Employing precautions

Bianca Venkata considers the impact of the pandemic on employment firms

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Nearly all employment law firms have shut down their physical offices during the lockdown but a minority have remained open on the basis that they are key workers.

Many firms have furloughed staff. This places a higher workload on employees who have not been furloughed. There is a risk that furloughed staff feel isolated. One way of overcoming this has been to hold firm social events over Zoom.

It appears that claimant employment law solicitors are experiencing a short term decrease in work but they can expect to be busy when employment tribunals (ETs) resume substantive hearings. Typical employment law queries that claimant solicitors are currently receiving are:

- **Whether employees can be forced to take furlough** – The answer is 'No' (as it is a variation of a significant term of their contract) but if an employee unreasonably refuses they risk being made redundant and or dismissed.
- **Whether furloughed employees will receive 100 per cent of their earnings** – Employees placed on the government's job retention scheme are asked not to work and receive 80 per cent of their salary up to a maximum of £2,500 gross per month. The scheme does not include gratuities and discretionary payments which means some employees, such as in the hospitality sector, receive significantly less than 80 per cent of their salary.
- **Whether employees can be required to take holiday during the covid-19 pandemic** – The answer appears to be 'Yes', subject to the drafting of the contract. Some firms are requesting employees to use holiday leave during the lockdown period as they think that they will be busy once normality resumes.

Respondent solicitors tend to be busier and are receiving queries regarding redundancies. This is illustrated by Rolls-Royce's recent decision to make 9,000 employees redundant. Given that Rolls-Royce has already furloughed 4000 employees, this may be a sign that more redundancies are yet to come.

Firms are facing the challenge of paying high overheads while receiving less business during the lockdown. This is augmented by the fact that many insurers are defending force majeure and business interruption claims.

On a positive note, firms are availing of the government schemes to overcome the challenges posed by covid-19 including:

- Deferring the payment of VAT and self-assessment payments on account.
- Furloughing employees and using the government's self-employment income support scheme.
- Availing of loans where between 80-100 per cent of the loan is guaranteed by government.

LITIGATION IN THE ET

The Presidents of the ET issued guidance on 18 March 2020, a direction the following day and an updated direction on 24 March. In summary, all in person hearings listed between 23 March 2020 and 26 June 2020 have been converted to a case management hearing. Case management hearings by telephone tend to deal only with straightforward matters and substantive preliminary hearings. Final hearings are being relisted.

This is because while under rule 56 of the Employment Tribunal Rules preliminary hearings are to be heard in private, a number of hearings are required to take place in public, including:

- Strike out applications under rule 53(1)(c).
- A preliminary issue which impacts liability (rule 53(1)(b) and (3)).
- Any hearing involving a witness giving evidence (rule 46).
- A final hearing (rule 59).

In order to take place in public, members of the public need to be able to see and hear any witness under rule 46. This means that public hearings cannot take place by telephone call or video call to which the public do not have access. Instead, it appears that what is required is that the judge sits in the tribunal and that the public are free to attend the hearing.

On 9 April 2020, the President of the Employment Appeal Tribunal (EAT) announced that from 16 April 2020 the EAT would be hearing some appeals by telephone and skype for business.

HEALTH AND SAFETY

As the government eases the lockdown restrictions, more employees are likely to be required to return to the work place. Particular focus is being paid to health and safety given the covid-19 pandemic, illustrated by the government's determination to re-open primary schools on 1 June.

Employers including law firms have a legal obligation to protect the health and safety of their employees under the law of tort; and under a range of statutes and regulations including the Health and Safety at Work etc Act 1974 and the Workplaces (Health, Safety and Welfare) Regulations 1992.

Steps employers may be required to undertake to ensure health and safety range from regular cleaning to ensuring high standards of hygiene; provision of handwashing facilities; ensuring social distancing by spacing out working areas; and reducing the number of employees in a room; and installing plexiglass barriers.

Failing to adequately protect employees' health and safety puts a firm at risk of a personal injury claim being brought against it if the employee contracts covid-19 at work.

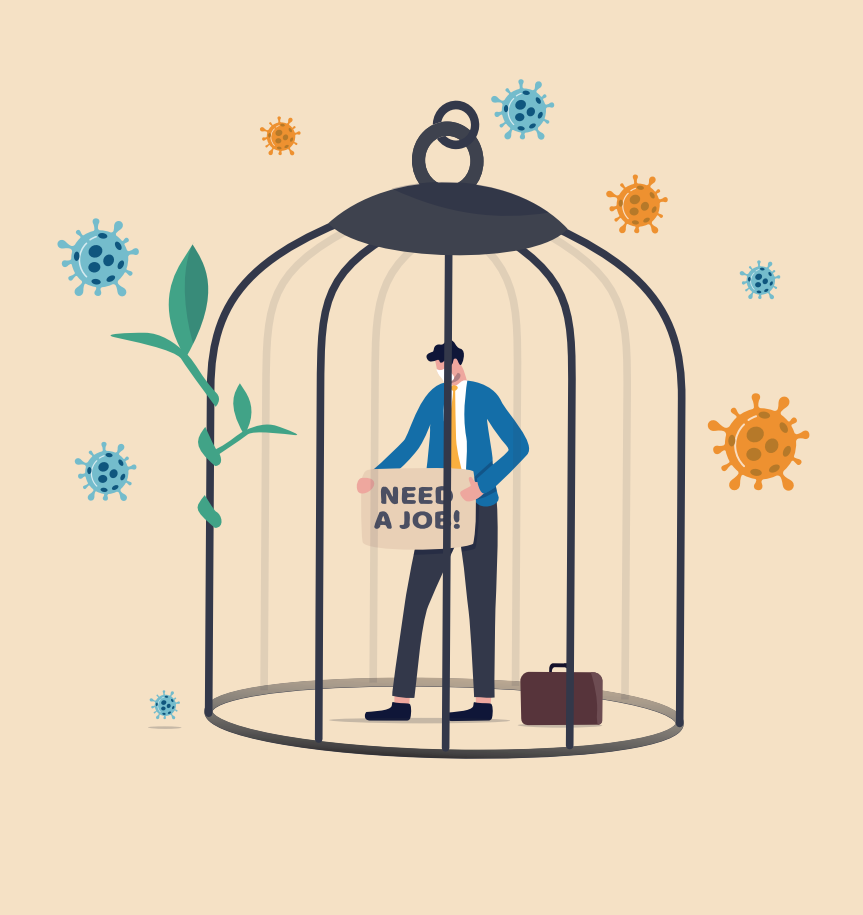
Note that employees also have the following rights in relation to health and safety concerns at work:

- The right to withdraw from the workplace where there is a "serious and imminent danger" (section 44 Employment Rights Act 1996).
- The right not to suffer a detriment or be dismissed for refusing to work because of a reasonable concern of being exposed to serious injury (sections 100 and 101 of the 1996 Act).
- The right not to suffer a detriment or be dismissed for bringing a whistleblowing claim (section 47B and section 101A of the 1996 Act).

GDPR

In light of the easing of the lockdown, some employers may decide to carry out health checks on employees attending work, including temperature tests. Personal data regarding health is "special category data" under Article 9 of the General Data Protection Regulation (DGPR). Data controllers are prohibited from processing special category data unless they can rely on an exemption under Article 9(2) GDPR which includes express consent, the pursuit of legitimate activities and the protection of public health.

The UK Information Commissioner's guidance, Workplace Testing – Guidance For Employers, states that as long as employers have a good reason, they should be able to process employee data regarding covid-19.



POTENTIAL LITIGATION

The current NHS guidance says certain groups are clinically vulnerable to the virus such as those over 70, those suffering from underlying health conditions and pregnant women.

The NHS has drafted guidance proposing that a risk assessment should be carried out on how covid-19 impacts black and ethnic minority (BAME) health workers, with a potential outcome being that BAME workers will not be allocated to covid-19 wards.

This leads to the question of whether employers who adopt policies based on the vulnerability of particular groups to the virus (for instance, only requiring healthy white employees aged under 70 years to attend work premises) could face potential discrimination claims under s13(1) Equality Act 2010. Though an age discrimination claim could be justified under s 13(2), there is no such justification for race, disability or pregnancy discrimination.

On the other hand, if employers fail to take preventative measures to protect vulnerable employees they risk facing claims for failure to protect health and safety. This places employers in a conundrum and calls for clear legal advice from employment solicitors. SJ

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