Managing business change following COVID-19

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Your speakers

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Matters being discussed

- A very brief overview of the Job Retention Scheme
- Difficulties when bringing employee’s back to work
Economic impact of COVID-19

“...for a period it’s going to be tough...”
Rishi Sunak, Chancellor (11 March 2020)
The Job Retention Scheme
Job Retention Scheme

- As a result of the economic impact of the COVID-19 pandemic, the government introduced the Coronavirus Job Retention Scheme (CJRS).
- The Scheme is and was intended to avoid redundancies by alleviating the pressure on employers to continue paying wages (cap £2500) during the crisis period.
- Around 7.5 million jobs across the UK were furloughed.
- It will continue in its current form until the 31 July 2020.
- Part time working will be supported from 1 August 2020- 30 September 2020 – more guidance awaited!
Ending Furlough
Coming back to work

Inform the Employee that they will be required to return to work and convey the following information:

• The date that they will return;
• That the period of furlough will end;
• The salary;*
• Working arrangements.

*will this revert to 100% or do you need to amend terms and conditions.
Bringing Employee’s back to work
Keep your employees safe

Section 2(1) Health and Safety At work Act 1974 sets out that:

“It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.”
What do you need to do?

- Homeworking as the first option
- A risk assessment of the coronavirus related risks at work
- Flexibility in working arrangements
- Ventilation in the workplace
- Staff assist
- Suitable facilities/regular washing by staff
- More frequent cleaning of the workplace to guard against transmission
- Give those in the workplace the information on the risks and the steps that they must take
- Health surveillance on staff
- Restriction on movement around the building, no congregating, minimal personnel in communal areas
Risk Assessment …..

- Who can work at home
- Staggered hours/shifts
- Day and Night Shift
- Staggered working week
- Reducing face to face working
- Part time home and part time on site
- Limit personnel in lifts
- PPE
- Queue management at stores
- Reduce Visitors
- One way flow
- More cleaning
- 2m distancing
- General Public limitations
- Employee health surveillance
- Restricting numbers in communal areas
- Deactivating turnstiles to avoid touching metal
- Laundering of clothing
- Assigned desks rather than hot desking
- Travel restrictions
Staff returning to work

I can’t come back, I am pregnant
I can’t come back, I am vulnerable
I can’t come back, I live with someone who is shielding
I can’t come back, I am scared
I can’t come back, I have no childcare
Pregnancy

Regulation 16 - Management of Health and Safety at Work Regulations 1999:
• Duty to assess the workplace risks posed to new or expectant mothers and their babies.
• Duty to alter the employee's working conditions or hours of work to avoid any significant risk.
• If there are no alternatives to the usual contractual arrangement – suitable alternative work should be offered (terms should not be substantially less favourable.)
• Where suitable alternative work/ homeworking is not available, or the employee reasonably refuses it - medical suspension is on full pay.
• Maternity leave will start automatically before the employee's chosen start date if the expectant mother is absent from work "wholly or partly because of pregnancy" after the beginning of the fourth week before the expected week of childbirth.
Clinically extremely vulnerable staff

1. Solid organ transplant recipients.
2. People with specific cancers:
   - people with cancer who are undergoing active chemotherapy
   - people with lung cancer who are undergoing radical radiotherapy
   - people with cancers of the blood or bone marrow such as leukemia, lymphoma or myeloma who are at any stage of treatment
   - people having immunotherapy or other continuing antibody treatments for cancer
   - people having other targeted cancer treatments which can affect the immune system, such as protein kinase inhibitors or PARP inhibitors
   - people who have had bone marrow or stem cell transplants in the last 6 months, or who are still taking immunosuppression drugs
3. People with severe respiratory conditions including all cystic fibrosis, severe asthma and severe chronic obstructive pulmonary (COPD).
4. People with rare diseases that significantly increase the risk of infections (such as SCID, homozygous sickle cell).
5. People on immunosuppression therapies sufficient to significantly increase risk of infection.
6. Women who are pregnant with significant heart disease, congenital or acquired.

People who fall in this group should have been contacted to tell them they are clinically extremely vulnerable.

Clinically extremely vulnerable staff

- People who fall in this group should have been contacted to tell them they are clinically extremely vulnerable.
- Likely to be at the greatest risk of severe illness from COVID-19.
- Likely to be disabled.
- Advised not to work outside the home.
- If it is NOT possible to perform the role at home, they should not be asked to return to the workplace and should remain on sick pay or furloughed if they qualify.
- Government advice is that those living with a clinically extremely vulnerable person can go to work.
Living with the clinically extremely vulnerable

Government guidance-

“The rest of your household do not need to start shielding themselves, but they should do what they can to support you in shielding and to carefully follow guidance on social distancing.”

“Particular attention should also be paid to people who live with clinically extremely vulnerable individuals.”

• Those living with clinically extremely vulnerable are expected to return to work and failure to do so could be a disciplinary offence.

• Anticipate most employers will react sensitively to genuine concerns and permit change of duties/unpaid leave/ furlough/ holiday use.

• Constructive Unfair Dismissal.
Clinically vulnerable staff

- aged 70 or older (regardless of medical conditions)
- under 70 with an underlying health condition listed below (that is, anyone instructed to get a flu jab each year on medical grounds)
- chronic (long-term) mild to moderate respiratory diseases, such as asthma, chronic obstructive pulmonary disease (COPD), emphysema or bronchitis
- chronic heart disease, such as heart failure
- chronic kidney disease
- chronic liver disease, such as hepatitis
- chronic neurological conditions, such as Parkinson’s disease, motor neurone disease, multiple sclerosis (MS), or cerebral palsy
- diabetes
- a weakened immune system as the result of certain conditions, treatments like chemotherapy, or medicines such as steroid tablets
- being seriously overweight (a body mass index (BMI) of 40 or above)
- pregnant women

Clinically vulnerable staff

- Could qualify as disabled- use the s6 test rather than the Government list.
- Reasonable Adjustments.
- Higher risk of severe illness if they contract COVID-19.
- Not been advised by the government to shield.
- Careful risk assessment of the individual before they return to the workplace.
- Can the employee work at home.
- If not, they should be offered the safest available workplace roles.
- If social distancing cannot be maintained and no safer alternatives, then consider whether working presents an unacceptable level of risk.
- Furlough/ Sick pay/ unpaid leave/ other alternatives.
Fear

- Home Working may well resolve the issue.
  If not,
  - Is the employee pregnant/ disabled etc.
  - What is the current public health advice.
  - What is the specific reason giving the employee concerns.
  - Can you make any adjustments to alleviate the fear – i.e. parking space, shift pattern to avoid peak times.

Potential,

- Failure to follow a lawful instruction to attend work- Misconduct.
- Unauthorised absence – unpaid.
- Disciplinary action.
- S44 – how remote is this – H&S dismissal or detriment for raising a concern.
S44 (1) (d) ERA 1996

An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that:

"...in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left or (proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work."

- Could this pandemic fall within s44?
- The more remote the danger the more difficult a potential claim under s.44 ERA would be.
- If an employee is subjected to a detriment i.e. not being paid and/or dismissal because they refuse to return to work, there is a risk of a claim for detriment and/or automatic unfair dismissal.
If you get it wrong

- **Constructive unfair dismissal** – breach of trust and confidence
- **Automatic unfair dismissal** – H&S related
- **Detriment** – H&S related
- **Indirect Discrimination** - requiring all employees to continue to attend work in a pandemic could be indirectly discriminatory against the employee and those who share the employee's disability
- **Discrimination arising from disability** - where an employee self-isolates because of their disability and their employer treats them unfavourably (pay/dismissal)
- **Reasonable adjustments** - the purpose of reasonable adjustments is to facilitate a disabled employee to remain in work, or to return to work. The emphasis is therefore on assisting the employee to work, not to not work
- Where a disabled employee refuses to attend work because of the perceived increased risk because of their disability, medical advice should be sought as soon as possible, from the employee's GP or occupational health, to confirm or clarify the potential risks and to see what adjustments
- Where the matter is urgent and there is insufficient time to obtain medical advice, employers may wish to err on the side of caution.
Childcare

- Work from home
- Flexibility to the working arrangement (different days/hours/shifts)
- Dependants leave – no notice, reasonable time off
- Parental Leave – 21 days notice
- Furlough
- Employees who are unable to work because they have caring responsibilities resulting from coronavirus (COVID-19) can be furloughed.
- Flexible Working – variation to contract
- Indirect Discrimination
- Constructive Dismissal
- Disciplinary action
- Communication is key
Varying terms and conditions

Examples of variations:

• reducing hours
• flexible working
• overtime bans
• reducing remuneration
• Changing days of work
• Changing hours of work

*You could reach a temporary agreement for a set period, set out in writing
Varying terms and conditions

Consider whether you need to make a change:

Do the express terms allow for flexibility or permit the change to be made?

- What if the express terms do not permit variation
- Seek express agreement
- Unilaterally impose the change
- Working under protest
- Terminate and re-engage
Varying terms and conditions

Terminating and re-engaging

The potential for a claim for unfair dismissal will crystallise on termination of the current employment contract:

- you will be able to defend a claim if you can show that the motivation for the change was reasonable
- fair reason (usually ‘some other substantial reason’) and fair process
- reasonableness
  - the extent of consultation
  - likely impact of the change on the employees
  - whether you have considered any alternatives to the changes
  - employer’s reason for making the changes
  - employee’s reason for rejecting the changes
  - whether the majority have agreed to the changes / whether a union has supported or accepted the changes
Varying terms and conditions

Terminating and re-engaging

- Other dangers:
  - some employee may not accept the offer of re-engagement (preparation for losing them)
  - mass dismissals can trigger collective redundancy consultation obligations
Interrupted internal processes
Where internal processes have been interrupted...

- Key considerations
  - acting reasonably
  - acting with reasonable expedition

- When and how will they resume and with what consequences?
  - can the process continue?
  - is continued suspension necessary?
  - is a replacement investigation officer required?
  - can witnesses provide evidence whilst on furlough?
Where internal processes have been interrupted...

• **Ongoing grievances**
  - continuing? - nature of grievance may be affected by changes
  - if continuing - consider how to progress without undue delay
  - look to identify possible solutions

• **Capability procedures**
  - review and set fresh targets to allow for any changes caused by furlough leave
  - review phased returns (consider long term changes in ways of working)
Redundancy
Redundancy - Definition

- Definition
  - Employer has ceased or intends to cease:
    - to carry on business for the purpose the employee was employed
    - to carry on business in the place the employee was employed
  - The requirement of employer:
    - for employees to carry out work of a particular kind
    - for employees to carry out work of a particular kind in the place where the employee was employed has ceased or diminished or is expected to cease or diminish

  (s.139(1) Employment Rights Act (ERA) 1996)
Redundancy - Fair dismissal

• Unfair Dismissal

- For a dismissal to be fair (where an employee has 2 years’ service), an employer must have:

1. A potentially fair reason for dismissing the employee (as set out in section 98 of the ERA 1996).

2. Acted reasonably in treating that reason as sufficient to justify dismissing the employee.

- Polkey v A E Dayton Services Limited [1987] IRLR 503 - reasonableness in relation to redundancy
Redundancy - Consultation

- Key components of fair consultation:
  - consultation when proposals are still at a formative stage
  - adequate information on which to respond
  - adequate time in which to respond
  - conscientious consideration of the response

- Opportunity for employees to comment, challenge and put forward suggestions

- Right to be accompanied
Redundancy - Selection

• Pool
  - genuinely apply mind to the choice
  - consider:
    - what type of work is ceasing/diminishing?
    - the extent to which employees are doing similar work
    - the extent to which employees' jobs are interchangeable
    - impact of furlough leave?

• Selection criteria
  - objective
  - fair application
Redundancy - Looking for alternatives...

• Duty to look for alternative work
  - consideration to whether suitable alternative employment exists
  - sufficiently thorough search

• Considering alternatives to redundancy
  - consideration of other options to reduce costs
  - voluntary redundancy?
Redundancy - Practical tips

• Managing the process
  - Think about the motivation for the proposal and the reason(s) why the proposal is necessary (i.e. the particular impact on the business/organisation)
  - Step back and take time to objectively assess whether the reason is transparent and whether you are able to explain it to employees transparently or whether you need to strengthen your points
  - Decide whether the situation fits the definition of redundancy
  - Plan in advance how consultation is going to be approached
  - Ensure you include absent employees
  - Use your notes to assist you with the ‘at risk’ meeting and initial invitation to consultation letter
Redundancy: collective consultation
Collective Consultation and Furlough

• Can you collectively consult with employees during furlough?
  – employee representatives under CJRS
  – employees
  – risk of disability claims
  – it is a job retention scheme ...

• Timing
  – May, June, now October

• Notice, Collective Consultation and Furlough
  – Reduced Pay or Top Up?
Redundancy – Collective Consultation

• Applies where an employer is proposing to dismiss 20 or more employees at one establishment within a 90 day period or less

• Must begin in good time and in any event
  – 20 – 99 dismissals – 30 days’ consultation
  – 100 or more dismissals – 45 days’ consultation

• Good Time vs Earliest Opportunity
  – may be more than the minimum periods stated
  – conflict between UK and EU law – contemplate vs proposal
  – early enough to influence the decision
Redundancy – Collective Consultation

- Employees / Apprentices only

- Meaning of employer – the person by the employee ... is employed

- Affected employees

- Dismissal
  - construed in accordance with ERA 1996
  - expiry of fixed term contracts, constructive dismissals, volunteers,
  - not include layoff or short time working

- Definition – dismissal not related to the individual concerned

- Special circumstances – rendering it not reasonably practicable
Ascertaining the Number of Redundancies

- Can I structure dismissals in stages to avoid triggering the duty?

- No account should be taken in respect of consultations which have already begun
  - it depends on the facts
  - 70 redundancies and then 30 more 3 weeks later (no consultation has started on either) – 45 day consultation
  - 70 redundancies (consultation started) and then 30 more 3 weeks later – 30 day consultation on 70 alone
  - the trigger for the second tranche will be carefully examined
Meaning of Establishment

- Redundancies at “one establishment”

- Contradiction between UK and EU law

- Interpreted very broadly

- Establishment
  - distinct, degree of permanence, assigned to perform a particular task, has a workforce to do so
  - no need for legal / financial autonomy, management to carry out redundancies

- Geographical and organisational separation
  - management, customers, staff

- Woolworths
Length of Consultation

- Minimum period = start of consultation and first dismissal taking effect
- Individual consultation can take place
- Process is to seek agreement
- Dismissals taking effect – the de-bunk of Junk
  - dismissal notice is giving notice, not the end of employment
  - must have carried out collective consultation = agreement or consultation exhausted
  - employer must have notified Secretary of State

- NB – the only safe way to make dismissals in the minimum period = agreement
Redundancy – Collective Consultation

• Consult with appropriated representatives of affected employees
  – trade union representative
  – elected employee representatives

• Methods of avoiding or reducing dismissals or mitigating the consequences of dismissals

• Statutory information to be provided to representatives in writing
Redundancy – Collective Consultation

• Statutory Information
  – reasons for proposal
  – numbers/roles proposed to be dismissed
  – total number of employees affected
  – proposed method of selection
  – procedure for carrying out dismissals
  – proposed method for calculating redundancy payments
  – information about use of agency workers

• Obligation to notify the Secretary of State
  – criminal offence
  – form HR1
  – allows local job centres to gear up for influx of unemployed
Redundancy – Collective Consultation

- **Protective Award**
  - 90 days’ gross pay per employee or ¼ of the wage bill
  - punitive
  - sanction for breach of the consultation obligations
  - not designed to compensate employees for loss
  - Tribunal starts at the maximum and reduces this to account for steps taken
Your speakers

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