Employment

Coronavirus (COVID-19): key employment law issues

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Over the last four months or so, we have all become rather more familiar than we would have liked with COVID-19 (or coronavirus, as it is better known), with a return to masks on the Underground (retro from the SARS virus (2003) and swine flu (2009)), suspicious glances at anyone with a cough and endless monitoring of the government's now pandemic (declared by the World Health Organisation on 11 March 2020) map showing the spread of the virus. Sales of antibacterial hand gel, face masks and tinned produce have rocketed, while the stock market has nosedived (almost 9% on Monday 9 March 2020 and almost 25% since the beginning of the year).

The concern is very real. As of Wednesday 11 March 2020 (the government publishes updated figures at 2.00 pm each day), there were 456 cases of coronavirus in the UK. That was from over 27,000 people who have been tested. However, the Medical Director of Public Health England (PHE), Professor Paul Cosford, has declared that it is now "highly likely" that there will be widespread transmission in the UK and has advised that we must all be prepared. The Cobra Committee has been convened (signifying a "crisis or emergency" situation).

This blog looks at the implications of coronavirus pandemic for employers and employment lawyers. The outbreak raises issues of immigration law, employment law, health and safety, and data protection. All are briefly considered in this blog, with the usual caveat that specific legal advice may well be required to address particular cases. That applies in the employment law area more than in other areas.

The implications have already become all too real for many high-profile solicitors firms, with Latham & Watkins postponing its annual global partnership meeting in New York and Baker McKenzie's London office only re-opening last week following closure when an employee was taken ill (the employee subsequently tested negative for coronavirus). Baker McKenzie's staff joined non-legal sector employees from, among others, Chevron and Crossrail, who have been asked to work from home as a precaution. It is a list that is expanding by the day.

In these fast-moving and ever-changing situations, it is often difficult to filter the fact from the fiction. Unfortunately, some of the fiction, from a legal and employment law perspective, has come from official government guidance issued by the Health Secretary Matt Hancock and (usually more reliable) ACAS.

Issues that could arise include the following (although there are likely to be numerous other issues on a case-by-case basis).

Entitlement to sick pay

The entitlement to sick pay for employees who have coronavirus is an issue on which the official advice and guidance published by the government (through the Health Secretary) is far from comprehensive or, to be frank, even accurate. The same issues arise for employees who are on self-enforced isolation as a precaution, who are caring for a relative with coronavirus or who are responsible for looking after children sent home from schools that are closed.

Even with regard to the “obvious” case (that is, actual sickness due to coronavirus), the position is not straightforward. The starting point with regard to entitlement to sick pay is the employee’s contract or any terms implied through custom and practice with regard to the payment of sick pay for genuinely ill employees (Albion Automotive Ltd v Walker [2002] EWCA Civ 946). Many employers have contractual terms that provide only for the payment of statutory sick pay (SSP), with the possibility of a discretionary payment of contractual sick pay.

If there is no contractual right to sick pay, then the employee is only entitled to SSP (currently £94.25 per week). Tax and National Insurance will be deducted. Even then, there is ordinarily no right to be paid for the first three days of sickness absence (referred to as “waiting days”) before the “qualifying days” of up to 28 weeks’ SSP kick in. That period is likely to be sufficient unless a much more serious illness (usually pneumonia) is contracted as a result of coronavirus.

Addressing concerns about the three-day deferred period, the government announced last week that it would be suspended for the duration of coronavirus and, importantly, for all absences with illness, whether related to the coronavirus or not. In yesterday’s Budget, the Chancellor appeared to backtrack on this, however, stating that it would be paid “for people who have COVID-19 or have to self?isolate, in accordance with government guidelines”. Eligibility will, however, be extended to both:

- Individuals who are unable to work because they have been advised to self-isolate (presumably regardless of whether or not they have symptoms).
- People caring for those within the same household who display COVID-19 symptoms and have been told to self-isolate.

However, that is very unlikely to be correct with regard to contractual sick pay. The vast majority of contractual definitions of sickness absence would not cover periods of self-isolation when the employee was not in fact ill.

It is also not correct under the Statutory Sick Pay (General) Regulations 1982 (SI 1982/894), so amending Regulations will be required. Currently, an employee who is not incapable of work can only claim SSP if he or she abstains from work pursuant to a notice “made under 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” (regulation 2(1)(b)). The entitlement to SSP for those on voluntary isolation will not apply unless and until the government passes an enactment (that is, regulations or an instrument made under an Act; see regulation 2(3)) declaring coronavirus a “relevant infection” and issuing instructions for notices to exclude or refrain from work to be issued by employers. We are informed that the necessary enactments will be passed. However, at the time of writing, they have not been.

In the Budget, the Chancellor also announced that:

- The government will reimburse small employers (with fewer than 250 employees) any SSP paid for the first 14 days of sickness in relation to COVID-19.
- Contributory Employment and Support Allowance (ESA) benefit claimants directly affected by COVID-19 or self-isolating according to government advice will also be able to claim SSP from day one.

Those on casual, zero-hours and agency workers contracts should be able to claim SSP, on the same terms as above, but only subject to earning a minimum of £118 per week over the previous reference period (usually 13 weeks). There has been no relief on that requirement implemented by the government, leaving an estimated two million of the lowest-paid and most vulnerable workers having to fend for themselves. The government advice (to turn to benefits) is unlikely to be satisfactory, given qualifying periods and the administrative delays in applying. The self-employed will certainly have to fend for themselves.

A further issue that potentially arises is if the absence because of coronavirus (whether because of actual illness or because of isolation) triggers an employer’s unsatisfactory attendance sickness absence policy. Such policies are, by definition, dealing with genuine absences for genuine reasons. There is no reason in principle why absences for coronavirus should be treated any differently to genuine absences for other causes. No disability discrimination issues should arise from the coronavirus itself as the symptoms are unlikely to last for more than 12 months. However,

employees with some disabilities, such as auto-immune conditions, respiratory conditions or diabetes, are likely to suffer more severe symptoms (and therefore take greater time off work) if they catch the virus.

The dismissed employee would be left in these circumstances simply with an argument that a dismissal triggered by a coronavirus-related absence was outside the range of reasonable responses of a reasonable employer. The prospects of success of that argument would be improved if the government has passed the relevant instrument referred to above. In any event, like all “range of reasonable responses” arguments, the employee would face an uphill battle before the tribunal.

In the Budget, the government has taken the radical step of extending SSP provision to employees who take time off work to look after a sick member of their household who displays COVID-19 symptoms and has been told to self-isolate. However, even the government and ACAS guidance is not suggesting that those who take time off for childcare reasons because, for example, a school has been closed for a two-month period (as has been suggested for certain regions) would be entitled to SSP (or contractual sick pay). The only options for the employee in those circumstances is to appeal to the employer’s better nature (for example, by asking to work at home) or to use holiday entitlement or seek out a contractual entitlement to leave for childcare or care reasons.

Can an employer compel workers to take paid holidays to facilitate self-isolation?

Decisions as to when a worker takes annual leave entitlement under the Working Time Regulations 1998 (SI 1998/1833) (WTR) are often thought, and stated to be, ones to be made by the worker. This is not correct. An employer can compel workers to take the leave to which they are entitled (under regulation 13) on particular days (regulation 15(2)(a), WTR). This was, for example, enforced in the Staffordshire pottery industry with the kilns being shut down for “Potter’s fortnight” and workers obliged to take leave during the shutdown. While it may not be popular, an employer could use its powers under regulation 15(2)(a) to force a shutdown (for an isolation period) and compel workers to use their holidays during the shutdown period. The employer would, however, be required to give notice of at least twice the length of the period of leave that the workers are being ordered to take (regulation 15(4)(a)).

Can employees be compelled to travel to higher-risk countries for business purposes?

There would appear to be four main arguments preventing an employer from insisting that an employee must travel to a genuinely high-risk country as follows:

- It would amount to a breach of the duty of care owed by an employer to an employee. An employee who contracted coronavirus while travelling to the high-risk country at the employer’s insistence could, potentially, make a personal injury claim against the employer if he or she subsequently contracted coronavirus.
- It would amount to a breach of the implied duty of trust and confidence between employer and employee, potentially entitling the employee to resign and claim constructive dismissal.
- An employee in circumstances of serious and imminent danger is entitled to remove themselves from that danger and cannot be subjected to any detriment on that ground (section 44(1)(e), Employment Rights Act 1996 (ERA 1996)).
- There is an implied term in an employee’s travel clause that travel requirements must be reasonable.

Can either employers or employees insist on homeworking?

Whether the employer can insist on homeworking will depend, in the first instance, on whether there is a contractual mobility clause that is sufficiently widely drafted to include homeworking. However, given the duty of care on an employer to take reasonable steps to protect employees from foreseeable risks, there is likely to be an implied term that an employer can insist on homeworking in the circumstances of a coronavirus pandemic.

An employee can generally not insist on working at home. The argument would have to be made by the employee that they are in serious and imminent danger by being in the workplace and that they are removing themselves from the workplace accordingly (section 44(1)(e), ERA 1996). That may be a credible argument if there have been actual cases of coronavirus in the workplace, or it may be a reasonable adjustment where the nature of a disabled employee's disability makes them more likely to suffer serious effects from the virus. It is unlikely to work if the employee is simply worried about an unidentified and non-specific risk.

Can an employer take steps to prevent an employee who refuses to self-isolate from accessing the workplace or from having contact with other employees or clients?

The simple answer to this question is yes. Indeed, an employer owes a duty of care to other, non-infected or low-risk employees to protect them from the risk of infection. An employer can therefore insist on an employee not attending the workplace in circumstances in which there is a genuine risk of them infecting other employees.

The key issue is whether the employee would be entitled to be paid in those circumstances.

An employee is entitled to be paid if they are "ready, willing and able" to attend the workplace even if, for whatever reason, the employer decides that they should not do so. That is likely to be the position of the employee in question (although it is possible to construct an argument that the employee is not "ready" for work if actually infected with coronavirus).

What is an employer entitled to communicate about an employee who has coronavirus?

The Data Protection Act 2018 defines information about an employee's health as a "special category of personal data". This means that it can only be processed by the employer in defined and restricted circumstances.

It seems to me very unlikely that an employer would be able to justify the public naming of an employee who had contracted coronavirus since this is simply not necessary. The same purpose (of alerting other employees to the risk of infection) can be achieved by the employer simply stating that an unidentified employee has contracted the virus.

Dealing with Chinese national employees who are unable to return as a result of travel restrictions

This a complex area outside the scope of this blog. The Home Office has confirmed that leave to remain for Chinese nationals working in the UK who are unable to return due to travel restrictions and whose leave to remain would otherwise expire will be extended automatically to 31 March 2020. Full details are on the Home Office website.

Employment lawyers should probably prepare for long working hours, albeit possibly from the office at home.

Peter Edwards practises in the areas of personal Injury (including sexual abuse), employment and industrial relations/trade unions, and is rated as a Leading Junior in both Chambers & Partners and Legal 500.

This blog was first published on 12 March 2020 by Practical Law, and can be viewed here.