

# INSIGHTS MAY 2020

## Returning to work after Covid-19



During our webinar on 20<sup>th</sup> May, we answered your questions on getting your people back to work, health and safety, and variations to commercial contracts as you plan the return to work for your business. The questions and answers are below. You can watch our [Returning to work after Covid-19 webinar](#) in full here.

- 1. How should a business deal with difficult or challenging employees who are reluctant, or worse, to come back to work? What practical advice would you give a client?**

**Answered by Michael Stokes, Head of Employment & immigration**

The main point would be communication and record keeping, so that if it ever matters, if you ever have a dispute in a tribunal or a court one day, you can show the judge just how reasonable you were being at all stages.

It's terribly important for employers to take account of the individual circumstances of employees and it's also important for employers not to assume that someone who has been a thorn in their side in the past will be being deliberately difficult in this situation. They might be but if they assume that, they're going to get into difficulties straight away.

Employers are going to have to take their time and approach all problems of this kind, and there will be many, very methodically, approaching them all in the same way and making sure that they're not making knee-jerk decisions based on previous dealings because everything to do with Covid-19 and returning to work in a pandemic is unlike anything that any HR department or HR director has ever dealt with.

**Answered by Kamal Chauhan, Partner, Licensing, Regulatory & Tax**

Having open dialogue in consultation works both ways from an employer as well from an employee, so I guess we really are in a position now when we can almost press the reset button around the cultural workings of an organisation. Hopefully we can have more effective and constructive dialogues between the two parties, between employer and employee. Try to get around a table if you can and have those constructive discussions and iron out the issues before they become proper legal issues, if you can – see where the land lies once that has taken place. A constructive way forward is the best way forward.

## **2. Can my employer insist on me coming back to work, if I am worried about infecting a member of my family, if I can possibly work from home?**

Answered by Michael Stokes

They have got to deal with it carefully and patiently, and they have got to get the information relating to that particular employee and their family situation because each of these individual cases is going to depend on individual circumstances at home, because they're all going to be different.

Obviously the situation at work can be regulated to a large extent, but ultimately if the employee feels that they have got a reasonable belief that if they return to work they are in danger, or of becoming infected and infecting a family member, it may be so important that they are not coming back.

Then you'll end up with a constructive dismissal claim in the tribunal or if the employer takes the lead, a dismissal. It's going to be about whether the instruction to come back to work was reasonable, so it's an objective test. If it's a health and safety dismissal - and that can work for resignation as well; you can resign on health and safety grounds if you have a reasonable belief that you are in imminent danger by staying or attending work – we are going to have a lot of cases like, with tribunals having to assess the reasonableness of those beliefs.

I would be desperate to try to agree a return to work if I was the employer, or to find out exactly why it wasn't possible, and to try to accommodate the employee as far as I could.

## **3. What guidance is there for dealing with employees who feel that there isn't adequate protective measures in place when they've been asked to return to work and how is that best dealt with?**

Answered by Michael Stokes

If you are inviting any of your employees to come back to work after they have been in lockdown for some while, you are going to be producing widespread publications. Risk assessments, something much more positive, much more engaging with the employees, explaining how the employer is taking all possible steps to make sure the workplace is safe before they are invited back to work. There is a lot of PR that needs to be done in that situation.

In a non-Covid-19 situation, when I have advised employers, employers have been convinced that employees are not being straight with them, that they are just trying to avoid capture, by not wanting to come to work or come to meetings and what I try to do is paint the employee into a corner, to try to make them engage with the employer. In this case, the employer should be laying it on with a trowel, publicising why their workplace is going to be OK because they have taken all necessary steps to make it as safe as they can.

I am not going to say 'contact each employee separately to give them individual reassurance' – you can't do that – you have to got to try to deal with the mass of employees in that collective way and then where people have individual points, there is no substitute for engaging with them. Find out what their problem is; is it in their head, is it at home, is it a family member? Why are they worried?

Because eventually an employer has to make decisions about things and they have got to have a pretty good idea if their employee is worried in a reasonable way.

If we deal with an actual dismissal – an employer wants an employee to come, they won't come back and are eventually dismissed, either for misconduct or for some other reason, because they have not come to work – in that situation a tribunal will assess the reason for dismissing. If it was that the employee wouldn't come into work, then it's a question of whether the employer acted reasonably giving that as the reason to dismiss, and that is where consideration of why the employee said no would come into play.

If it is a resignation, or a constructive dismissal, the tribunal would be assessing whether the employer insisting that the employee coming back to work amounted to a fundamental breach of contract, which undermined the whole relationship. That's a familiar test, and anyone who has had a tribunal case will know what the tests are there.

I'm interested in the health and safety aspects of the Employment Act concerning the reasonableness of the employee in deciding that it wasn't safe for them to come back to work; tribunals don't decide those things very often, and that's going to be interesting and difficult.

The objective test is whether the employee was reasonable in their belief, so it's familiar in that sense, but the tribunals won't have seen many cases of this kind.

#### Answered by Kamal Chauhan

If I was a regulator going into a business, the first question I would be asking would be can you demonstrate to me as a regulator that you have taken all reasonably practicable measures to ensure the health and safety of your employees and non-employees? It goes back to ensuring that you have, in the first instance, engaged with employees as far as you can. There is a balancing act, you can't go and ask every single person what their opinion is and you can't ask what the family's opinion is of a certain situation; on the one hand you have got the risk, and on the other you have got the resource to mitigate that risk, and it's finding a balance between the two.

Amplifying what has worked really well for a business – working remotely, staggering shift patterns, let's use that as our evidence to go back to employees or people who have got real concerns about returning to the workplace and how they can deal with it; we can use that as our business evidence, corporate evidence, to allay and concerns of fears people may have about a return to the workplace.

#### **4. Can I insist upon wearing a facemask without giving my employer an opportunity to punish me indirectly?**

#### Answered by Michael Stokes

I would be astonished at the moment if an employer thought to discipline someone who wanted to wear a face mask. What sort you wear and in what circumstances you wear and for how long over the next few months; that context is going to determine if you are acting reasonably as an employee in not obeying your employer's instruction to remove the mask. At the moment, I don't see that happening at all – it would be extraordinary for an employer to say you should not wear a mask.

### Answered by Kamal Chauhan

If there are specific reasons for an employee or an operative not to wear a face mask, that's the only reason I can think of; for example in the food and beverage industry, there are certain measures you have to take into account when working with food preparation, but that is very specific. It would be a brave business that turns round and says that we don't want you to be wearing a face mask because we have got no other reason. Hopefully we won't be in a situation where we see that. Different people have different appetites towards risk and different exposure to risk, so that needs to be seen in the round so that when an employee makes that request, the business can make a decision on that, given their role; if they feel better wearing it, go ahead and do so.

## 5. Where does the burden of proof lie as to where an employee may or may not have contracted coronavirus?

### Answered by Michael Stokes

I have to consider the context; if you're in an unfair dismissal context, the employer has to show what their reason for dismissal was; the burden is on them to prove that they were reasonable in acting on that basis, so I suppose if there was a question mark over whether someone did in fact have coronavirus, the employer would have to show that they didn't believe it, and had reasonable grounds for not believing it.

You often get sick pay disputes when the employer doesn't think that someone is sick, and you get a doctor's opinion or a diagnosis, but I think the burden, the exact way one would have to prove it, would depend on the context.

### Answered by Kamal Chauhan

This may stem from whether incidents are RIDDOR reportable – if a vial of substance containing the virus was dropped on the floor of a laboratory, that could lead to an unintended incident of exposure at work, so you would have quite clearly evidence of exposure in that workplace, and the burden of proof would lie with the employer to make all the reporting available to the Health and Safety Executive.

With regards to a case of disease, if someone is diagnosed as having Covid-19 and there is evidence that they were exposed at work, I think there would have to be very specific circumstances, and then the business would have the obligation to report it. The regulator would then undertake an investigation.

## 6. GDPR – What are the main difficulties with GDPR compliance and increased collection of employees' health data in response to Covid-19?

### Answered by Dan De Saulles, Solicitor, Commercial

GDPR can slip through the net given the current situation – employers should be aware of what and how much information they are collecting especially regarding health data. Some difficulties / aspects to be aware of include:

1. Data collection – organisations may be tempted to collect as much information as possible; whether employees have self-isolated, information on body temperatures of employees on site and also visitors to site, and also device location data. All of this is personal data, and most of it will fall into “special categories of personal data”; GDPR requires organisations to minimise the amount of data they collect, so if you are obtaining that kind of information, it is advised to record it on a yes/no basis.
2. The legal basis for that processing – so how can you hold and store personal data effectively? We know that organisations have to have a legal basis for this and in this current situation you could rely on ‘legitimate interests’ and contractual necessity, to ensure the health, safety and wellbeing of employees, and also in terms of meeting legal obligations under the new coronavirus laws and government restrictions. If you are processing these special categories of personal data, you must fall within the special conditions. If you are collecting data for public health reasons, you’re acting on the advice of a public medical advisor, so this would allow you to justify gathering that.
3. Reviewing current policies – if you’re collecting new categories of personal data, it will be necessary to update your policies to cover that. It’s as good a time as any to update your policies – for instance, your remote working policies and remind employees what their obligations are under those. Another factor to consider is whether you have carried out a data protection impact assessments in light of the new data being collected?

The ICO has said that it will adopt a more flexible approach, but they are still hot on the heels of businesses who do not comply with GDPR, so be aware of that and do review your internal policies.

**If you have a question or need advice on returning to work post Covid-19 call our free phone helpline on 0800 086 2819 or email us at [covid19legalsupport@hcrlaw.com](mailto:covid19legalsupport@hcrlaw.com)**

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