of the vulnerable categories or because of childcare commitments while the schools are shut, employers may need to think about alternative arrangements. Currently, these groups can continue to be furloughed with no change to the scheme until the end of July. However, after that date, the scheme will allow furloughed employees to work part time and employers will need to pay a percentage of their furloughed employees' salaries. There are, however, other options available to employers and staff.

Key steps for employers to take

- Consult with employees and their representatives.
- Keep up to date with government guidance and medical advice.
- Consider alternatives to a return to work if appropriate.
- Ensure ongoing dialogue.

Sick pay
The definition of incapability for work has been extended to cover those employees who are unable to work because they are:

- self-isolating to prevent infection either because they have symptoms or someone they live with has symptoms; or

- extremely vulnerable and have been notified that they must follow rigorous shielding measures.

Those employees are therefore entitled to statutory sick pay (SSP) and, depending on the terms of the scheme, contractual sick pay. SSP will be available from day one of the sickness.

Unpaid parental leave
If the employer is not offering furloughing leave, those who cannot work due to childcare issues may ask to take unpaid parental leave rather than returning to work. This is available for up to 18 weeks per child until the child is 18 for employees who have been continuously employed for one year. Notice needs to be given, although the employer may decide to waive the strict rules.

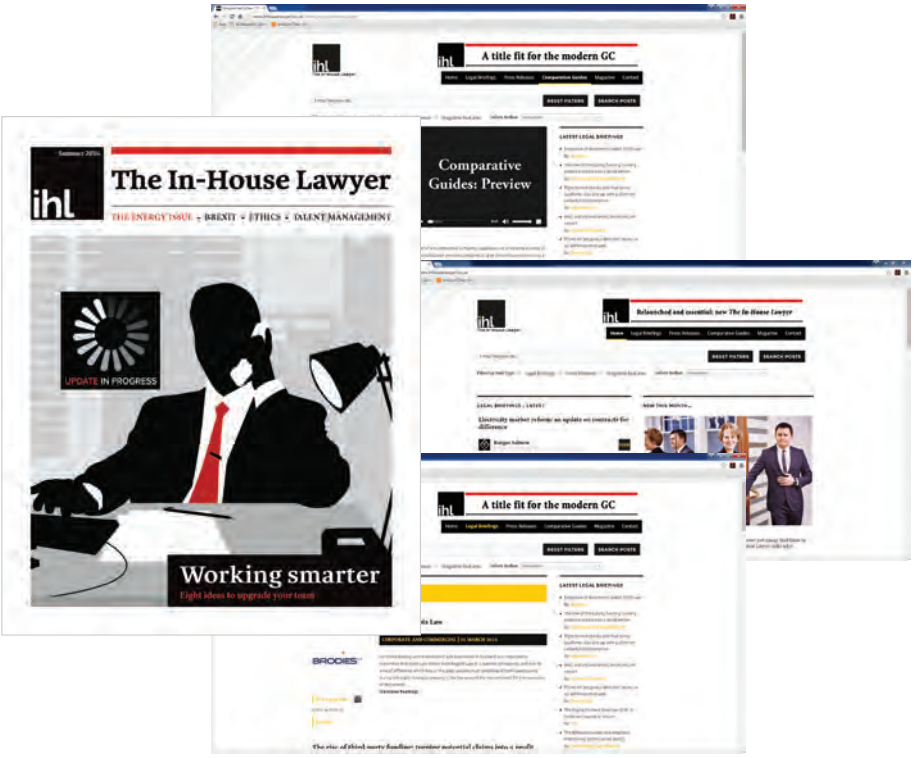
Flexible working requests
Alternatively, an employee could make a flexible working request and ask to reduce their hours and/or work from home. Again, an employer could agree to waive the formal requirements of the flexible working procedure.

Edwards v Secretary of State for Justice [2014] UKEAT/0123/14/DM

Annual leave
An employee could ask to use their annual leave to care for their child. Employers could also require employees to use their annual leave as long as they give two days' notice for every day of leave.

Unpaid leave
An employer may try to agree with the employee that they can take a period of unpaid leave. ■

The In-House Lawyer



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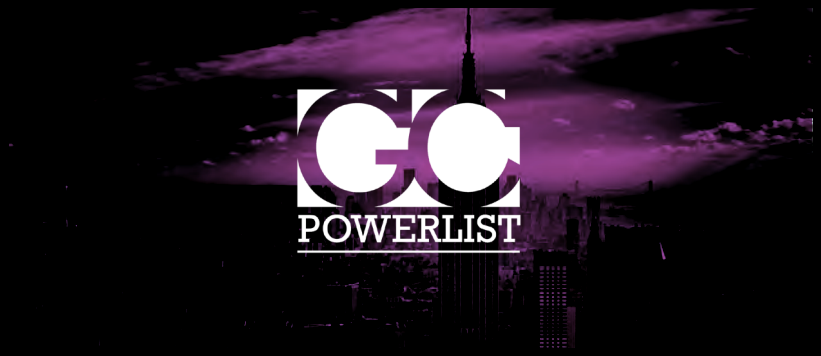

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