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THE CHAMBERS OF TIMOTHY RAGGATT QC

Employment Law Update

This Employment Law Update discusses two issues which are likely to be at the forefront of the minds of employers and employees as a result of the coronavirus pandemic.

Romana Canneti addresses the issue of redundancies, and details the steps that employers can take in order to avoid finding themselves facing a claim for unfair dismissal.

Ben Haseldine considers how best employers and employees can seek to amend employment contracts to accommodate the potential need for changes in the workplace and working practices arising from the public health situation and Government advice.

The cliff edge of redundancy?

Romana Canneti (1997)

The 'cliff edge'

How can an employer both make staff redundant and avoid a successful unfair dismissal claim? As airlines from British Airways to Virgin announce the prospect of mass job cuts, and high street names from Carluccios to Debenhams go into administration, many employers will see redundancies – particularly where salary cuts cannot be agreed - as their sole route to survival.

The Chancellor Rishi Sunak recently announced that the government will continue to support employers furloughing staff until October. His move to avoid the 'cliff edge' of mass redundancies will come as a relief to employers and employees alike, but Treasury support for business owners comes at a heavy price; one

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which is unsustainable in the long-term. The cost of the Coronavirus Job Retention Scheme (CJRS) is reportedly £14bn a month. It is thought to have preserved the jobs of some 7.5 million people and has seen a 55 per cent reduction in the number of firms going into administration compared to the previous month. However, employers will be required from August to 'start sharing' the cost of the scheme by enabling employees to return to their jobs part-time.

So now, with an end to lockdown in sight, and a phased return to work underway, the process of weaning businesses off an unprecedented level of Government support has begun.

From an employee's perspective, the extension preserves their 80% pay during furlough, albeit in return for a phased return to work, (with a probable concurrent loss of opportunity, in several cases, to find work elsewhere to make up the 20% deficit in wages).

From an employer's perspective, although details have as yet not been announced, the workforce's gradual return to work and productivity can only mean increased outlay during a period of accelerated economic recession. For several businesses already buckling under the strain of covering fixed overheads during a period of little or no revenue, significant cost savings will need to be found to replace government support.

How can employers navigate a safe route down the cliff edge?

As employment practitioners know, the starting point for avoiding an unfair dismissal claim is to be found at section 139 of the Employment Rights Act 1996 (ERA) which provides that employment has terminated by reason of redundancy where the employer's need for an employee to carry out work has 'ceased or diminished'.

Guidance on the interpretation of s139 is found in *Safeway stores PLC v Burrell* [1997] IRLR 200, [1997] ICR 523. Three questions are said to arise:

1. First, has the employee been dismissed?
2. If so, has the requirement of the employer's business for employees to carry out work of a particular kind ceased or diminished?
3. If so, was the dismissal of the employee caused wholly or mainly by that state of affairs?

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In short, if an employer can satisfy the test of a potentially fair reason for dismissal within section 98(2) of the ERA – and economic viability must, it seems to me, be a potentially fair reason - the question of how a redundancy situation has been handled will then determine:

- whether the dismissal was fair or unfair;
- whether the reasonableness test in Section 98(4) of the ERA is met; and
- the merits of a potential unfair dismissal claim.

Make it fair

Williams v Compair Maxam Ltd [1982] IRLR 83, is the leading case on whether a redundancy dismissal was fair or unfair. In the EAT, Mr Justice Browne-Wilkinson (as he then was) identified five key factors.

- The first is warning. Employers must give as much warning of impending redundancies as possible, so that employees can take steps to inform themselves, consider alternatives, and if necessary start looking elsewhere for employment outside the business.
- Second is consultation - whether with unions representatives or individuals - as to the best desired means to achieve what management needs, (in this context cost-cutting) with the lowest level of hardship to employees. Such consultation will often involve considering whether there shall be pools for selection.
- The third element is selection criteria. These should be as objective as possible, and could involve, suggested Browne-Wilkinson J, recourse to attendance records, efficiency of the job, experience, length of service (although in January 2020 the EAT held that length of service should not be relevant to a wrongful dismissal claim, so it is possible that this third factor will be challenged; see *East Coast Main Line Company Ltd v Cameron*).
- The fourth factor identified by the EAT was the need for fair selection, including genuine consideration of any representations made by employees at risk of redundancy or their representatives.
- Lastly, an employer should seek to see whether instead of dismissing an employee, he could offer him alternative employment. (This fifth factor, in the current circumstances of the CJRS, could arguably present furlough as an alternative to dismissal, making it an option that should at least be explored by employers seeking to reduce their workforce, as discussed below).

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Although Tribunals are generally reluctant to second-guess employers' decisions on redundancy, they will step in if they consider the decision to be a 'sham'. So although section 98(4) of the ERA requires a Tribunal to consider factors including the 'size and administrative resources' of employers if determining the reasonableness of a decision to dismiss, where the very survival of 'the employer's undertaking' depends on cutting costs, and where other attempts to cut costs (such as salary cuts) have been rejected, a Tribunal may well find a dismissal on the grounds of redundancy reasonable, if the five-factor test in *Compair Maxam* is satisfied. In the current economic climate, the emphasis is likely to be much more on procedural fairness than on what is the real reason for dismissal.

More than 20 redundancies?

The size of an organisation and the scale of proposed redundancies are particularly important given the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992. Section 188 places a duty on employers to consult where it's being proposed to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less. The consultation has to begin in good time, and in any event, if there are going to be more than 100 employees dismissed, at least 45 days before the first dismissal; otherwise, at least 30 days. Furthermore, by virtue of section 193 of the 1992 Act, the Secretary of State must be notified in writing where more than 100 redundancies are proposed.

As specialist practitioners will know, a failure to engage in the collective consultation obligations can be a very expensive mistake for employers: in such circumstances, regardless of length of service, each employee can claim compensation of 90 days' pay per person.

An important provision within section 188 of the 1992 Act to be carefully considered in the current unique circumstances of COVID and lockdown, is the *special circumstances* defence at section 188(7). If there are special circumstances which render it impracticable for the employer to comply with the statutory obligations in full, it is sufficient that the employer does as much as is reasonably practicable in the circumstances – an issue which could, for example, arise where employees' representatives are themselves furloughed.

Accordingly if, say, an SME is dismissing more than twenty employees and can't afford to have a consultation period of at least 30 days, there may well be an argu-

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ment that there are special circumstances which render it impractical for them to do so. In such circumstances, it is vital for the employer to consult with the workforce, to share its thinking as to the practicability and impracticability of the statutory consultation periods, and to offer as much of a 'reasonable' consultation period as is deemed possible, with a view to reaching consensus with employee representatives on the length of the period. The key points for an employer are to record and communicate their thinking.

The High Court has recently been considering the implications of large-scale redundancies for businesses in administration during furlough: in the Carluccio's case, Mr Justice Snowden held that there might be a duty on employers and indeed administrators - depending on the facts - to take steps or additional steps to give employees the opportunity to be furloughed, and therefore receive the benefits of government grants and the job retention scheme, as opposed to dismissing those employees. (*In the matter of Carluccio's Ltd (in administration)* [2020] EWHC 886 (Ch)) applied in the matter of *In the matter of Debenhams* [2020] EWHC 921 (Ch) involving15,000 furloughed employees). The Debenhams case considers whether the administrators must adopt the contracts of employment thereby putting the employees front in the queue as creditors for insolvency purposes. In the unique circumstances of Covid-19, it seems furloughing can be used to delay redundancies, effectively holding the ring so that the proceeds of sale of the business can be held thereafter.

Is consultation during furlough 'work'?

Present circumstances – that is, the operation of the previously unknown concept of furlough - raise questions about whether participation in individual or collective redundancy by furloughed employees is itself 'work' and therefore not allowed. Just as women on maternity leave are allowed to participate in redundancy consultation, the answer must logically be that such participation is not to be considered as 'work'. Engaging in consultation is for the benefit of the *employees*: it is not going to be generating a profit and is not part of an employer's normal day to day business (although it might avoid a fine for breach of section 188).

Could a redundancy where furlough is available risk an unfair dismissal claim?

- Employers should be aware that it could, if furlough is 'alternative employment' as suggested above. That said, there is the counter-argument that where holiday rights on full (not 80%) pay continue to accrue when an employee is furloughed, and (in some cases) where furlough could give an em-

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ployee continuity of employment over the two year threshold for statutory redundancy pay purposes, furlough may not be a viable option for the business.

- Where an employee has refused a contractual variation to cut their wages by 20%, and an employer's subsequent failure to furlough them results in a successful unfair dismissal claim, compensation would be limited to 80% (or whatever contribution the CJRS scheme makes at the material time) because dismissal would have taken place at the end of the furlough scheme in any event.
- And where the need for dismissal is genuine, the redundancy process can be initiated during furlough although as emphasised above, procedural fairness will be under close scrutiny in any subsequent proceedings.

Can an employer safely make its highest paid employee redundant to reduce cost?

They can: ultimately it is the decision of the employer, although it's vital that they consult about what the applied criteria are, and that they seek to reach agreement. If they think that their desired management results of saving costs can be achieved most fairly by getting rid of a highly paid employee rather than many others on lower pay, this is arguably an acceptable rationale, although it is one that must be consulted on, shared and explained.

Any potential age discrimination issues should, however, be carefully considered, given that often the highest earning person is the oldest. In such cases an employer should avoid presenting cost as the sole rationale.

Similarly, an employer using length of service as a selection criterion should bear in mind the need to ensure that this is not directly or indirectly discriminatory on the basis of a protected characteristic.

Conclusion

This paper presents a snapshot of some likely issues arising from wide-scale redundancies during the Coronavirus pandemic: it is hoped the retreat from the 'cliff edge' of mass redundancies is not too distant a prospect. But until then, employers should carefully consider, record and communicate their every step.

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Altering Terms of Employment and COVID-19

Ben Haseldine (2014)

It is becoming increasingly apparent that employment contracts may have to be altered as a result of the implications of the coronavirus pandemic. Employers and employees are being instructed to adapt their workplaces and practices to accommodate Government guidance on social distancing, and so thought should be given as to how the 'new normal' can be reflected contractually by varying employment terms.

This article seeks to provide a basic framework explaining how terms of employment may be varied, and highlights the legal consequences that may follow such amendments.

Likely contractual changes

On 11 May 2020, the Government published a suite of eight guidance documents under the heading 'Updates: Working safely during coronavirus (COVID-19)'. Each document provides specific advice in respect of safe working practices across various work environments including offices, construction sites, factories, warehouses, shops, and vehicles. These documents can be accessed at https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19/updates.

From these documents it can be seen that a number of changes to work practices are advised, including:

- **Place of work** – The Government advice relating to whether individuals can work from home as opposed to their usual workplace has been central to its approach to tackle coronavirus. Employment contracts will often specify an employee's place of work, and so consideration may be given as to whether it is necessary to vary that term.
- **Shift patterns** – It is advised that where people are split into teams or shift groups, as far as possible those groups should be fixed in order to minimise the number of people who have direct contact with others. This may require shift patterns and hours of work to be amended.
- **Job descriptions** – In light of the fact that some workers will now be having to take on the responsibilities of their furloughed colleagues, it may be

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appropriate for job descriptions to be updated to reflect the changed role.

- **Workplace conditions** – Whether expressly or impliedly, employers will be under a contractual duty to ensure that the workplace is safe for their employees (as well as customers, visitors, and contractors). During a public health crisis, this duty becomes even more important, and it may be desirable for specific provisions to be made in the terms of employment to reflect the need for hygiene facilities and general cleanliness, as well as what personal protective equipment (PPE) will be supplied.
- **Grievances and discipline** – Given the potential for increased disputes relating to working conditions, roles, pay, and staffing generally – coupled with the likely stretched HR facilities – it may be necessary for changes to be made to the grievance and discipline provisions in employment contracts. Particular care should be exercised, however, before knee-jerk changes are made given the risks of ill-considered amendments resulting in litigation.

A particularly contentious change which can be foreseen is in relation to **wages**. The financial impact of the coronavirus pandemic is widely recognised: businesses are experiencing a decrease in demand which has led to a drop in revenue and a squeeze on available cashflow. The Government has introduced extensive financial support measures to seek to ensure that employers are not forced to lay off their workforce. However, it is foreseeable that in the short- or medium-term, businesses will have to consider whether the salaries that were paid before the pandemic are sustainable at that level going forward. Accordingly, it can be anticipated that employers may want to vary contracts and reduce pay.

<u>The law relating to variation of employment contracts</u>

The first step that should be taken is to identify the contractual term which requires variation to reflect the intended change. It may be the case that an amendment of the contract will not, in fact, be necessary and instead the change in work practice can better be made by amending (or introducing) a policy document.

Once it has been determined that a contractual change is required, the next consideration should be what entitlement (if any) there is in the contract for variations to be made.

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Often an employment contract will have an express term permitting an employer to vary specific things (such as the place or hours of work). This is known as a specific flexibility clause. It should be noted that such clauses are often narrowly interpreted by the courts, particularly if the intended change will be to the detriment of the employee (such as a reduction in pay). That said it has been known for tribunals to imply specific flexibility clauses into employment contracts, and it may be the case that such implication will be increasingly permitted as part of the tribunal's tacit response to help deal with the coronavirus pandemic.

Occasionally an employment contract may have a general flexibility clause, but again it should be noted that the courts will only in the most clear case consider such an express general clause to be effective in permitting an employer to change any term of the contract.

If the terms of employment do not make provision for a specific variation then consideration should be given to what other options are available to employers and employees.

The most obvious and constructive way to effect an amendment is by agreement. During these uncertain times, it is clear that employers and employees should be engaging as much as possible in a dialogue to keep the other appraised of the changing situation. If a contractual change is necessary as a means of dealing with the pandemic then, if possible, it should be expressly agreed, with such agreement being recorded in writing (that always being preferable in the event of a later dispute). Employers and employees should consider whether it will be more efficient to engage with each other individually or, where appropriate, through a trade union representative. It is possible that there will be an increase in trade union membership as a result of the increased uncertainty for workers caused by coronavirus, and this is a factor which employers may wish to bear in mind.

If there is not express agreement to an amendment, it may nevertheless be the case than an employee will be taken to have impliedly agreed in certain circumstances. In a situation where an employer has, in effect, imposed a contractual change, an employee is likely to be taken to have acceded to that amendment if they do not raise any objection, and continue to work pursuant to the variation.

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Technically, if an employer imposes a contractual change without agreement (either express or implied), they will have done so in breach of contract, and so consideration should be given to the next potential steps.

An employee may continue working in accordance with the new terms but may express themselves as working under protest and then bring a claim for breach of contract. Such a claim would be brought in the civil courts (as opposed to the employment tribunals, whose jurisdiction in breach of contract claims only arises upon the termination of employment) and the likely remedy would be in damages. Alternatively, if the variation has resulted in a reduction in their pay, the employee may bring a claim before the employment tribunals for unlawful deduction of wages. In both cases, the central factual dispute is likely to centre around whether or not the employee can be said to have impliedly accepted the change or acquiesced in the breach. In some cases, the employee may consider that the alteration to the contractual terms is so significant that a deemed termination situation has arisen, and so the appropriate claim may be for unfair dismissal.

It may be the case that the employee feels unable to continue to work under the new terms and resigns, preferring then to bring a claim for constructive dismissal. Such a claim will be dependant upon the employee showing the variation to amount to a repudiatory breach.

In order to avoid the legal challenges that a unilateral amendment may present, an employer may be advised to consider terminating the employment and offering re-engagement on the new terms. Termination of the employment should, of course, be done consistently with the notice period detailed in the employment terms.

It should be stated that termination and re-engagement may give rise to an unfair dismissal claim, and an employer should expect to defend such a claim in the usual way: a potentially fair reason for dismissal must be shown (pursuant to section 98 of the Employment Rights Act 1996); and the employer must demonstrate that it acted reasonably in dismissing the employee for their failure to agree to the variation. These will inevitably be context-specific enquiries, and it will be necessary for the employer and employee to be prepared to engage in a detailed analysis of the circumstances and impacts of the public health crisis on the company.

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Concluding remarks

The coronavirus pandemic presents an uncertain and disruptive time for employers and employees, and it may be expected that the fluid situation will lead to significant changes being made to businesses and employment practices. However, all parties should be careful to tailor their responses to ensure compliance with the law: ill-considered knee-jerk reactions are more likely to have negative consequences down the line. It is hoped that this article gives a basic framework for how any alterations to an employment contract which are deemed necessary should be approached.

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