



## Employment Law Newsletter - July/August 2020

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We do not normally send out a newsletter at the end of August so, unless there are changes in legislation, we are taking a break and you will next hear from us at the end of September.

### Can your furloughed employees attend court to give evidence for you?

The Nottingham County Court has held that an employee's attendance at court to give evidence on their employer's behalf is not "work" in the context of the Coronavirus Job Retention Scheme (CJRS). It also held that being contacted by the employer's lawyer to arrange attendance at court is not asking a furloughed employee to do work. Participating as a witness for the employer (or anyone else) in the justice system is not a breach of the terms of the CJRS.

These findings were made during an application to vacate made by Bourne Leisure in defending a personal injury claim against it by a visitor to a leisure facility. While the application to vacate succeeded overall, it was held that the fact that a furloughed employee needed to give evidence was not a basis for vacating a hearing. As far as we are aware, this is the first decision on whether giving evidence for an employer during furlough amounts to work.

The decision of the County Court is not binding on HMRC, so will not be determinative if HMRC were to investigate an employer for breach of the terms of the CJRS in similar circumstances. It is also strongly arguable that the judge's views have no bearing on the rather different situation of an employee being interviewed by the employer's solicitors to give a witness statement, or an employee attending an internal disciplinary hearing to give evidence.

### How should you deal with anonymous witnesses?

In [Tai Tarian Limited v Christie](#) the Employment Appeal Tribunal (EAT) guided us. A tenant of Tai Tarian Limited, a housing association, complained that one of its carpenters, Mr Christie, had made homophobic comments when he was working at her property. The employer dismissed Mr Christie without disclosing the tenant's identity. A tribunal decided that the Housing Association had dismissed Mr Christie unfairly, although the EAT returned the case to a new tribunal for a rehearing.

### **So, what should you do if a witness refuses to let you disclose their identity?**

#### **Approach carefully**

Relying on an anonymous statement does not inevitably make a dismissal unfair. However, it undermines the extent to which the employee can challenge the veracity of the evidence. Without knowing their accuser, the employee cannot describe the incident fully, its context or the witness's motivation for lying.

#### **Reassure the witness**

Ask the witness why they wish to remain anonymous. They may have a valid reason. Without pressurising them, explain the relevance of their evidence and how your business protects witnesses, particularly whistle-blowers, from repercussions.

#### **Corroborate**

Try to corroborate the evidence by speaking to other witnesses or analysing documents. Consider allowing the employee to put written questions to the anonymous witness.

### **Consult, consult, consult**

Many of you will be proposing redundancies this year and next. Some may seem inevitable. You might think that consultation is futile.

The EAT reminded us about the importance of consulting employees at risk of redundancy in [Gwynedd Council v Barratt and another](#).

The council planned to close one school and open another. It told its teachers that they would be redundant unless they got a job at the new school or were redeployed elsewhere by the council. Teachers could only secure a job at the new school if they applied and succeeded in an interview. Two PE teachers who failed at interview were unfairly dismissed.

The tribunal held that 'threatening to dismiss staff and compelling them to apply for their own jobs or similar jobs ignores years of jurisprudence on dealing with potential redundancy situations'.

### **What should you do differently?**

#### **Allow challenges**

Always allow employees to challenge the decision to select them for redundancy, during the consultation process and through an appeals procedure.

#### **Follow the formal process**

In a reorganisation, you should avoid requiring employees to apply for the same jobs and instead follow the usual redundancy process of consultation, selection pools and criteria, and suitable alternative employment.

#### **Competitive interviews**

You may use a competitive interview process where employees apply for new roles, as opposed to the same or substantially the same roles. However, you should still consult affected employees.

### **Holidays: how should you handle staff quarantine?**

The government caught many of us out when it announced, after a surge in coronavirus cases, that anyone returning from mainland Spain, the Balearic Islands and the Canary Islands on or after Sunday 26th July would have to self-isolate for two weeks. What should you do?

### Prepare

Don't wait for the problem. Make and communicate your decision on how you will handle employees who are forced to quarantine after travelling abroad. Identify whether they can work from home. Are there duties outside their normal tasks that would benefit you? Decide whether you will pay them if they can't do anything useful. This will help employees assess the risks if they choose to travel abroad and make an informed decision.

### Pay

The government has told employers to do what they can to be flexible and avoid penalising employees. However, unless your contract says otherwise, there is no entitlement to full pay. Your employees cannot demand full pay by saying they are happy and ready to work but the new rules mean they cannot physically do so. There is not even an entitlement to statutory sick pay during the new 14-day quarantine period.

Consider relaxing your holiday policy to allow them to take any remaining holiday, even if they can't give you the normal period of notice.

However, if you've sent someone abroad for business purposes, you should consider paying them in full. If you don't, they'll be livid. They could resign and claim constructive unfair dismissal.

### Communication

Make sure they tell you. Anyone who is asked to quarantine must comply unless they are exempted from the rules. This means they must return to their home immediately after entering the UK and remain there for 14 days. They cannot go to work, shop for food, or go outside for exercise.

Ensure they follow your absence reporting procedure.

Anyone who doesn't self-isolate will commit a criminal offence and can be fined £1,000.

### Avoid the problem

You can't normally control where your people go on holiday. That is their own time. However, you can discourage them from going on holiday abroad by making it clear they will have to follow any quarantine advice in place and won't be paid during this time.

An absolute ban may be unreasonable if the only downside is the employee having to self-isolate after returning. It may also be indirectly discriminatory because it may affect some nationalities more than others.

Some people will have booked their holidays before lockdown and may decide to go if they can, even if they have to quarantine afterwards.

Try persuasion. Honey will work better than vinegar.

### Can you dismiss someone who can't return to work because they are in quarantine?

You can, but you shouldn't. Not turning up for work is, potentially, a fair reason for dismissal but most employment judges are going to be sympathetic to anyone who has returned to the UK to find that quarantine rules were imposed during their holiday and they have remained at home in line with government advice.

### Can you cancel leave that you have already authorised?

You can cancel annual leave that you have already authorised, so long as you give the minimum notice. The general notice period for taking leave is a period at least twice as long as the amount of leave the employee has requested unless you have agreed otherwise. So, two weeks' notice to cancel one week's holiday.

However, this should be avoided if possible. The employee will lose money although they have done nothing wrong if they booked their holiday under the travel restrictions at the time. It would be better to find another solution such as working from home when they come back.

## Job Retention Bonus

The government's Job Retention Bonus is to provide additional support to employers who keep on their furloughed employees in meaningful employment after the government's Coronavirus Job Retention Scheme ends on the 31st October 2020.

The Job Retention Bonus is a one-off payment to employers of £1,000 for every employee for whom you previously claimed under the scheme, and who remains continuously employed through to the 31st January 2021. Eligible employees must earn at least £520 a month on average between the 1st November 2020 and the 31st January 2021. You will be able to claim the Job Retention Bonus after you have filed PAYE for January and payments will be made to employers from February 2021.

Full guidance will be published by the end of September.

## CJRS Fraud

Police have arrested a man in Solihull on suspicion of defrauding the CJRS by £495,000. HMRC's fraud investigation service commented that they would 'not hesitate to act on reports of abuse of the scheme'. The arrest is thought to be the first relating to the CJRS.

If you would like to discuss these or any other issues facing your organisation please speak to your usual contact at Watershed or Keith Morgan on +44 161 703 5611

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