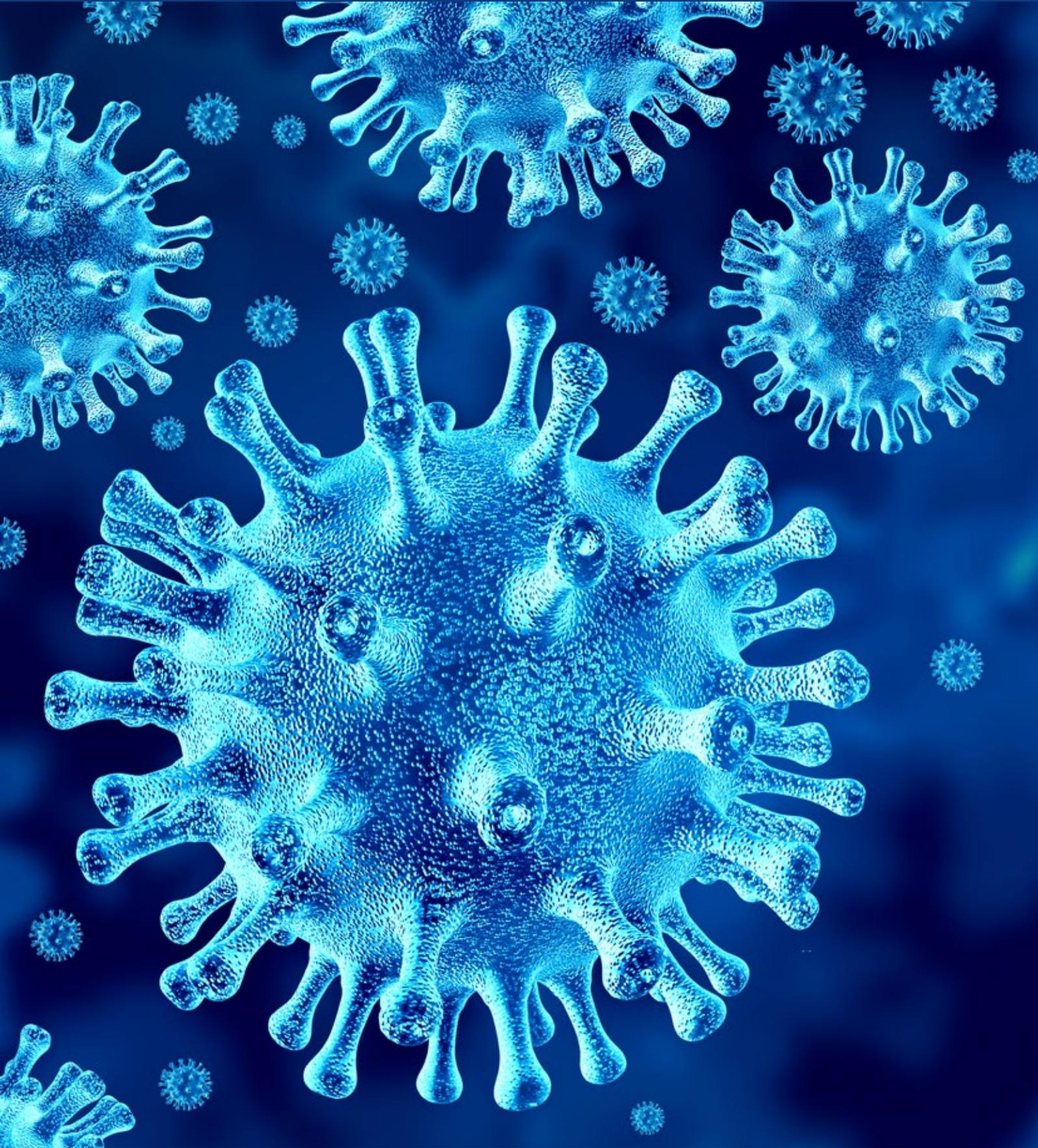


HFW



**THE CORONAVIRUS CRISIS:
EMPLOYMENT LAW CONUNDRUMS**

The Coronavirus Crisis: Employment Law Conundrums

The crisis facing the Country in all aspects of the fabric of social life has been said to be the greatest in a generation.

As we all know, the Government has put in place measures which are unique, particularly in relation to the workplace and employment law. However, these measures have to be seen against the backdrop of already existing employment law which creates some difficult issues for employers and employees. There has been a fair amount of guidance from the various agencies. In this Bulletin we seek to bring together the various strands and consider permutations

that may apply where the employer needs to make changes to working practices due to the crisis. The announcement by the Prime Minister at 8.30 pm on 23rd March 2020 that employees should stay at home and the Country should effectively go into lockdown has fundamentally changed the approach that must be taken but leaves open a large number of issues. We shall first consider the Lockdown issue then the various issues that are thrown up from the perspective of the employee and employer.

This is Issue 1 of the Bulletin which will be updated in line with developments.

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Specific Legislation & Guidance

In considering the steps that an employer or employee should take, the following specific coronavirus provisions should be considered:

- The Coronavirus Bill 2019-2021.
- The Statutory Sick Pay (General) (Coronavirus Amendment) Regulations 2020.
- The Statutory Sick Pay (General) (Coronavirus Amendment) (No. 2) Regulations (SI 2020/304).
- The Health Protection (Coronavirus) Regulations 2020 (SI 2020/129).

The following general guidance is likely to be of relevance:

- The Public Health England and BEIS: COVID-19: guidance for employees, employers and businesses which is applicable in England. There is also guidance by the Welsh Government and, in Scotland, by Health Protection Scotland. ("The General Guidance")
- ACAS Guidance: Coronavirus (COVID-19): advice for employers and employees (<https://www.acas.org.uk/coronavirus>). ("ACAS General Guidance")

There is detailed information relating to the circumstances when individuals should be self-isolated or can be required to be self-isolated, contained in Public Health England, "COVID-19: Stay at home guidance for households with possible coronavirus (COVID-19) infection" (<https://www.gov.uk/government/publications/covid-19-stay-at-home-guidance/stay-at-home-guidance-for-households-with-possible-coronavirus-covid-19-infection>). ("The Stay at Home Guidance") There is similar guidance for Wales and for Scotland. ACAS has also produced Guidance on Working from Home.

There is further guidance on social distancing and for vulnerable people: Public Health England: COVID-19: guidance on social distancing and for vulnerable people (<https://www.gov.uk/government/publications/covid-19-guidance-on-social-distancing-and-for-vulnerable-people>). ("The Social Distancing Guidance") There is guidance in Scotland from NHS Inform.

Lockdown

Staying at home

At 8.30 pm on 23rd March 2020, the Prime Minister announced to the nation that the Government was putting the Country into lockdown, albeit with very limited exceptions where persons were permitted to leave their homes, once a day for exercise, to purchase food and to travel to and from work.

In relation to travel to work, the Prime Minister said "Travelling to and from work...only where it is absolutely necessary and cannot be done from home" is permitted. It was unclear from the statement whether the Government envisaged that going to work was permitted or whether it was only permitted to go to work if it was "absolutely necessary" and the work could not be "done from home". It was also unclear whether the Government was stating that it was mandatory that employers permit (or were required to allow) employees to work from home, unless that work could not be done by being at the workplace. At the same time the Government further extended the businesses that were expected to close, in particular, shops save for exceptions that related to sale of food, medicine or other essentials.

The Government website then produced Guidance "Full guidance on staying at home and away from others" (<https://www.gov.uk/government/publications/full-guidance-on-staying-at-home-and-away-from-others>).

away-from-others). This states:

"When we reduce our day-to-day contact with other people, we will reduce the spread of the infection. That is why the government is now (23 March 2020) introducing three new measures.

1. Requiring people to stay at home, except for very limited purposes
2. Closing non-essential shops and community spaces
3. Stopping all gatherings of more than two people in public

Every citizen must comply with these new measures. The relevant authorities, including the police, will be given the powers to enforce them – including through fines and dispersing gatherings."

In relation to actual work, the Full Guidance sets out the position as follows:

"1. Staying at home

You should only leave the house for one of four reasons:

- Shopping for basic necessities, for example food and medicine, which must be as infrequent as possible.
- One form of exercise a day, for example a run,

walk, or cycle - alone or with members of your household.

- Any medical need, or to provide care or to help a vulnerable person.
- Travelling to and from work, **but only where this absolutely cannot be done from home.**

These four reasons are exceptions - even when doing these activities, you should be minimising time spent outside of the home and ensuring you are 2 metres apart from anyone outside of your household.

These measures must be followed by everyone. Separate advice is available for individuals or households who are isolating, and for the most vulnerable who need to be shielded.

If you work in a critical sector outlined in this guidance, or your child has been identified as vulnerable, you can continue to take your children to school. Where parents do not live in the same household, children under 18 can be moved between their parents' homes."

The above appears to state that you can only travel to and from work when it absolutely cannot be done from home. We have noted that the Government then sent out a 'tweet' in which it stated the only reason you may leave home to go to work are "if you're a key worker". The Mayor of Manchester then sent a tweet stating that "Have now spoken to No 10 & had it confirmed that people CAN leave home to work – as long as they fully observe the 2m distancing rule".

There is thus ambiguity in what the Government is stating, and we await the Regulations to see precisely how they are framed.

The position at present appears to be:

- You may travel to and from work where absolutely necessary.
- You may go to work provided that the 2-metre rule is complied with (but this remains uncertain).
- If you are a key worker then you may go to work.

Key workers

The concept of a 'key worker' had particular relevance in relation to schooling, as all but children of key workers should remain at home, whereas key workers may be permitted to take their children to school. The definition is therefore set out in some detail in the "Guidance for schools, childcare providers and local authorities in England on maintaining educational provision" dated 19th March 2020 (<https://www.gov.uk/government/publications/coronavirus-covid-19-maintaining-educational-provision/guidance-for-schools-colleges-and-local-authorities-on-maintaining-educational-provision>).

The Guidance covers "key worker" as follows:

Parents whose work is critical to the COVID-19 response include those who work in health and social care and in other key sectors outlined below. Many parents working in these sectors may be able to ensure their child is kept at home. And every child who can be safely cared for at home should be.

If your work is critical to the COVID-19 response, or you work in one of the critical sectors listed below, and you cannot keep your child safe at home then your children will be prioritised for education provision:

Health and social care

This includes but is not limited to doctors, nurses, midwives, paramedics, social workers, care workers, and other frontline health and social care staff including volunteers; the support and specialist staff required to maintain the UK's health and social care sector; those working as part of the health and social care supply chain, including producers and distributors of medicines and medical and personal protective equipment.

Education and childcare

This includes childcare, support and teaching staff, social workers and those specialist education professionals who must remain active during the COVID-19 response to deliver this approach.

Key public services

This includes those essential to the running of the justice system, religious staff, charities and workers delivering key frontline services, those responsible for the management of the deceased, and journalists and broadcasters who are providing public service broadcasting.

Local and national government

This only includes those administrative occupations essential to the effective delivery of the COVID-19 response, or delivering essential public services, such as the payment of benefits, including in government agencies and arm's length bodies.

Food and other necessary goods

This includes those involved in food production, processing, distribution, sale and delivery, as well as those essential to the provision of other key goods (for example hygienic and veterinary medicines).

Public safety and national security

This includes police and support staff, Ministry of Defence civilians, contractor and armed forces personnel (those critical to the delivery of key defence and national security outputs and essential to the response to the COVID-19 pandemic), fire and rescue service employees (including support staff), National Crime Agency staff, those maintaining border security, prison and probation staff and other national security roles, including those overseas.

Transport

This includes those who will keep the air, water, road and rail passenger and freight transport modes operating during the COVID-19 response, including those working on transport systems through which supply chains pass.

Utilities, communication and financial services

This includes staff needed for essential financial services provision (including but not limited to workers in banks, building societies and financial market infrastructure), the oil, gas, electricity and water sectors (including sewerage), information technology and data infrastructure sector and primary industry supplies to continue during the COVID-19 response, as well as key staff working in the civil nuclear, chemicals, telecommunications (including but not limited to network operations, field engineering, call centre staff, IT and data infrastructure, 999 and 111 critical services), postal services and delivery, payments providers and waste disposal sectors.

If workers think they fall within the critical categories above, they should confirm with their employer that, based on their business continuity arrangements, their specific role is necessary for the continuation of this essential public service.

The FCA has also produced Guidance in relation to financial services: see “Key workers in financial services” at <https://www.fca.org.uk/firms/key-workers-financial-services>. This Guidance states:

“Firms are best placed to decide which staff are essential for the provision of financial services. To help firms identify who they are, firms should first identify the activities, services or operations which, if interrupted, are likely to lead to the disruption of essential services to the real economy or financial stability. Firms should then identify the individuals that are essential to support these functions. Firms should also identify any critical outsource partners who are essential to continued provision of services, even where these are not financial services firms.

We recommend that the Chief Executive Officer Senior Management Function (SMF1) is accountable for ensuring an adequate process so that only roles meeting the definition are designated. For firms that do not have an SMF1 Chief Executive Officer this will be the most relevant member of the senior management team.

The types of roles that may be considered as providing essential services could be:

- Individuals essential in the overall management of the firm, for example individuals captured by the Senior Managers Regime.

- Individuals essential in the running of online services and processing.
- Individuals essential in the running of branches and providing essential customer services, such as those dealing with consumer queries (including via call centres), client money and client assets and those maintaining access to cash and other payment services.
- Individuals essential to the functioning of payments processing and of cash distribution services.
- Individuals essential in facilitating corporate and retail lending and administering the repayment of debt.
- Individuals essential in the processing of claims and renewal of insurance.
- Individuals essential in the operation of trading venues and other critical elements of market infrastructure.
- Risk management, compliance, audit and other functions necessary to ensure the firm meets its customers’ needs and its obligations under the regulatory system.
- Any individual that provides essential support to allow the functioning of the above roles, such as finance and IT staff.

Firms should consider whether they should issue a letter to all individuals they identify as key workers that clearly identifies them as such and that can be presented to schools on request. We recommend that the letter includes the sentence “the individual has been designated as a key worker in relation to their employment by [firm name]” and is signed by someone with appropriate authority.”

The steps that you should now take.

We consider that employers should undertake an informed process to decide whether employees really should now be at home, as follows:

- Is the employee a key worker, where it is essential that they be at their place of work to perform their job? In some cases, a key worker may still be able to work from home (ie certain aspects of financial services).
- If the employee is not a key worker, is it really necessary that they come into the workplace to perform their job or can they in reality work from home?
- If they cannot really work from home, nevertheless do the ‘self-isolation’ or ‘social distancing’ scenarios set out in (3) below apply? It is still necessary to consider the impact of coming into work and all of the scenarios set out below.

Part 1: The Employee's Crisis

The symptoms of coronavirus

It is to be noted that much of the Guidance is predicated upon an employee exhibiting symptoms relating to the virus or being diagnosed with the virus. In short, the General Guidance states that:

“The most common symptoms of coronavirus (COVID-19) are a new, continuous cough or a high temperature. For most people, coronavirus (COVID-19) will be a mild infection”.

Time off because of symptoms: Absences and Pay

A cornerstone to the prevention of the spread of COVID-19 is the principle of self isolation, particularly where employees are exhibiting symptoms which may relate to the virus. There are three scenarios:

- 1 The symptoms do not appear to be virus related.
- 2 The symptoms or some of the symptoms may relate to the virus. In this scenario, however, the symptoms may or may not mean that the individual is positive.
- 3 The individual has been tested positive for COVID-19.

The two sets of Guidance Notes, the Stay at Home Guidance and the Social Distancing Guidance are the starting points in considering whether employees can be required to self-isolate or whether the employee can assert that he or she should stay at home.

The Stay at Home Guidance

The Stay at Home Guidance provides that:

- if you live alone and you have symptoms of coronavirus illness (COVID-19), however mild, stay at home for **7 days** from when your symptoms started. (The **ending isolation** section below has more information)
- if you live with others and you are the first in the household to have symptoms of coronavirus, then you must stay at home for 7 days, but all other household members who remain well must stay at home and not leave the house for 14 days. The 14-day period starts from the day when the first person in the house became ill. See the **explanatory diagram**
- for anyone else in the household who starts displaying symptoms, they need to stay at home for 7 days from when the symptoms appeared, regardless of what day they are on in the original 14-day isolation period. The **ending isolation** section below has more information, and see the **explanatory diagram**

- it is likely that people living within a household will infect each other or be infected already. Staying at home for 14 days will greatly reduce the overall amount of infection the household could pass on to others in the community
- if you can, move any vulnerable individuals (such as the elderly and those with underlying health conditions) out of your home, to stay with friends or family for the duration of the home isolation period
- if you cannot move vulnerable people out of your home, stay away from them as much as possible

The Social Distancing Guidance

The Social Distancing Guidance advises on social distancing measures we should all be taking to reduce social interaction between people in order to reduce the transmission of coronavirus (COVID-19). It is intended for use in situations where people are living in their own homes, with or without additional support from friends, family and carers. The Social Distancing Guidance is expressed in terms of “strong advice”.

“We strongly advise you to follow the above measures as much as you can and to significantly limit your face-to-face interaction with friends and family if possible, particularly if you:

- are over 70
- have an underlying health condition
- are pregnant

This advice is likely to be in place for some weeks.”

This Guidance states:

We are advising those who are at increased risk of severe illness from coronavirus (COVID-19) to be particularly stringent in following social distancing measures.

This group includes those who are:

- aged 70 or older (regardless of medical conditions)
- under 70 with an underlying health condition listed below (ie anyone instructed to get a flu jab as an adult each year on medical grounds):
- chronic (long-term) 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)**, a learning disability or cerebral palsy
- **diabetes**
- problems with your spleen – for example, **sickle cell disease** or if you have had your spleen removed
- a weakened immune system as the result of conditions such as **HIV and AIDS**, or medicines such as **steroid tablets** or **chemotherapy**
- being seriously overweight (a body mass index (BMI) of 40 or above)
- those who are pregnant

Note: there are some clinical conditions which put people at even higher risk of severe illness from COVID-19. If you are in this category, next week the NHS in England will directly contact you with advice about the more stringent measures you should take in order to keep yourself and others

safe. For now, you should rigorously follow the social distancing advice in full, outlined below.

People falling into this group are those who may be at particular risk due to complex health problems such as:

- people who have received an organ transplant and remain on ongoing immunosuppression medication
- people with cancer who are undergoing active chemotherapy or radiotherapy
- people with cancers of the blood or bone marrow such as leukaemia who are at any stage of treatment
- people with severe chest conditions such as cystic fibrosis or severe asthma (requiring hospital admissions or courses of steroid tablets)
- people with severe diseases of body systems, such as severe kidney disease (dialysis)

There is a very useful chart in this Guidance:

Summary of advice

Group/Action	Wash hands more often	Household isolation for 14 days*	Self-isolation for 7 days**	Social mixing in the community***	Having friends and family to the house	Use remote access to NHS and essential services****	Vary daily commute and use less public transport	Home working
0-69	Yes	Yes	Yes	Advised against	Advised against	Advised	Advised	Advised
70+	Yes	Yes	Yes	Strongly advised against	Strongly advised against	Strongly advised	Strongly advised	Strongly advised
Any age member of vulnerable group with an underlying health condition ¹	Yes	Yes	Yes	Strongly advised against	Strongly advised against	Strongly advised	Strongly advised	Strongly advised
Pregnant women	Yes	Yes	Yes	Strongly advised against	Strongly advised against	Strongly advised	Strongly advised	Strongly advised
Those with serious underlying health conditions	As above, but further bespoke guidance will be provided by the NHS next week							

* if one member of your family or household has a new continuous cough or high temperature

** if you live alone and you have a new continuous cough or high temperature

*** noting cinemas, theatres, pubs, bars, restaurants and clubs are now all required to close. If you meet others when you are outdoors (for example, on a walk) ensure that you stay at least 2 meters away.

**** for example via telephone or internet

¹ such as anyone instructed to get a flu jab each year

The Different Scenarios

With the above definitions in mind, we consider the rights and obligations of employer and employee in relation to self-isolation and pay. Note that this is separate from employer considerations regarding running the business where there has been a diminution in work, difficulties with the numbers in the workforce or the employer is trying to take steps to save the business. Statutory Sick Pay is also considered separately.

Scenario One: The employee decides to self-isolate because the employee or someone in the household is displaying symptoms.

In this case the employee has sought self-isolation because the individual is displaying symptoms or someone in the household is displaying symptoms or is positive. In such case there will be deemed incapacity for the purposes of SSP. The employee may also be entitled to contractual sick pay dependant upon what the contract of employment provides. The employee in this case is probably not entitled to contractual pay. The employee probably cannot demand that they work from home, nor the employer insist that the person work from home, unless homeworking is provided for in the contract. However, it would be in the interests of both parties to explore homeworking and the employee is fit to work (and only incapacitated because of the deeming provisions for SSP). Note that where there is mandatory quarantine or detention the position is likely to be the same; in particular where the employee is fit to work.

Scenario Two: The employee decides to self-isolate because he or she is a vulnerable person.

In this case, the employee is not displaying any symptoms but wishes to isolate to protect from the risk of infection. If this is agreed with the employer then the position is likely to be the same as the first scenario.

However, where the employer wishes the employee to continue to work the position is more difficult. The Social Distancing Guidance 'strongly advises' for socially distance steps. The employer may wish the person to continue to come to work. The employer will need to bear in mind that it owes its staff a duty of care and there may be an argument that there is a breach because the vulnerable person is placed at greater risk. Where the person has a disability there is also a duty to consider reasonable adjustments so that the questioning of home working may need to be considered.

It should be noted that where a pregnant woman cannot work from home and there is no suitable alternative role, there may be an issue of whether

the person should be suspended on full pay under the Management of Health and Safety at Work Regulations 1999 (SI 1999/3242). There is a duty to carry out a risk assessment and this is now likely to include a duty to assess the risk of infection. Where there is no suitable alternative work, by Regulation 16(3), the employee should be suspended on full pay.

Scenario Three: The employee does not wish to come to work but wants to self-isolate/work from home because of a fear of transport/coming to work and risk of infection.

We consider this scenario as one where the employee is fit and healthy and does not come within a vulnerable group. The employer owes a duty to provide a safe work environment and if this cannot be guaranteed the employee may wish to argue that there is a breach of this duty. However, where there are no symptoms and the Stay at Home or Social Distancing Guidance does not apply we consider that it will be difficult for an employee to argue that the SSP provisions apply in such circumstances.

Scenario Four: The employer wishes to send the employee home because the individual is displaying symptoms which means the Stay at Home Guidance applies.

The position here is one where the employee is displaying symptoms so that there could be a risk to the workforce. If there are reasonable grounds for concern that an employee is infected it may be that, if there is not an express right, there is an implied term that the employee can be required to stay at home. It must surely be the case that, if there is a risk of infecting the workforce, an employer can require that the employee be isolated from the workforce in those circumstances.

One of the authors has already come across a case where the employer has insisted that the employee goes home because the employee has a cold, though temperature is normal, and the employee does not have any respiratory problems nor a dry cough. In such a case, where there is no express right to send home, can the employer insist that the employee go home but not be paid? We do not think so. Nor, strictly speaking where the employee is asserting that she is fit, would SSP apply. This example illustrates the risk of over-reaction from an employer.

The question then is whether the employee should be treated as on sick leave so that SSP will apply or contractual sick pay is payable. As an alternative, the employee may be requested to work from home on the basis that their normal terms and condition for pay etc will apply. We consider homeworking below, and this is going to take on great significance in the next few months as increasing workers are being asked or required to work from home.

Scenario Five: The employer wishes to send the employee home because the individual is a vulnerable person which means the Social Distancing Guidance applies.

The position is likely to be the same as Scenario Four. The employer may want the employee to work from home to minimise risk and it could be argued that this is in the interests of the health and safety of the employee. However, where, for example, the employee is aged 71 and asserts that he or she wants to come to work, if there is no express power to require working from home, we think it would be difficult for the employer to not pay contractual salary if the employee is ready willing and able to work.

Scenario Six: The employer wishes to send the employee home even though neither Guidance is applicable, but the employer wants home working to be implemented.

This is the case where the employer has decided to close the business premises and implement home working. Unless there is an express power it may be argued that the employer cannot do this. However, we cannot see, as a matter of common sense why employees will resist this if they are to be paid. It is already a practice that is being implemented nationwide.

Scenario Seven: The employer wishes to send the employee home/lay the person off for a period to save money.

This scenario, as with the next two scenarios, are cases where the employer is trying to send the employee home or lay the person off, for financial reasons to do with the business and not because of the health reasons associated with coronavirus. As such, they are considered under Part 2 “The Employer’s Crisis” at (17).

Scenario Eight: Redundancy or changes to terms and conditions to save money.

See Part 2 “The Employer’s Crisis” at (19).

Scenario Nine: The Furlough situation.

38. See Part 2 “The Employer’s Crisis” at (10).

Statutory sick pay

By section 151(4) of the Social Security Contributions and Benefits Act 1992 an employee absent due to incapacity will be entitled to statutory sick pay; the section providing that a day on which the employee is, or is deemed in accordance with regulations, to be incapable “by reason of some specific disease or bodily or mental disablement or doing work which he can be reasonably be expected to do” under the contract, will be incapacity.

The difficulty with fitting the requirements, whether enforced or voluntarily, into the Social Security Contributions and Benefits Act 1992, is that a person

who is self-isolating may have only minor symptoms which do not make the individual incapable of carrying out work. Moreover, a person who is self-isolating due to a vulnerability may be capable of work. The Statutory Sick Pay (General) (Coronavirus Amendment) Regulations 2020, by Regulation 2(1)(c) provided that, with effect from 13th March 2020, (the date being amended to 16th March 2020, as below) the Statutory Sick Pay (General) Regulations 1982/894, were amended to provide:

- “c) he is—
 - (i) isolating himself from other people in such a manner as to prevent infection or contamination with coronavirus [...]6 , in accordance with guidance published by Public Health England, NHS National Services Scotland 7 or Public Health Wales8 and effective on [16th]9 March 2020; and
 - (ii) by reason of that isolation is unable to work.”

The Statutory Sick Pay (General) (Coronavirus Amendment) (No. 2) Regulations 2020 (SI 2020/304) changed the date from 13th to 16th March due to the publication of updated guidance on that date, of the Stay at Home Guidance and the Social Distancing Guidance – for the content of the Guidance see above.

The Health Protection (Coronavirus) Regulations 2020 (SI 2020/129) contains detailed provisions in relation to detention and isolation. By Regulation 2(1)(b), the Statutory Sick Pay (General) Regulations 1982/894 provides for deemed incapacity where:

- “(b) he is—
 - (i) excluded or abstains from work, or from work of such a kind, pursuant to a request or notice in writing lawfully made under an enactment; or
 - (ii) otherwise prevented from working pursuant to an enactment,
 by reason of it being known or reasonably suspected that he is infected or contaminated by, or has been in contact with a case of, a relevant infection or contamination”

Statutory sick pay is therefore payable where a person is excluded from work under Regulation 2(1)(b), or where an employee isolates in order to avoid the risk of infection under the Stay at Home Guidance. Where a member of the household also has symptoms which leads the employee to self-isolate this scenario will also be covered.

The effect of the Social Distancing Guidance is not so clear. The Government intends that vulnerable groups will be covered and this guidance “strongly advises” vulnerable groups not to go to work, whereas the Stay at Home Guidance states that those affected “must” not go to work (or take public transport).

A new system of isolation notes came into effect on 20th March 2020 which is intended to provide employees with evidence that they have been

advised to self-isolate. The system is online at <https://111.nhs.uk/covid-19> which also contains stay at home advice.

Absence to care for a sick person

We have already noted that where the employee is from a household in which someone has contracted the infection or symptoms of the infection, that person may wish to self-isolate. There is no reason why the person should not, at the same time, be caring for the sick person.

We also note that section 57A of the Employment Rights Act 1996 provides for a reasonable period of time off to provide assistance where a dependant falls ill, to make provision for the care of such a dependant or because of the unexpected disruption or termination of the arrangements for the care of a dependant. We can envisage circumstances where this section could be relied upon; the carers of a housebound dependant are themselves self-isolating so that someone needs to take over the care of that dependant (See **Duggan QC on Contracts of Employment** at chapter I.04-I.1.11).

Normal sickness absence

It is important to remember that throughout this crisis, there will be employees who are absent due to sickness that has nothing to do with the coronavirus. In those circumstances the normal sickness absence procedures and provisions for payment will normally apply. Where, for example, someone is absent because of 'flu' and the absence has been diagnosed as such, the employee may prefer that the usual sickness provisions apply.

Holiday

There are three potential scenarios that need to be considered in relation to the provision of statutory holiday under the Working Time Regulations 1998:

- (i) The employee has booked holiday but has to self-isolate or is tested positive. When an employee falls sick during a period when they would otherwise have been on holiday, then the holiday period may be converted to sick leave. This is because annual leave is for the purposes of relaxation and leisure which is different from sick leave (*Pereda v Madrid Movilidad SA* [C-277/08, [2009] IRLR 959; **Duggan QC on Contracts of Employment at J45**). We take the view that an employee who has to remain at home, is self-isolating or social distancing is probably in the same position so that if holiday has been booked during such period it can probably now be regarded as a period of sickness absence rather than holiday.
- (ii) On the other hand, employers may wish to instruct employees that they cannot take holiday during a such periods so that they receive SSP which is likely to be less than holiday pay.
- (iii) Query whether a worker who is not unwell but following Government guidance to stay at home under the 'Lockdown' rules can still be regarded as on holiday or instructed to take holiday during that period (with the appropriate notice given) so that holiday is used up.

These are complex issues on which advice should be taken about the specific circumstances.

Part 2: The Employer's Crisis

In Part 1 we considered the position where the employee needs to be absent/self-isolated for various reasons and how the rules are likely to apply. We considered holiday provisions and the interaction of statutory sick pay and sickness pay, as well as the position of vulnerable groups. Of course, these issues equally affect the employer who has to deal with the workplace issues. In this Part 2, however, we concentrate on the crisis that the coronavirus pandemic is causing to the survival of the business and the legal framework in which employers will act. We offer some scenarios that are likely to be a central feature of the crisis.

The detrimental impact on business: reduction in business

The impact of absences from work is one detrimental feature of the crisis. The downturn in business due to the crisis or the fact that businesses have had to close creates a very difficult business environment in which there is a serious risk that many will not survive the economic crisis that has been created. The downturn means that a redundancy situation is the inevitable consequence with the result that section 139 of the Employment Rights Act 1996 will apply:

Many people have already been laid off or their employment terminated. We consider the available options for an employer that is trying to save the business with an intact workforce.

The detrimental impact on business: managing an absent workforce

We have already seen the various permutations which will lead to an absent or reduced workforce. This may lead to there being insufficient numbers so that the workplace has to close on a temporary basis. Where the business has to close on a temporary basis and the employer hopes to re-open there may be a number of alternatives that can be considered:

- The employer could ask employees to take unpaid temporary leave; we are aware of some employers suggesting the employees can volunteer for an unpaid 'sabbatical' but this is unlikely to be attractive to employees in these uncertain times.
- There may be a variation in terms, with a temporary reduction in salary. This is likely to depend on the terms of the contract of employment and/or the agreement of the workforce. In normal times this would be a very difficult proposition to get agreement on, but it may be that employees who are still working would be prepared to adopt such a measure. The position remains that any purported variation of terms and conditions will be a breach of contract if it is unilaterally imposed and advice should be taken about the terms of the contract before this is envisaged (See the cases referred to in **Duggan QC on Contracts of Employment** in Chapter C).
- There could be dismissals with offers on different terms, but this is likely to trigger the requirement to collectively consult because of section 195 of Trade Union and Labour Relations (Consolidation) Act 1992 – TULR(C)A 1992
- Temporary layoffs may be a possibility.
- The employer could seek to control holiday entitlement, which may retain an intact workforce, but will mean that holiday pay will have to be paid (See above at paragraph 49).
- The stage may be reached where there is no alternative than redundancies. In the first instance the employer may seek voluntary redundancies.
- The next stage may be to terminate those contracts of employment of employees who do not have qualifying service to claim unfair dismissal or redundancy payments.
- Failing all the above, the only other alternative may be to implement redundancies.

Before we consider these alternatives, we must consider the Government's coronavirus job retention scheme.

The Government's 80% bailout: what it means

The Job Retention (or Furlough Scheme) was announced by the Government on 20 March 2020. This provides that all UK employers, regardless of size or sector, can claim a grant from HMRC to cover 80% of the wages costs of employees who are not working but kept on the payroll.

Up to £2,500 a calendar month may be claimed for each employee that is furloughed.

The Government has not published much about the Furlough but the "Guidance COVID-19: support for Businesses" (<https://www.gov.uk/government/publications/guidance-to-employers-and-businesses-about-covid-19/covid-19-support-for-businesses#support-for-businesses-through-the-coronavirus-job-retention-scheme>) contains the following passages in relation to the Scheme:

"Support for businesses through the Coronavirus Job Retention Scheme

Under the Coronavirus Job Retention Scheme, all UK employers will be able to access support to continue paying part of their employees' salary for those employees that would otherwise have been laid off during this crisis.

Eligibility

All UK businesses are eligible.

How to access the scheme

You will need to:

- designate affected employees as 'furloughed workers,' and notify your employees of this change - changing the status of employees remains subject to existing employment law and, depending on the employment contract, may be subject to negotiation
- submit information to HMRC about the employees that have been furloughed and their earnings through a new online portal (HMRC will set out further details on the information required)

HMRC will reimburse 80% of furloughed workers wage costs, up to a cap of £2,500 per month. HMRC are working urgently to set up a system for reimbursement. Existing systems are not set up to facilitate payments to employers."

The difficulty with the information that has so far been provided is that:

- It states that changing the status of employees remains subject to "existing employment law" but that it may be subject to negotiation. It therefore remains the position that consent would be needed for the change in status and a unilateral change is likely to be a breach of contract that

could lead to claims for unlawful deduction from wages or constructive dismissal. The employee could 'stand and sue on the contract': *Rigby v Feredo [1988] ICR 29* and **Duggan QC on Contracts of Employment** at C54. We suggest that advice is taken before any furlough is implemented.

- The support is "for those employees that would otherwise have been laid off during this crisis." It would appear that this means if, for example, the employee moves to part time work then this would not be covered.
- The employee is to be kept on the payroll, but this does not explain the lawful mechanism by which the employer will no longer be under an obligation to pay nor the employee to demand the full salary if they remain in employment.
- There appears to be no mechanism to legally change the contract of employment so that where the Guidance states that the contract may be "subject to negotiation" it presumably means that there will have to be agreement between employer and employee to the furlough and the 80% payment.

Do you have to pay full salary anyway?

It has been stated that employers can choose to top up the remaining 20% if they wish. However, where the employee remains in employment the legal mechanism by which the employer may keep the employee "on the books" but not have to pay full salary is not explained. Of course the employee may wish to accept the scheme rather than be made redundant and not have any income. We have already noted that an employee may refuse to accept the change in status which could lead to various claims so that advice really should be taken before any change is implemented.

There are various other financial measures for support set out in the Guidance.

Moving employees to part time work for a period

One possibility to save costs and because there has been a reduction in business would be to move employees onto part time work for a period, with a commensurate reduction in salary but with the business having the staff to cover the work that is carried out. A variation of the contract of employment of this nature would need the agreement of the parties. As we have noted, the difficulty is that the Furlough Scheme would not appear to apply to a move to part time work so that the employer does not get the financial support and the employee does not receive as much pay as he or she would otherwise get by way of an 80 percent payment of salary. It may be that the situation will need to be addressed.

Asking employees to work 'as normal' from home

We have already noted under Part 1 the circumstances in which employees must stay at home under the Stay at Home Guidance or are strongly advised to stay at home under the Social Distancing Guidance. The announcement by the Prime Minister at 8.30 pm on 23rd March 2020 that employees should stay at home and not use public transport unless it is absolutely essential to the job envisages a much wider 'lockdown' in which the British workforce will be expected to stay at home and work from home unless that is simply not possible because of the job (obviously key workers, such as NHS staff would be an exception and there are many other obvious exceptions such as transport staff, shopworkers in food shops and other essential workers to keep the infrastructure going). The announcement envisages a "Nation of Homeworkers" for a limited time whilst the crisis continues. The rationale for this is obvious, acceptable and necessary if lives are to be saved. Homeworking throws up a number of difficult issues which have always existed, but which may need to be taken on board in an expedited or amended way.

Facilities to be able to work from home

Normally, where homeworking is envisaged, the employer will want to ensure that the work can be properly carried out from home, the employee will work the necessary hours, there will not be 'distractions' such as childcare during working time and there will be proper facilities at home for the employee to be able to do the work. Where the employee has to be at home under the Stay at Home Guidance and it is agreed that the individual will work from home, it may not be feasible for any of these checks and balances to be carried out. It may be that some 'short form' guidance would assist the employee as to what duties are expected and how they are to be carried out. Duggan QC on Contracts of Employment at Chapter 5.7. contains very detailed guidance on Homeworking and suggested policies. The HFW employment team can assist in providing advice about the appropriate steps to take.

Homeworking terms

Further, it would normally be the position that there will be specific agreed terms for homeworking. Given the urgency of the measures that are being put into place it may simply not be feasible to agree and negotiate detailed terms and conditions and our experience so far is that the basis on which homeworking is being instilled is much more ad hoc. Nevertheless, employers may wish to give consideration to the ACAS checklist "Homeworking - a guide for employers and employees" which is replicated in **Duggan QC on Contracts of Employment** at 5.7.42.

Health and Safety

Further, health and safety may be a real issue. The employee may need specific arrangements, which in cases of disability may include reasonable adjustments to enable the job to be carried out. A first-rate example of this which we have recently experienced relates to an employee with a bad back who had a special chair at work. When the office went into temporary closure with the employees to work from home, she commented that she would have difficulty in carrying out her duties at home as she did not have a suitable chair. The employer had the chair couriered from work to home.

Other points to consider include:

- The Provision and Use of Work Equipment Regulations 1998 (SI 1998/22306) apply to the use of equipment at home.
- There would be reporting requirements if there is an accident.
- A risk assessment would normally be expected; it may be that employees should have a pro forma check off list for employees to complete and HFW can assist in providing such documents.
- The data protection requirements of the GDPR and Data Protection Act 2018 will continue to apply as will confidentiality provisions.
- Some form of performance monitoring may be needed.

It would be sensible to have a policy to cover all relevant issues (See **Duggan QC on Contracts of Employment** at chapter 5.7.).

Redundancy?

The worst-case scenario is that the employer has no choice but to make redundancies as the business no longer requires all of the workforce and does not have the financial strength to keep the workforce on the books. Where the business has had to temporarily close (and we know that this has happened to many, many businesses around the country, in particular public houses, cinemas, restaurants and shops, there is simply no business to be run and there may be no need for staff or only for a skeleton staff.

Can it be argued that the crisis is so unprecedented that contracts are frustrated?

We have considered whether this crisis has created a situation so unexpected and so unprecedented that an employer who has to close down the business for an unspecified period of time can argue that the contracts of employment have not been terminated by dismissal but have been frustrated. The concept of frustration has always been a difficult one in

employment law, but the principles are relatively clear.

Harvey on Industrial Relations defines the concept of frustration as the contract coming to an end by operation of law where “without the fault of either party, some supervening event occurs which was not reasonably foreseeable at the time when the contract was made and which renders further performance of the contract either totally impossible or something radically different from what the parties bargained for, then the contract is forthwith discharged by operation of law. The superseding event must be one that was unforeseen and not catered for in the contract.”

The concept of frustration has arisen on a number of occasions in the context of employees who are absent because of sickness. Two of the leading cases are *Marshall v Harland and Wolff Ltd (No 2)* [1972] ICR 97, 7 ITR 132, NIRC and *Egg Stores (Stamford Hill) Ltd v Leibovici* [1976] IRLR 376, [1977] ICR 260, EAT, where the employee considered when sickness could be a frustrating event. Nine points made by Phillips J in *Egg Stores (Stamford Hill) Ltd v Leibovici* [1977] ICR 260 which could be considered in deciding whether a contract is frustrated:

“It is possible to divide into two kinds the events relied upon as bringing about the frustration of a short-term periodic contract of employment. There may be an event (eg a crippling accident) so dramatic and shattering that everyone concerned will realise immediately that to all intents and purposes the contract must be regarded as at an end. Or there may be an event, such as illness or accident, the course and outcome of which is uncertain. It may be a long process before one is able to say whether the event is such as to bring about the frustration of the contract. **But there will have been frustration of the contract, even though at the time of the event the outcome was uncertain, if the time arrives when, looking back, one can say that at some point (even if it is not possible to say precisely when) matters had gone on so long, and the prospects for the future were so poor, that it was no longer practical to regard the contract as still subsisting.** Among the matters to be taken into account in such a case in reaching a decision are these:

1. the length of the previous employment;
2. how long it had been expected that the employment would continue;
3. the nature of the job;
4. the nature, length and effect of the illness or disabling event;
5. the need of the employer for the work to be done, and the need for a replacement to do it;

- 6 the risk to the employer of acquiring obligations in respect of redundancy payments or compensation for unfair dismissal to the replacement employee;
- 7 whether wages have continued to be paid;
- 8 the acts and the statements of the employer in relation to the employment, including the dismissal of, or failure to dismiss, the employee, and
- 9 whether in all the circumstances a reasonable employer could be expected to wait any longer. (emphasis added)"

We suggest that it will be very difficult but by no means impossible to argue frustration where the supervening event is the employee's absence because of the requirement to isolate, the employee develops symptoms, or the employee has proved to be tested positive. This will be the more so where there are provisions as to sickness/PHI in the contract of employment, as it may be argued that the coronavirus is but one form of sickness, therefore absence due to sickness is envisaged under the contract (*FC Shepherd & Co Ltd v Jerrom; Villella v MFI Furniture Centres Ltd* [1999] IRLR 468).

What then, about the case where the employer has had to close the premises/business because the coronavirus has meant that it is no longer viable for the business to continue? Given the uniqueness of this crisis it is not easy to find a case that is on point. In the old case of *Turner v Goldsmith* [1891] 1 QB 544 it was held that there was not a frustrating event where the employer's factory was burnt down. The employee was provided with samples and worked as a canvasser, receiving commission on sales. It was not necessary to imply a term that the contract would only exist so long as the factory continued to exist. The employer was therefore not excused from performance. However, in the present case where the coronavirus has led to the business being closed or the business diminishing to such an extent that it is no longer tenable, we question whether it may be possible to rely upon the doctrine.

We do, however, think that it would be a high risk strategy to rely upon the doctrine, though if it reached the stage where claims were being made, it may be that this would be one of the matters put forward as a potential defence.

The definition of redundancy

Where section 139 applies there will be a redundancy situation. Where the employer only envisages making a number of the workforce redundant this is likely to raise issues over selection criteria, the consultation process and the basis on which decisions are made to select certain employees for redundancy. The difficult point may arise as to whether employees who are positive or who are self-isolated would be

selected over those employees who are fit and well and able to work. The fact that the selection process is made within the context of a serious crisis will be unlikely to negate the requirement of a fair process that would normally be expected with selections for redundancies.

Lay Off

If there is a contractual right to layoff then this may be utilised. If there is no express term or any other right then it will be a breach of contract to lay off an employee. There may be rights to a guarantee payment or lay off/short term working may lead a redundancy situation. The provisions of section 28 and 147 of the Employment Rights Act 1996 sets out detailed provisions for these scenarios (**Duggan QC on Contracts of Employment** at D95-D97) and advice should be taken before lay off is envisaged.

Collective Consultation

Depending upon the number of employees that are going to be selected, the collective consultation process under sections 188- 189 of TULR(C)A 1992 will apply. We do not consider these procedures in detail in this Bulletin, but we would note that the collective consultation process will mean that the time limits under section are applicable.

We have considered whether the special circumstances exception may apply. By section 188(7) of TULR(C)A 1992:

"(7) If in any case there are special circumstances which render it not reasonably practicable for the employer to comply with a requirement of subsection [(1A), (2) or (4)], the employer shall take all such steps towards compliance with that requirement as are reasonably practicable in those circumstances."

By section 189(6):

"If on a complaint under this section a question arises—

(a) whether there were special circumstances which rendered it not reasonably practicable for the employer to comply with any requirement of section 188, or

(b) whether he took all such steps towards compliance with that requirement as were reasonably practicable in those circumstances, it is for the employer to show that there were and that he did."

The position is well set out in **Harvey on Industrial Relations** as follows, which notes that most cases deal with insolvency and:

"...if it is a sudden disaster, then it may constitute special circumstances but if there is a gradual deterioration, so that the employer could see the

writing on the wall, then it is open to the tribunal to find that the circumstances are not special (*Clarks of Hove Ltd v Bakers' Union* [1978] IRLR 366, CA). See, to similar effect: *Association of Patternmakers v Kirvin Ltd* [1978] IRLR 318, EAT; *USDAW v Leancut Bacon* [1981] IRLR 295, EAT; *Angus Jowett & Co Ltd v National Union of Tailors and Garment Workers* [1985] IRLR 326, EAT; *GMB v Rankin and Harrison* [1992] IRLR 514, EAT; *Re Hartlebury Printers Ltd* [1992] IRLR 516, Morritt J.

In a case where it is in issue whether the insolvency was a sudden disaster (so constituting special circumstances) or was merely a disaster waiting to happen, the tribunal is not entitled (with the advantage of hindsight) to substitute its own commercial judgment for that of the employer. The question is whether the employer genuinely and reasonably failed to foresee the impending disaster (*Hamish Armour v Association of Scientific, Technical and Managerial Staffs* [1979] IRLR 24, EAT). In *Keeping Kids Company (in compulsory liquidation) v Smith* [2018] IRLR 484, EAT, the charity had been struggling financially for some time and had drawn up detailed cost-cutting and redundancy plans. These were superseded when, unexpectedly, the police began investigating various criminal allegations against the charity. This investigation precipitated a withdrawal of funding which led very quickly to the collapse of the charity. HHJ Eady QC concluded that this was a special circumstance for the purposes of TULR(C)A 1992 s 188(7), describing it as 'an unexpected and sudden disaster [...] which entirely derailed its plans and meant that the operation had to close down pretty much immediately' (at [70]). The police investigation had become public on 30 July, the Cabinet Office demanded immediate repayment of an unspent grant of £2.1m on 3 August, all employees were dismissed on 5 August and an order was made for compulsory winding up of the company on 20 August (at [3])."

We query whether the suddenness of this pandemic and the crisis that it has caused may be regarded as a sudden disaster, which makes it impractical to consult. Given the suddenness of the crisis, the requirements to self-isolate and the sudden difficulties that this crisis is causing employers, it may be at least arguable that the special circumstances defence can apply, though we would suggest that some form of consultation is likely to be necessary even if it is abbreviated.

Changing terms and conditions and collective consultation for redundancy: the section 195 pitfall.

Where the employer seeks to impose change by terminating and offering new terms and conditions,

even if they are only intended to be for the period of the crisis, it must be remembered that section 195 of TULR(C)A 1992 will apply. This provides that:

"(1) In this Chapter, references to dismissal as redundant are references to dismissal for a reason not related to the individual concerned or for a number of reasons all of which are not so related."

It was held in *GMB v Man Truck & Bus UK Ltd* [2000] IRLR 636, EAT that section 195 is satisfied where employers collectively dismissed the workforce in order to take them all back on new terms of employment, with no actual job losses. This would mean that where the employer adopts the approach of changing terms and conditions by dismissing and offering new terms, the requirements for collective consultation will apply.

The self employed

Whilst the Government announced the 'Furlough' package for employers and employees, considerable concern has been expressed about the impact of staying at home on the self-employed. To this end the House of Commons, Public Bill Committee has proposed an amendment to the Coronavirus Bill "Statutory Self-Employment Pay" which provides that there must be regulations to cover freelancers and the self-employed, who will receive guaranteed earnings of 80% of their monthly net earnings averaged over the previous three years, or up to £2917 a month, whichever is the lower. We shall update this Bulletin to advise what steps the Government decides to take in relation to the self-employed when the position becomes clear.

Seeing a way through the crisis

We have set out above various employment law issues that are likely to arise during this crisis. It is clear that co-operation between employers and employees will be essential if we are to get through this crisis with as healthy a workforce and economy as possible. The Government is seeking to assist by offering unprecedented financial support. Nevertheless, the rigours of employment law will still apply albeit the concept of reasonable and fairness may be considered against the backdrop of an unprecedented crisis.

We would be very interested in any comments that readers have on this Bulletin and whether they have any additional views that should be added to the paper. We can be contacted at the emails below for any views.

We will update this Bulletin with new editions to keep up to date with developments.

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