# EMPLOYMENT LAW AUTUMN 2020 REPORT

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# TRANSCRIPT

This transcript is of Daniel Barnett's Employment Law Autumn Report, recorded on 20 October 2020.

The content of the report is intended for general guidance only.  You should always seek your own independent advice.

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# THE NEW JOB SUPPORT SCHEME

**IMPORTANT NOTE:** This transcript does not include the changes to the Job Support Scheme announced by the Chancellor, Rishi Sunak, on 22 October 2020. Please see here for more details.

## INTRODUCTION

On 24 September 2020 the Chancellor of the Exchequer announced the Job Support Scheme. Its purpose is to protect viable jobs.

Two weeks later, on 9 October, the Chancellor announced an amendment to the Job Support Scheme. This is specifically for employers where the business has been told to close due to local or national restrictions: at the moment, that's Liverpool and Lancashire.

So, we have two different Schemes within the Scheme – one for businesses that have not been told to close, and a second scheme for businesses that have been told to close.

It replaces the Coronavirus Job Retention Scheme. The CJRS comes to an end on 31 October 2020, and the Job Support Scheme starts on 1 November 2020. It continues until the end of April 2021.

In summary, under scheme 1 (not a business which has closed down due to lockdown), the employee has to work at least 33% of their usual working hours. For any hours not worked the employer pays a third of what the employee would have earned, the government pays a third and the employee loses a third of what would have been earned. Under scheme 2, the government pays 67% of wages for those who cannot work – whether the job appears viable or not.

## WHAT EMPLOYERS QUALIFY?

An employer is not required to have used the JRS previously to be able to use the Job Support Scheme. But it does have to have a UK bank account and a UK PAYE number.

All SMEs are eligible. We don't have the definition yet, but for other purposes SMEs are usually defined as having at least two of the following criteria -

turnover of less than £25m, under 250 employees and gross assets of less than £12.5m. It's likely the government will use that standard definition.

Large businesses will have to undergo a 'financial assessment test' to show that they have had a downturn in income due to Covid. We don't know the details yet, but the moment they're announced, I'll send out a bulletin about it. It's rumoured that the Job Support Scheme will only be available to businesses which are not making capital distributions, such as dividend payments or share buybacks.

Moving to the second scheme, for businesses which are required to close due to national or local restrictions. It's a more generous scheme than the first one. It doesn't apply to businesses which choose to close due to Covid, the businesses must be *required* to close. It also does not apply if a business is required to close by a local public health authority, as a result of a specific workplace outbreak.

Whichever version of the scheme, the government has said it will publish a list of all employers who claim under the JSS, doubtless to try to shame larger employers into not putting in claims.

## WHAT EMPLOYEES QUALIFY?

To be eligible the employee must have been on the employer's PAYE payroll on or before 23 September 2020. To clarify this point, the government factsheet says that a Real Time Information (RTI) submission, showing the HMRC that payment has been made to the employee, must have been made on, or before, 23 September 2020.

Employees don't need to have been furloughed in the past to qualify.

As with the furlough scheme, there are entire categories of people who will not be eligible, for example those not on RTI on 23/9, directors who are paid via dividends, and all self-employed people.

This is an important difference to the Coronavirus Job Retention Scheme: under the CJRS, employers could put furloughed employees on notice of redundancy, and the government would pick up most of the bill for their wages while on notice. Under the JSS, the government will not contribute towards the wages of anybody who is under notice.

But an employer can bring an employee off the scheme and then put them under notice of redundancy. This could be a situation when the employer initially thinks that there is a viable job, but that situation changes.

It will mean that employers will need to think at the outset about whether the job is really viable (which is what the government wants). If the employee was

going to be made redundant in any event, most employers wouldn't want to pay the one-third contribution of the wages shortfall.

## WORK REQUIRED

Under the normal scheme, the employee has to work at least 33% of their usual working hours whilst on the scheme. Note that the government says in its factsheet that it will review this threshold after 3 months.

To be covered under the Scheme the employee must work the reduced hours for a minimum of 7 days. The 7 day pattern allows for a change in the hours of work – maybe 50% for 7 days, 33% for 7 days and then 100% for 7 days. What it does not allow for is a week with no work yet having the employee be paid (unlike the situation when the employee is furloughed).

Remember, this is all about viable jobs.

What are the normal working hours? Normally you just look at the contract – and it's clear that 'normal working hours' refers to the working pattern pre-furlough. If the employee is on a zero hours agreement, or some other flexible working arrangement, it might not be easy to define. The government's factsheet says that such employees can work under the Job Support Scheme and that more guidance will be given on this point.

Under the second scheme, the 'lockdown' scheme, where a place of work has closed entirely due to national or local lockdown, then it is likely that the Scheme rules will say that the employee cannot do any work. We don't yet know the position for locked-down businesses where some people can still do some work, eg a restaurant manager who might do a few hours' admin a day. It's possible they will be able to move onto the 'normal' version of the scheme.

## THE PAYMENT – THE NORMAL SCHEME

Under the normal scheme, the employer must pay the employee for all hours worked.

For every hour that is not worked, the payment is:

- The employer pays a third of the usual hourly wage
- The government pays a third of the usual hourly wage
- The employee loses a third of their pay

**EXAMPLE:**

- Employee on £1,000pw
- They work 33% of hours › £333
- That leaves £666 – split into three 1/3rds
- Employer pays £222, gvmt pays £222, they forego £222
- › they end up with £777

The government payment is capped at £697.92 per month.

If the employee is working just one third of their usual working hours this means that the government will be contributing a maximum of 22% of their salary – a significant difference to the Job Retention Scheme.

Class 1 NI contributions and pension contributions must still be paid, and the employer must meet all of this cost.

In the Job Retention Scheme the employer could top up the pay to 100%, but did not have to. The question of top up payments is not specifically addressed in the government factsheet about the Scheme. But the government does say:

> *Our expectation is that employers cannot top up their employees' wages above the two-thirds contribution to hours not worked at their own expense.*

Why would the government have this expectation? It seems that they are saying that they do not expect employers to be able to afford to make further payment. They refer to an 'expectation' rather than a specific rule that employers cannot make a top up payment.

## THE PAYMENT – THE LOCKDOWN SCHEME

The government will pay two thirds of the salary of employees who work in these businesses, up to a maximum of £2,100 per month. The employer is not required to pay <u>any</u> salary, as such (so the employee loses one third of usual salary), but they <u>will</u> have to pay any NI and pension contributions that fall due.

The employee has to be off work for a minimum of seven consecutive days for this to apply.

Once the business can reopen the government will stop making the payment. However, the employee can then be covered by the normal Job Support Scheme.

# FAQS

## HOW DO EMPLOYERS CLAIM THE PAYMENT?

The government's contribution will be made in arrears. A claim can only be submitted after payment has been made by the employer to the employee in any given pay period, and once that payment has been notified to the HMRC through an RTI return. Employers will make a claim on-line, and will be paid on a monthly basis.

## WHAT HAPPENS IF THERE IS NOT ENOUGH WORK FOR THE EMPLOYEE?

We have to remember the government's stated purpose for the scheme – it is to protect viable jobs. If there is not enough work available for the employee to work for a third of their working hours, then the job is not 'viable' within the meaning of the Scheme.

That approach does not take into account that there might not be work just now, but there might be in a few more months when Covid has (hopefully) been brought under control. The scheme does not help employers or employees in that situation.

There are definitely people working in areas which are currently closed (theatres and night clubs for example) who have no work that they can do. The only option for them would be either redundancy or to agree some sort of unpaid longer term leave. The Job Support Scheme does not help anyone who does not have at least 33% of their usual hours available to work.

## IS REDUNDANCY A BETTER OPTION?

If an employee has less than two years' service, and therefore is not going to get any statutory redundancy payment, the only cost to the employer of making the employee redundant is the notice period and any accrued, and untaken, annual leave. It might be that some employers conclude that redundancy is now the better option, rather than keeping these employees on the payroll with the hope that things improve.

This meets with the purpose of the scheme – it is about keeping viable jobs going. The government's hard-lined approach is: if the job is not viable let's not kid ourselves, it has to go. That makes sense, but it is a hard message to give to employees.

## WHAT IF AN EMPLOYEE CANNOT WORK?

To be eligible for the Job Support Scheme the employee must be working at least 33% of their usual working hours.

If an employee is sick, and therefore not working, they cannot be on the Job Support Scheme. They receive SSP or the company contractual sick pay. If an employee starts off on the Job Support Scheme, then becomes ill they go onto SSP. If the employee then gets better, and is able to work at least 33% of their normal hours, they go back on the Job Support Scheme.

If an employee is on maternity/adoption/shared parental leave etc then they are not working. They receive the relevant statutory payment. When they return to work they could go straight onto the Job Support Scheme…. as long as they are going to work at least 33% of their normal working hours.

If an employee is not willing to work, maybe because of concerns about Covid or because they have an underlying health condition or because they live with someone who is shielding, they cannot be on the Job Support Scheme. This might sound repetitive, but it is the point we have to keep coming back to – if they are not working 33% of their working hours then they cannot be on the scheme.

## CAN THE EMPLOYER FORCE THE EMPLOYEE TO WORK IN THIS WAY?

As with the CJRS, working under the new Job Support Scheme is a variation of contract. The employer therefore needs to seek agreement to the planned changes. The requirement under the CJRS was to have a written agreement in place with the employee, and the same is required for any agreement under the Job Support Scheme. This agreement must be made available to the HMRC if it is requested.

In reality, the employee is not going to have much choice. If you work for at least 33% of your contracted hours you will get some work and at least 77% of your usual pay.

If you don't agree to work in this way your employment will probably be at an end, albeit you'll get notice and redundancy pay.

## WHAT ABOUT EMPLOYEES ON FIXED TERM OR PART-TIME CONTRACTS?

Both fixed term and part-time employees are covered by the Job Support Scheme. As long as the employee is working for at least 33% of their usual hours then they are covered. For those who are part-time, it has to be at least 33% of their part-time hours, not 33% FTE.

If a fixed-term employees' contract comes to an end during the period that the Job Support Scheme is in place then – absence an extension - their employment simply ends. The Job Support Scheme doesn't, itself, extend their contracts.

## WHAT ABOUT EMPLOYEES WHO TRANSFER INTO A BUSINESS?

As long as the employees were on the payroll of the transferor at 23 September 2020 they can still be on the Job Support Scheme with the transferee.

## CAN AN EMPLOYEE TAKE ANNUAL LEAVE AT THE SAME TIME AS BEING UNDER THE JOB SUPPORT SCHEME?

If you're on annual leave, you're not working 33% of your normal hours – so are you eligible to be on the JSS?

Unless the Treasury says otherwise, it seems to me the answer is 'no'. During that week, the employee isn't working 33% of their normal hours and so the employer doesn't qualify for the grant. The employee will be entitled to full annual pay from the employer based upon their normal week's wage, calculated according to the ERA. In simple terms, under s221 ERA, that means their normal remuneration if they were working their normal hours – so it's based on their normal hours, not their reduced hours. For employees who work variable hours and have variable pay, you average out the income from the previous 12 weeks' work (s224) – which means holiday pay may end up being based on their reduced Job Support Scheme wages and/or Furlough wages. But the employer cannot recover any contribution from the government.

That actually makes sense, because why should the government subsidise payments for holiday that was probably accrued before the JSS came in?

## WOULD IT BE BETTER FOR TO AGREE A PERMANENT NEW WORKING PATTERN WITH THE EMPLOYEE?

Under the JSS, the employer has to pay the employee for more than the hours that they work. So, if there is only (for example) 33% of the usual work available why not agree this is a new working pattern and move the employee onto a part-time contract. This would mean that the employer would only have to pay the employee for the hours worked, and not the additional one third of hours not worked.

But employees are very unlikely to agree to a variation of contract which was going to result in them doing the same amount of work as being on the Job Support Scheme, but getting less money?

If the employee doesn't agree to the change, the employer could dismiss the employee and then offer re-engagement on the new terms. This would possibly be a fair dismissal under 'some other substantial reason'. If the employee has less than two years' service, and cannot claim unfair dismissal, it seems a fairly risk- free option.

However, if the employee has the qualifying service to bring a claim of unfair dismissal this could be a risky option. Showing that this was reasonable when the option of the Job Support Scheme is there could be difficult to achieve.

## WHAT DO WE THINK ABOUT THE SCHEME SO FAR?

It is not brilliant, but it is better than nothing. Why is it not brilliant?

Imagine, for ease of calculation, an employer has five people currently on furlough, each earning £2,000 per week (so a £10k salary bill). Yes, I'm ignoring NIC+pensions, but let's pretend that doesn't exist.

Now imagine that the employer decides that when furlough ends in 10 days' time, it can afford to pay £6,000 of that £10k salary bill - but no more.

Option 1 is to bring back all five employees under the new Job Support Scheme. If you bring them back at 40% of hours, then the cost is 40% for hours worked (£4,000) plus one-third of the £6k shortfall, i.e. another £2,000. There we go - we've reached the £6,000 available.

Under Option 1, the employer has 5 employees doing 40% FTE, equivalent to 2 full time employees.

Option 2 is to make 2 of the 5 employees redundant. That saves 40% of the wage bill and, hey presto, we've reached the £6,000 available to pay the salaries once again.

Under option 2, the employer has 3 full time employees (having made 2 redundant).

So, option 1 (Job Support Scheme) costs £6,000 and gives you two FTE employees. Option 2 (redundancy) costs £6,000 and gives you three FTE employees. Which would you choose if you were the employer?

And yes, I know I'm not factoring in the cost of notice pay or redundancy payments. I know I'm not factoring in the Job Retention Bonus payable at the end of January. But that doesn't detract from the fundamental maths - it will often be cheaper to make redundancies than to bring large numbers back from furlough under the Jobs Support Scheme.

# JOB RETENTION BONUS

Employers can have an employee on the Job Support Scheme and also claim a job retention bonus relating to the employee. So, it is worth us summarising the details of the Job Retention Bonus:

This is a one off payment of £1,000 to the employer (not to the employee) if the employee is employed on 31/1/21. There are three conditions:-

1. the employee must have been continuously employed from 1 November 2020 to 31 January 2021
2. the employee must earn at least £520 each month during this period.
3. the employee cannot be working their notice as at 1 February 2021.

# SELF-ISOLATION

On 27 September 2020, the *Health Protection (Coronavirus, Restrictions)(Self Isolation)(England) Regulations 2020* came into force.

Regulation 7 makes it an offence for an employer to knowingly permit a worker (including an agency worker) to attend any place other than the place the individual is self-isolating. This includes individuals who are required to self-isolate because they live with someone who has tested positive.

So, if an employer knows a worker has tested positive (or lives with someone who has tested positive), it is now responsible for stopping the worker from working (unless they can work from home). Any employer who fails to do so will face a fine, starting at £1,000.

There is also an obligation on the worker to tell their employer that they are self-isolating (Regulation 8). Any individual who breaches self-isolation will, normally, commit a separate criminal offence (Regulation 11).

# WHISTLEBLOWING AND INTERIM RELIEF

Whistleblowing is the colloquial term for making disclosures in accordance with the Public Interest Disclosure Act 1998.

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**43B *Disclosures qualifying for protection.***

*(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –*

*(a) that a criminal offence has been committed, is being committed or is likely to be committed,*

*(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*

*(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,*

*(d) that the health or safety of any individual has been, is being or is likely to be endangered,*

*(e) that the environment has been, is being or is likely to be damaged, or*

*(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.*

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It does not matter if the individual making the disclosure is wrong, or if it is concluded that it is not in the public interest. If the individual believes that the information is correct at the time of making the disclosure, and believes that it is in the public interest it can still be protected.

Interim relief is not particularly well known, and it's often thought of as the 'nuclear' option of employment remedies. It's only available if the employee has been dismissed for whistleblowing or trade union activities – performance dismissals, conduct dismissals, discriminatory dismissals and all other types of

dismissals do not give rise to interim relief applications. It's only dismissals for whistleblowing and trade union activities.

I've mentioned ***McConnell and anor v Bombardier Aerospace/Short Brothers plc (No.2)(2009)*** in the workbook; that was a case where the employee was unfairly selected for redundancy because of whistleblowing. Because the reason for dismissal was redundancy not whistleblowing, even though the selection was automatically unfair, the employee could not get interim relief.

## WHAT IS INTERIM RELIEF?

Interim relief is an order from the tribunal, usually made within a few weeks of the dismissal, that the employee EITHER be re-employed until the case is finished (that's liability and remedy), OR – at the employer's option – the employee not be re-employed but the employer continue paying their wages as if they were re-employed, again until the case is finished.

Most significantly, whether the employee ends up winning or losing the claim, they get to keep those wages. They don't have to pay them back – ever.

So it's an incredibly powerful tool for employees. I'm doing four or five interim relief cases at the moment, all arising from coronavirus health & safety issues, and they can involve quite big money.

So, how do you get an interim relief Order? There are three boxes you have to tick.

First, you have to present your ET1 within seven days of the dismissal. That's not too difficult if the employee seeks very prompt legal advice, but often – by the time they mull over being dismissed for a bit, chat to their friends, contact a lawyer's office, make an appointment, and speak to the lawyer the seven days has expired. Note that if an employee is bringing a tribunal claim and seeking interim relief, they do not have to go through Acas Early Conciliation.

Second, the claim has to be for automatic unfair dismissal on grounds of whistleblowing (or union activities).

Third, they have to prove to a judge in a speedily arranged hearing, based on documents only and no live evidence, that they have 'pretty good chance of success' at a full hearing (*Taplin*). That's been interpreted to mean not 51% chance, but some way over a 51% chance – although courts always avoid putting a percentage figure on it.

The judge will decide whether they tick those three boxes – and the third one is often not easy – then the judge will make an interim relief order and the employee is entitled to either reinstatement or, at the employer's election, their ongoing salary.

This can be very advantageous for an employee, particularly given that many Employment Tribunals currently have a waiting list of a year or more for cases to be heard. There is no requirement to mitigate any loss, and as I said, the employee keeps the money whether they win or lose at a full hearing. In effect, the employee sits at home on full pay.

## WHISTLEBLOWING AND INTERIM RELIEF IN COVID TIMES

We are seeing a big increase in interim relief applications, mainly flowing from two areas:

First, there are a lot of cases of alleged furlough fraud – cases where an employee has asserted that an employer has made false claims under the Job Retention Scheme. On 8 September 2020 the government said that around £3.5bn paid out under the CJRS has been paid out in error or in response to fraudulent claims. Employees might 'blow the whistle' because they are aware of such claims, or because they have been told to work but at the same time they are aware that a claim has been made for money from the CJRS with reference to their employment.

Secondly, there is the potential for claims relating to breaches of health and safety. These are the ones I'm tending to see at the moment. Employees can argue that they alleged there was a risk to health & safety because of non-Covid secure conditions at work, and if they are dismissed as a result of raising that complaint, it's a dismissal on grounds of whistleblowing which entitles them to seek interim relief.

There aren't any figures available yet, but from a personal perspective I had maybe half a dozen interim relief cases in the 20 years leading up to this year, and I've been instructed in half a dozen in just the last few months. It's something that all lawyers need to know about, and something that all HR Professionals need to warn their Boards is a risk of dismissing someone for raising health & safety issues.

# HEALTH & SAFETY DETRIMENTS / DISMISSALS IN THE TIME OF CORONAVIRUS

Can an employee be anxious about Covid and choose not to go into work? To answer that we are going to explore sections 44 and 100 of the Employment Rights Act 1996.

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***44 Health and safety cases.***

*(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that –*

*(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or*

*(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.*

*(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.*

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***100 Health and safety cases.***

*(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that –*

> *(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or*
>
> *(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.*
>
> *(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.*

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So, does this mean that an employee can say that s/he is scared of catching Covid if s/he returns to work, and then simply stay at home? Not quite…

## 'SERIOUS AND IMMINENT DANGER'

Firstly, let us note the specific words of the Act – there must be 'circumstances of danger which the employee reasonably believed to be serious and imminent'.

Even if an employer has taken every precaution set out by the government there is no way to give a complete guarantee that the employee will not catch Covid from someone in the workplace. Covid can certainly be a serious illness. We know that Covid is being transmitted across the country, and therefore it is difficult to argue that it is not an imminent danger. It would be difficult to argue that the threat of Covid is not serious – we are certainly told by the government that it is serious on a daily basis. So, it seems that part of the definition is met.

Is it imminent?

There is no guarantee that any workplace is safe. However, in a workplace where all possible precautions have been taken, in accordance with government guidelines, can the employee credibly argue they reasonably believe that there is an imminent danger? We Sections 44 and 100 were drafted for coalmines, not Covid, and we don't know how broadly tribunals will interpret 'imminent'.

If they interpret it broadly, accepting that there is a real possibility that the employee will contract Covid anywhere, then it's likely that employees will be protected if they insist on staying at home.

We also have to remember that the question is whether the employee reasonably believed there was 'serious and imminent' danger. What the employer thinks doesn't matter.

On that not, let's look at four cases, so we can see how the courts have approached this in a non-coronavirus context in the past.

## MOPPING THE FLOOR

In ***Oudahar v Esporta Group Ltd (2011)*** the employee was dismissed because he refused to mop an area of the kitchen. He refused because there were bare electric wires sticking out the wall, although the employer said it was safe to do the mopping.

In finding in favour of the Claimant, and so concluding that this was an unfair dismissal, the EAT said:

> *"the mere fact that an employer disagreed with an employee as to whether there were (for example) circumstances of danger, or whether the steps were appropriate, is irrelevant. The intention of Parliament was that an employee should be protected from dismissal if he took or proposed to take steps falling within section 100(1)(e)"*

This suggests, therefore, that it is for the employee to decide what is dangerous. If the employee concludes that there is a serious, imminent risk of catching Covid by being in the workplace, and that belief is reasonable, then the employee can refuse to work.

## DUSTY WORKPLACE

However, in the Oudahar case there was a risk (the bare wires) that the employer had not dealt with. If the employer has dealt with the risk, and either removed it or considerably reduced it, the conclusion could be very different.

In ***Hamilton v Solomon and Wu Limited (2019)*** the employee refused to work in a workshop because of the dusty atmosphere. The employer had issued dust masks, and the Employment Appeal Tribunal found his refusal to work to be unreasonable, saying:

> *"the claimant could not in the circumstances reasonably believe that there was a risk to the health and safety of any employee, including him, arising from the circumstances which actually existed at the respondent's workshop .... In addition, I concluded that there were not ... "circumstances of danger which [the claimant] reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert" in the part of the workshop to which Mr Solomon had required him to go and work.*

*That was because I concluded that it was not reasonable for the claimant to believe that his workplace was not safe because its dust extraction arrangements were to any extent inadequate."*

Taken at face value, this suggests an employer can largely defend a s44 claim by taking reasonable steps to reduce the possibility of any risk to health. Reading this across to Covid times, this might suggest that if an employer has taken all reasonable precautions in accordance with government guidelines then the employee cannot refuse to work.

But there is a big difference between that situation and Covid. The danger from Covid is still present, even with social distancing and hand sanitisers. It's going to be much easier for an employee to establish s/he reasonably believes in a serious, imminent danger to health.

## INTIMIDATED BY THE WORKPLACE

Another argument that could be put forward is that Covid is not a specific workplace issue. It is something that is everywhere, and the workplace is no more dangerous than anywhere else. However, that argument does not fit with the case of ***Harvest Press Ltd v McCaffrey (1999)***.

In this case the employee felt physically intimated by a colleague, he left work during his shift and then phoned his manager to say that he would only feel safe about returning to work if the colleague was removed. His argument that he had been constructively dismissed was successful, with the Employment Appeal Tribunal saying:

*"As to the submission that the circumstances of danger referred to in section 100(1)(d) means the circumstances of danger generated by the workplace itself, it seems to us that that is too narrow a view of words which are quite general. It seems to us clear that premises or the place of work may become dangerous as a result of the presence or absence of an employee. For example, premises might become unsafe as a result of the presence of an unskilled and untrained employee working on dangerous processes in the workplace where the danger of a mistake is not just to that employee, but to the colleagues who are working with him. It seems to us that the circumstances of danger contemplated by section 100(1)(d) would be apt to cover such a situation and it seems to us that had a fellow employee walked out because of the presence of an unskilled and untrained operative in those circumstances, he would be entitled to the protection of the legislation"*

So, this suggests that an employee could argue that the workplace is unsafe due to Covid being all around. It does not matter that it is not a specific workplace issue, if it is in the workplace then it is potentially unsafe. In particular, if a colleague was coughing or seemed feverish it could be seen as reasonable to remove oneself from the workplace due to a 'serious and imminent' danger.

## NO INDICATORS

Sections 44 and 100 do not just protect employees who refuse to work if they think that there is 'serious and imminent' danger. They also protects employees if they take appropriate steps to protect themselves from a danger that they see as being serious and imminent.

In ***Dent v Greater Reading Omnibus (1997)*** a bus driver stopped driving mid-route because the bus's indicators failed and he judged that to be dangerous. He was told to continue driving the route or be dismissed. The Tribunal found that the bus driver reasonably believed that there was a serious and imminent danger, and that the subsequent dismissal was unfair.

In the world of coronavirus, this could mean that a driver could refuse to take a passenger who is coughing, or an employee in a customer-facing role could refuse to serve a customer who seems to have a fever. An employee who removes themselves from the situation is likely to be an appropriate step to protect themselves.

This suggests, therefore, that we could have a two-tier issue. We could have employees who simply refuse to enter the workplace because of general risks. In addition, we could have employees who come into the workplace but refuse to do certain tasks because of certain risks. Both groups of employees may be acting reasonably.

## WHAT ABOUT TRAVEL?

So far, our focus has been on the workplace and whether it is safe for the employee to be at work. What about the commute to work? If an employee relies on public transport to get to work, could they argue that they are not going to come into work because the journey itself is not safe, and that they get the protection of sections 44 and 100 as a result (meaning they can't be subjected to detriments or dismissed)?

The point is largely untested in the courts. In my view, employees will be able to rely on these sections to cover themselves against dismissal or any detriment if they were are prepared to take public transport to get to work, due to a reasonable that their public transport presented a 'serious and imminent' danger to health. Sections 44 and 100 don't limit protection to danger in the workplace, and I think it's unlikely that a court would imply that very substantial limitation into the Employment Rights Act when parliament didn't put it in there.

I say 'largely untested' – there has been one case which touches on it.

In ***Edwards and others v The Secretary of State for Justice (2014)*** the claimant employees worked in Dartmoor prison. On snowy days they were told to gather at a supermarket car park and wait for transport to the prison. If none arrived

within 3 hours they would go home, but be paid for the day. On one particular day a 4x4 arrived to take them to the prison, but some of the employees didn't believe that it was sufficiently safe to travel due to the roads being very icy and refused to get in it. They were not paid for the day.

They were successful in arguing that this was an unlawful deduction from wages. They reasonably believed that there was a serious and imminent danger, and so they were protected under section 44 – they should not suffer a detriment because of their concerns.

Although you might think that makes it pretty clear that transport is covered within s44, there are two unusual aspects about the case:

1. This case clearly related to the safety of transport, but the point of whether sections 44 and 100 covered the transport was conceded by the parties, and not addressed specifically by the Employment Appeal Tribunal.
2. It is also worth noting the specific circumstances of this case, and that the transport was provided by the employer. This is very different to an employee being expected to travel on public transport, where the employer has no control over the cleanliness or safety of the transport being used.

Could it be argued that an employee is just being difficult if they refuse to use public transport to come to work, if other employees are using it?

No. In the *Edwards* case some of the employees did agree to travel in the 4x4. However, the EAT said that just because some had chosen to travel, it did not mean that it was unreasonable to believe it was unsafe.

So – what should the employer do if the employee refuses to come to work due to public transport? Up to the end of October one option has been to keep the employee on furlough, but this will go once the Job Support Scheme is in place. Employees need to understand that this option is disappearing.

There are all the obvious things to do, such as looking for alternatives to public transport (such as using their car, or borrow a bike); seeing if employees can do any work from home; finding another office that the employee might be able to work from… However, if none of those options are viable and the employee is refusing to travel into work, they probably will have the protection of s44. So the next question is whether you have to pay the employee when they're staying at home and not working.

## DOES THE EMPLOYEE GET PAID FOR STAYING AT HOME?

If the employee can stay at home because of concerns relating to travel does this mean that the employer has to pay the employee?

The argument against salary being due is that an employer is only required to pay an employee who is ready, willing and able to work. If the employee is not prepared to travel to work, then they are not ready, willing and able to work. It follows that they are not entitled to be paid.

That seems a pretty solid argument, and it's seems simple and obvious. But there's another argument, which is just as solid, just as simple, and just as obvious. Unfortunately, it leads to exactly the opposite conclusion. Section 44 states that the employee cannot suffer a detriment for exercising a statutory right. Not paying the employee is a detriment, and it follows the employer cannot say 'we're not paying you if you stay away from the workplace'.

So we have two competing arguments, both of which seem obviously correct. It's going to need the Supreme Court to sort that one out; and that's not going to happen for several years. In the meantime, what should employers do? I'll tell you that in just a second, but I will tell you my view – although I've been less confident about it as the months since lockdown in March have passed – is that employees are not entitled to be paid. There are two factors that just about persuade me that that is what the Supreme Court will end up deciding.

a. it's almost impossible to distinguish a genuine employee who fears serious, imminent danger from one who is gaming the system and wants to be paid for doing nothing at home. As a matter of public policy, I think the court is going to veer away from an answer that will potentially allow gaming the system on such a massive scale;

b. the other ruling would be a bizarre result given that under the Job Support Scheme, an employer who only gets 33% of work out of an employee gets government assistance to pay part of the rest, but that same employer would get no government assistance and would have to pay 100% of salary themselves if the employee does 0% of work because they're staying at home.

However, the opposite argument – that non-payment is a detriment and so the employee must be paid – is also a very compelling argument. It's harder to think of a bigger detriment than non-payment. It's possible to construct an argument that non-payment of wages should fall outside the 'detriment' sections of the Employment Rights Act 1996 because there is a specific Part of the Act dedicated to dealing with unpaid wages, but it's not an argument I'd pursue with a huge amount of enthusiasm.

Just for completeness, the case I mentioned before – *Edwards v Secretary of State for Justice* about the prison officers who refused to get in the employer's 4x4 on an icy road – does not give an answer to this. The appeal was brought on the grounds of inadequate reasons, and there was no discussion in the EAT about whether employees are entitled to wages if they refuse to attend work because of a reasonable belief in serious, imminent danger – it was just assumed by both sides that they were. The fact the employer didn't take that point might have been influenced by the fact that the argument was only over

one day's wages, and they probably decided it wasn't worth enough money to argue the point.

## WHAT SHOULD THE EMPLOYER DO?

First of all, there are some (hopefully) obvious 'soft skill' steps to take

- involve employees in discussions about workplace safety
- ask employees to raise their concerns and explain the steps that have been taken to address those concerns.
- see if there are any alternative duties the employee can do from home.

Taking this consultative approach, and given that most employees do want to do their best for the employer, means that some employees will return to the workplace.

What about those that do not? What can the employer do, and what are the risks, when we don't yet know the answer to whether the employee is entitled to pay or not if they refuse to come into work.

There are only three options:-

1. dismiss the employee
2. let them stay at home on full pay
3. let them stay at home unpaid

Let's discuss them in turn.

## OPTION 1: DISMISS THE EMPLOYEE

Dismissal for refusing to come into work because of a reasonable belief in serious, imminent danger to health is automatically unfair under s100. No two year qualifying period is needed to bring a claim, and the compensatory award isn't subject to the normal cap of one year's earnings or £88,519, whichever is the lower.

This is a very high risk option, and I recommend against it. It's also possible that the employee can show their refusal to work amounts to a public interest disclosure, in which case they might be able to claim interim relief.

It's just about possible, that with the right facts, and a fair wind behind it, an employer could show the principal reason for dismissal was conduct, ie the refusal to obey a lawful and reasonable order to attend work when the employer had taken all reasonable steps to make the workplace safe. But that really stretches the language of s100, and the argument is a very unattractive one.

## OPTION 2: LET THEM STAY AT HOME ON FULL PAY

This is the safe thing to do. You're not going to get sued. Quite the contrary, your employee will be thanking you – and soon, so will his or her best friend, and before you know, half the workforce will be saying they're staying at home on full pay because they believe there is a serious, imminent danger to health if they go to work.

So you *can* do that. But you won't want to.

That leaves…

## OPTION 3: LET THEM STAY AT HOME UNPAID

For the reasons I've explained, there is a very real chance that this will be a breach of contract – nobody knows what the Supreme is going to decide in five years time as to whether employees are entitled to pay when exercising their s44 right to stay at home.

If the Supreme Court decides they are entitled to pay, then the employee will have rock solid claim for arrears of all the wages they missed out on. They will also have a constructive dismissal claim, should they choose to resign, and of course the constructive dismissal will be automatically unfair under s100 and so compensation will be unlimited – although the duty to mitigate will engage here.

So this is not an ideal solution. But I think it's the least bad solution. Option 1 -dismissal – is a big 'no no'. Option 2 – paying in full – isn't going to practical for most employers. So that leaves option 3 by default.

In practical terms, many employees will come straight back to work as soon as they realise they're not going to be paid. And that will be the end of it – they're back at work, they've affirmed their contract, and life continues. That's a good result.

Some employees will stay at home, accept they're not being paid, but never sue.

And some employees will sue – either for constructive dismissal or unlawful deductions or s44 detriment. And in five years time, after the stay that is likely to get imposed on these cases until the Supreme Court rules, the employer might have to pay the backpay. But it's better off than if it had paid the money voluntarily under option 2, because it didn't result in a cascade of other employees developing copycat behaviours, and it's better off than if it faced a automatic unfair dismissal claim under option 1, because it has the cashflow benefit of five years' retention of the money until the Supreme Court rules.

So I don't pretend option 3 is a perfect solution, but I am confident it is the least bad solution.

# UPDATE ON CONSTRUCTIVE DISMISSAL

In ***Phoenix Academy Trust v Kilroy (2020)***, Mr Kilroy was the acting principal of a school that was taken over by a new academy trust. He was accused of gross misconduct and believed that the charges against him had been manufactured in an attempt to force him out. A disciplinary hearing was held at which he was told that there was a need for further investigation and that he would remain suspended in the meantime. He decided that his relationship with his employer was now beyond repair and instructed solicitors to send a resignation letter on his behalf indicating that he intended to claim constructive dismissal.

But before the letter was received, he was told over the phone that he was being dismissed with immediate effect. It was accepted by both sides that this meant that the resignation letter that he had sent had no effect. In a bid to clear his name he decided to appeal against the decision – although he also made it clear that he had no intention of returning to work. In the event, his appeal was successful, and the employer reinstated him. He refused to return and claimed constructive dismissal.

The Tribunal found that there had been little if any substance to the accusations of misconduct made against Mr Kilroy and held that the employer had indeed acted in breach of the implied term of mutual trust and confidence. It upheld the constructive dismissal claim, and the employer appealed.

The employer argued that by invoking the appeal procedure, Mr Kilroy had 'affirmed the contract'. An employee faced with a fundamental breach of contract by an employer has the choice to either resign and claim constructive dismissal, or decide to remain employed. Once the employee has shown that they intend to stay, they are said to have affirmed the contract and they lose the right to claim constructive dismissal. The EAT agreed that this meant that when Mr Kilroy appealed against the decision to dismiss him – even with the caveat that he had no intention of returning - he had indeed affirmed the contract.

But that was not the end of the story. The Tribunal was very critical of the way in which the employer had approached the appeal – both in terms of the time it took to reach a decision and also the substance of the decision itself. These matters arose after Mr Kilroy had affirmed the contract and it was necessary to consider whether they amounted to a fresh breach of the implied term of trust and confidence – either in their own right, or when taken alongside the employer's earlier failings. The case was therefore sent back to the same Tribunal to consider the point.

The EAT noted that there were two cases that the Tribunal had not been referred to which were particularly relevant in this case. They are both Court of Appeal decisions - so, let's look at them here:

The first ***Kaur v Leeds Teaching Hospitals NHS Trust (2019)***. In that case, the Court of Appeal addressed affirmation of contract and the last straw doctrine.

Ms Kaur was a nurse, who had an argument with a colleague. She argued that the way that her employer handled the disciplinary process, which resulted in a final written warning which was eventually confirmed at an internal appeal, was a repudiatory breach of contract. Her argument failed, but the Court of Appeal did explain the last straw doctrine and affirmation of contract.

The Court of Appeal said that affirmation of contract is not the important issue in last straw cases. All that the employee needs to show in a 'last straw' resignation is that there has been a series of incidents, whether or not they have been affirmed, which result in a breach of contract. Put another way, if there are further acts that are a breach of contract then they revive the employee's ability to rely on the string of actions, regardless of whether an act has previously been affirmed. The requirement to resign in a timely manner relates to the last in the series of incidents.

The Court of Appeal set out five questions to consider:

1. What is the most recent act which the employee is pointing to as a reason for resignation?
2. Has the employee done anything that suggests that they have affirmed the contract since that act?
3. If not, was the act alone sufficient to justify resignation?
4. If the act alone was not sufficient, was there a series of actions which, cumulatively, resulted in a breach of contract? If the answer to this is yes, there is no need to give separate consideration to a previous affirmation.
5. Did the employee resign totally, or partly, in response to the breach?

Although the Employment Tribunal did not apply the case of Kaur when making their decision in the *Kilroy* case – the case we're discussing about the acting principal of the school - let us do that now:

1. The most recent act that Kilroy was relying on was the way that the appeal was handled – both the time it took to reach a decision, and the substance of the decision.
2. Kilroy had done nothing to suggest that he had affirmed the contract since that act.

3. It is difficult for us to decide if the act alone was sufficient to justify resignation, because we do not have sufficient detail about the appeal process, BUT

4. There was a series of actions that had occurred, and they could be sufficient to amount to a pattern of behaviour of which the appeal was the 'last straw'. The Tribunal would need to go back over the facts to decide that, but what is important is that Kilroy did not affirm the last action. So, if the Tribunal does decide that the pattern of actions was enough to amount to a repudiatory breach of contract the affirmation that occurred by appealing the decision is not important.

5. And, finally, we need a finding of fact – did Kilroy resign in response to the breach (it seems likely that the conclusion will be 'yes').

The other case that the EAT noted in *Kilroy* as being of importance was ***Folkestone Nursing Home Ltd v Patel (2019)***.

Mr Patel was a healthcare assistant who was dismissed for gross misconduct. There were two issues that led to the dismissal – he had fallen asleep when supposed to be working, and he had allegedly falsified patient records. He appealed against the dismissal; the appeal was successful and he was told he could come back to work. However, the appeal only addressed the issue of falling asleep at work, it did not consider whether or not he had actually falsified the records. Mr Patel asked his employer to clarify whether this allegation had been removed, the employer did not give the reassurance and therefore he decided not to return to work, but to claim unfair dismissal.

The Court of Appeal said that a successful appeal results in a dismissal 'disappearing' and the contract of employment continuing. That is nothing new.

However, the Court of Appeal then addressed the issue of the appeal outcome letter. That letter addressed the issue of falling asleep at work, but not the (arguably more important) issue of falsifying records. As the employer had not addressed that, and had not gone back to look at this again when Mr Patel questioned it, the employer had breached the implied duty of mutual trust and confidence, and so Mr Patel could refuse to return to work and treat himself as constructively dismissed.

What do we take away from the Kilroy case, and the further examination of the law? Four points:

1. If an employee takes action which suggests that s/he has accepted the actions of the employer, and intends to remain in employment, this is affirming the contract of employment.

2. Once the contract of employment is affirmed the employee cannot argue that there has been a breach of contract.

3. However, if the employer then does something further which also breaches the contract of employment, and the employee does not affirm that breach, the employee can argue that there has been a series of breaches and this is the last straw.
4. The employee can then resign in response to that final breach and claim constructive dismissal.

# UPDATE ON PERSONALITY CLASH DISMISSALS

Let us move on and look at dismissals due to a clash of personality.

Sometimes working relationships just break down and can't be repaired. The employer may feel that it is left with no alternative but to dismiss an employee who simply cannot work effectively with a manager or key colleagues. A dismissal on these grounds can fall within the potentially fair category of 'some other substantial reason' and the question will then be whether the employer has behaved reasonably.

In ***Gallacher v Abellio Scotrail (2020)*** the employee – Ms Gallacher - was a manager who initially had a good working relationship with her boss, Ms Taggart. This started to turn sour however when her request for a pay-rise was turned down. Ms Gallacher perceived a general change of culture in the business and decided that she 'wanted out'. There were then a number of issues arising concerning whether or not Ms Gallacher should take part in an on-call rota and over the recruitment of a new member of her team. She made it clear that she was looking for another role and took a period of sick leave lasting some seven weeks. In a one-to-one meeting Ms Gallacher and Ms Taggart discussed their deteriorating relationship and Ms Gallacher said that she did not behave in the same way with anyone else. Ms Taggart felt that she was ascribing all the blame for their difficulties to her and was not interested in working to resolve matters.

Abellio, the employer, decided that Ms Gallacher could not work with Ms Taggart and that she would therefore have to leave the business as there were no suitable alternative roles. She was told this at her annual appraisal and was not offered any right of appeal. She claimed that she had been unfairly dismissed.

The Tribunal dismissed her unfair dismissal claim. It held that Ms Gallacher had adopted a 'truculent' attitude in her discussions with Ms Taggart and had indeed lost all confidence in her. Their differences meant that the relationship could not be rescued and that any attempt to resolve their issues through mediation or further discussions would have been futile.

Ms Gallacher's appeal to the EAT focussed on arguing that the employer had not followed a reasonable procedure before deciding to dismiss. Ms Gallacher had been given no warning that dismissal was being considered and no chance to modify her behaviour. She had been told of the decision at a meeting arranged for some other purpose and had been given no opportunity to appeal or put her side of the argument.

The EAT rejected the appeal against the finding that the dismissal was fair. This was one of those rare cases in which the employer was entitled to conclude that it would have been futile to follow a procedure before deciding to dismiss. Ms Gallacher did not dispute that her relationship with Ms Taggart had broken down and the Tribunal found that she had displayed no interest in resolving the situation. This was a breakdown in trust between two senior managers and the Tribunal had been entitled to find that following something akin to a disciplinary procedure would have served no useful purpose.

So, before we all start listing in our heads the difficult employees that we will go away and dismiss, let us explore some important points about this case in more detail…

The important issue in this case was whether dismissing without following a disciplinary procedure was fair. So the first thing to think about is whether this situation is properly categories as a 'conduct' dismissal or a 'SOSR' dismissal. If it was a conduct issue then a normal disciplinary procedure should be followed.

The employer in Gallacher succeeded in establishing that the relationship had broken down, and that there was no specific conduct issue – it was just that the employees could not work together. This argument has also been successful in other cases such as in ***Ezsias v North Glamorgan NHS Trust (2011)***.

In that case, Mr Ezsias was a consultant surgeon. Working relationships had broken down such that nine senior members of the department had signed a petition saying that they had no confidence in him. An investigation took place, and it was decided that the breakdown of relationships was primarily due to Mr Ezsias. He was dismissed.

Mr Ezsias argued that this was an unfair dismissal because the employer had not followed the contractual disciplinary procedures. The Employment Appeal Tribunal said if it was a conduct dismissal then the disciplinary procedure should have been followed. However, if it was 'some other substantial reason' it was not a disciplinary issue and therefore the disciplinary procedure was not relevant.

It held that the issue was not conduct, and therefore the dismissal was fair.

Another case to look at is ***Perkin v St George's Healthcare NHS Trust (2005)***. Mr Perkin had 16 years' service and was the Finance Director. He was technically competent, and there were no problems with relationships within his department. However, he had a particularly intimidating manner when dealing with executive colleagues.

He had a meeting with the Chief Executive, and was asked to resign with immediate effect. He refused, and then raised a grievance against his employer. In response, his employer began disciplinary proceedings relating to Mr Perkin's

relationships with external advisers and third parties. At the disciplinary meeting Mr Perkin made allegations about the integrity and honesty of two senior colleagues. He was dismissed, due to his behaviour.

The Court of Appeal agreed with the Tribunal and the EAT that this was a fair dismissal. However, it did make some important points – it cannot just be an employee's personality that is given as a reason for dismissal. The question is whether the way that the personality manifests itself results in a breakdown of confidence, and if this then causes (or could cause) damage in the running of the employer's business.

So, what do we conclude about dismissals when the relationship has broken down?

1. It will not be common for a relationship to have broken down such that the situation is irretrievable. Steps should normally be taken to clear the air and fix relationship.
2. If the real issue is that the employee is deliberately behaving badly, the situation is one of conduct and should be addressed through the disciplinary procedure.
3. If the issue is genuinely a clash of personalities, and there is a potentially damaging impact on the running of the business, it could fall into a 'some other substantial reason' dismissal; and,
4. If it is a SOSR situation there is no technical requirement to follow the disciplinary procedure, although it will be a lot safer to follow a process that looks remarkably like one.

So, let us move onto our third and final big case from recent months – this time looking at the transfer of undertakings.

# UPDATE ON CHANGING TERMS AND CONDITIONS FOLLOWING A TUPE TRANSFER

The Transfer of Undertakings (Protection of Employment) Regulations (known as TUPE) provide that an employee's terms and conditions cannot be changed because of the transfer of their employment from one employer to another

It has been argued in the past that this provision only applies to negative changes and that actual improvements in terms and conditions can be valid even though a strict reading of the Regulations themselves suggests otherwise.

The issue was tested in ***Fergusen & ors v Astrea Asset Management Ltd (2020)*** in which an asset management company lost the contract to manage a high-value area of real estate in Kensington and Mayfair belonging to the Abu Dhabi Royal Family.

This was effectively the only contract the company managed and so it was accepted that all employees would transfer under TUPE. This included the senior leadership and directors who promptly agreed that they should be paid hefty bonuses once the transfer had gone through - and that they would be entitled to generous termination payments if they were dismissed. These changes were incorporated into their contracts of employment and presented to the new employer. The new employer was not impressed and promptly dismissed the individuals concerned – refusing to honour the new terms.

One of the many issues that fell to be considered in the subsequent tribunal proceedings was whether these changes in terms and conditions were valid and binding. The Tribunal held that they were not. The only reason for the changes was that the contracts were being transferred to a new employer. They were therefore void under TUPE. The EAT agreed. The Regulations were clear that any purported change in terms and conditions was void if the reason for it was the transfer itself. That was certainly the case here as there was no other commercial justification for the changes being made. Suggestions that positive changes were permitted were not based on the Regulations themselves which were unambiguous on the point.

To explore this case let's start by looking at the law – and specifically at *Regulation 4(4) of the Transfer of Undertakings (Protection of Employment) Regulations 2006*. This says:

*4.—(4) Subject to regulation 9, in respect of a contract of employment that is, or will be, transferred by paragraph (1), any purported variation of the contract shall be void if the sole or principal reason for the variation is—*

*(a) the transfer itself; or*

*(b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce.*

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In the *Fergusen* case the EAT ruled that Regulation 4(4) does not give an exclusion if the contractual change is preferential to employees. The EAT gave the following reasons:

- The Acquired Rights Directive (from which we get TUPE) has the purpose of safeguarding employee rights. It is about preserving the current situation, and is not about improving the situation for employees.
- Reaching the conclusion is consistent with UK case law (we will come to that in a moment)
- If it is concluded that Reg 4(4) allows preferential variations this will lead to a number of debates about what preferential means. There could be disagreement about whether something is or is not better for an employee.

The EAT in *Fergusen* referred to a case called ***Regent Security Services Ltd v Power (2007)***. In Regent the employee had a retirement age of 60 before the transfer. After the transfer the employee signed an agreement relating to a number of points, including a new retirement age of 65. Despite this, when the employee reached the age of 60 Regent retired him, and he claimed unfair dismissal.

The Court of Appeal ruled that employees who transfer cannot be refused the rights that transfer to them. However, if the employer agrees new rights with the employee it cannot then point to TUPE as a way of getting out of these new rights. The Court of Appeal concluded, therefore, that transferred employees can choose between the rights that transferred with them under TUPE, and any new rights that they have agreed on with the new employer.

Although the Regent case does raise some relevant issues it has one crucial difference to the *Fergusen* case. In the Regent case the employee agreed the changes with the employer post-transfer. In *Fergusen* the changes happened pre-transfer.

So, in *Regent* the Court of Appeal said that the employee can choose between the terms that he transferred with and the new terms that were agreed.

This does not help *Fergusen*. Here the terms that the employee transferred with were the new terms, no new terms were agreed post-transfer.

So, what do we conclude?

Any contractual changes will be void if the reasons for the change are related to the transfer. And they will be void regardless of whether they are preferential or not.

# LIVE Q&A SESSION

**Daniel Barnett:** Good afternoon, everyone. It's the 20th of October. This is part two. You all amazingly, and I don't know how, managed to cope with three hours of me this morning, yet you have come back for more. Thank you.

We'll go to the first question. Jennie, over to you.

**Jennie Hargrove:** Hi, everybody. Very quick off the mark as always, we're going to start with Diane Lambdin.

**Diane Lambdin:** Hi Jennie and thanks, Daniel, for this morning. It was great. I did stick with you for the three hours, but I might not be able to stick with you for very long this afternoon, as other work calls.

On your final session on TUPE, I think by then I was drifting in and out of consciousness. Can you just clarify, "Any changes are void, whether they're preferential or not," I think you said. If you make preferential changes with the agreements of the staff, after the transfer, are they still void?

**Daniel Barnett:** Well, here, you have the clash between the EAT case, the recent EAT case of Ferguson, which said they are all void, assuming that the transfer is the reason for the changes.

And the Court of Appeal case of Power v Regional Security, where preferential changes were allowed, and those were agreed after the transfer. Now, Ferguson said Power had been decided incorrectly, but, of course, the EAT can't overrule the Court of Appeal.

I think the Court of Appeal was wrong in Power. A lot of people think the Court of Appeal was wrong in Power, but technically it's still binding, so the preferential changes agreed after the transfer has taken place, can be enforced, unless and until the Court of Appeal overrules itself; which I think will happen next time it pops up for decision by the Court of Appeal.

**Diane Lambdin:** Okay. And on the basis that an employee isn't going to object to the preferential changes, it's just a risk the employer takes.

**Daniel Barnett:** Exactly.

**Diane Lambdin:** Okay, that's lovely. Thank you very much.

**Daniel Barnett:** Thanks Diane.

**Sarah Loates:** Hi everybody. The Job support scheme, does it apply to workers?

**Daniel Barnett:** No, because they won't be on the employees' realtime information.

**Sarah Loates:** Oh okay, thank you.

**Kim Charles:** Brilliant session this morning, thank you very much. I asked my colleagues for questions to raise this afternoon, and the first one said, "How do they get out of HR," Daniel!

I work for a local authority, and what I'm really worried about is whether or not this JSS will actually apply to us. Because it seems to be referring to businesses, and it doesn't seem clear whether the public sectors' going to get a chunk of the pie, so to speak.

**Daniel Barnett:** I wouldn't have thought so, for a second. I suspect, although, again, we haven't got the answer yet, the answer's going to be the same as was the case with the furlough scheme. Which is, the government's already paid for the salaries once, why should it pay again?

**Kim Charles:** Yes, okay. Thank you very much. That was it: easy.

**Michelle Walsh:** We've got a small office, seven staff, including a manager. And during lockdown, some staff were furloughed, some worked from home, a manager in the office. In August, the manager insisted all staff work from the office. Safety concerns were raised and ignored. And the manager's response was that she's blasé about COVID.

**Michelle Walsh:** So when Boris changed the rules, where staff were called that they could work from home again, all staff were told they had to work in the office until the end of October. And if they then insisted working from home, the manager would insist they had to attend the office at least one day a week, for a staff meeting, because she wasn't prepared to do it by Zoom. And she was also going to transfer all the calls coming into the office to the employees working from home.

So that's the first part of it. And then, a week or so later, somebody in the office is now self-isolating, because they live with somebody who's tested positive. So, obviously, concerns were raised at the staff meeting, and there was a question of, the risk assessment could be reviewed, and the response was, "No, because it's already happened now." So it's kind of, what redress do staff have, other than a grievance?

**Daniel Barnett:** Redress against what, exactly?

**Michelle Walsh:** I guess, being forced to come into the office, where they don't feel it's safe.

**Daniel Barnett:** None. If they stayed at home and were subjected to detriment as a result, they'd have a claim under Section 44. But, having come into the office, they have no redress.

**Michelle Walsh:** Right, okay. So, if they then go home because they don't feel safe, then it comes under Section 44?

**Daniel Barnett:** If they can establish they have a reasonable belief of serious and imminent danger. If it comes within the wording of it, yes.

***Michelle Walsh:*** Yeah, okay. Thank you.

**Andrew Yendole:** Hi, Daniel. I also work in the public sector, and the furlough scheme applied to some people, who, their funding was through private means; essentially, ceremonies' offices, most of whom are casual staff. So my question is, with the JSS, if we work on the basis that it will apply to those limb B, casual staff, how are we supposed to work out whether they're working out 33% of their normal hours because they don't have any? They can pick and choose, and drop ceremonies within 24 hours of them about to take place. How do we work out whether or not they would get anything? Because the 33% may be, in reality, 100% of what they would have worked anyway. Because it's their choice whether or not they work.

**Daniel Barnett:** Yes. The starting point is that you look at their working pattern before furlough came in, so it's all pre-March. But in terms of working out what their average number of hours are, we just don't know yet, because the government hasn't issued the guidance. It could well be the same position as was the case for the furlough scheme, which is that you look at the number of hours in the same calendar month the year before, or the average number of hours, averaging over the last 12 months; but we don't know.

There will be guidance. Hopefully, it will be before midnight on the cusp of the first of November. But we will get some guidance at some point.

**Angie Crush:** With employees who say they don't want to come into the workplace because they fear for their health going to work, two things: 1) if you know that person is still going out, going shopping, has been on holidays in the U.K., can you use that to say you don't genuinely believe they have that fear, and they just don't want to come to work?

And 2), do you think it's different, depending on if you're a young, fit, healthy person, which the vast majority of COVID cases don't cause any sort of serious problems to; do you think there's a difference, depending on the characteristics of the individual?

**Daniel Barnett:** Both, great questions. I'm going to deal with second one, first.

No, it doesn't make a difference, because Section 44 and Section 100 refer to, "danger to health," but they don't refer specifically to, "danger to health of the employee." So, if, for example, they live with somebody who they're worried about giving Coronavirus, that would be absolutely fine, if they didn't want to catch because they don't want infect somebody else; that would cover them, within Section 44.

Even if that wasn't the case, even if they were loners and lived on their own, then, the phrasing of Section 44 is, "a reasonable belief in serious, imminent danger." I think the danger is the infection by Coronavirus; that's the danger, not the symptoms that might flow from it. So it doesn't say, "serious, imminent risk of getting seriously ill," it says, "serious, imminent risk of danger," and the danger is exposure to the virus.

And if you go and read any of the 60 odd sets of statutory instruments that have been issued since March, about Coronavirus, they all say in the preamble, "This is being issued as a matter of urgency because of the serious, imminent threat presented by Coronavirus," it's using the same wording. So, I think, they'd still be able to rely on this section, is the answer to question two.

Question one was, "Can we challenge their belief that there's a serious, imminent risk or danger, if we've got evidence on them going out clubbing, going on holiday etc?" The answer to that is, in theory, yes, you might be able to undermine that they believed there was danger. But if their response to that evidence is, "Well, okay, but there's a world of difference between going away for a week to a beach where I'm distant from everybody, and being cooped up in an office with loads of sweaty, feverish, coughing, spluttering people. So I was nervous of one, but not the other," I think, in practice, it would be quite difficult to disprove that. I'm not saying it's impossible, I just think it would be difficult.

**Nicola Matthews:** A supplier of mine has got an exhibition stand, design and build business, and this sector was closed down in March, because of the ban on gatherings of more than 30 people. Will this type of business, which has been closed down due to COVID restrictions with zero income since March, be still eligible for extended job support, where the government pays the staff, from the first of November?

**Daniel Barnett:** No. Because there's a difference between businesses that aren't practically economic to run at a profit, and businesses that have been forced to close by government decree. Your supplier has not been forced to close by government decree; it's chosen to close, because under the current situation, with no more than 30 people, its business isn't capable of being profitable.

So, no, is the short answer. Which means it falls within the normal job support scheme, and it can only get benefits, or assistance for those who are working 33% of the hours.

**Nicola Matthews:** Thank you.

**Shona McFarlane:** Hi Daniel. My question relates to offshore workers that travel by helicopter, to offshore installations. There have been instances of people not wanting to travel because of their exposure to COVID-19, which has been proven when certain individuals have travelled back from offshore platforms that were positive. In these particular situations, the employer has placed them on unpaid leave,

even though they were not registered as a no-show. So, what's the situation with offshore workers, traveling in very cramped conditions, in helicopters, regarding COVID?

**Daniel Barnett:** I haven't got a clue. And I say that, Shona, because I … Sorry, are you talking about under Section 44?

**Shona McFarlane:** Yes. That they would suffer detriment, and it's a health and safety issue.

**Daniel Barnett:** I'd need to look, and I can't do that on the spur of the moment, I'm afraid. I'd need to look up the territorial provisions applying to Section 44 and whether they apply outside the border of the U.K., or England and Wales. I'm afraid I don't have the answer to that off the top of my head. Sorry, Shona.

**Andrew Lloyd:** Hello. I remember your mentioning earlier in the talk, that if the employee chooses to stay at home because he thinks the workplace is unsafe, that you're better off, in most situations, not paying him. We have an employee who has to work on sites, who's ready and willing to work, but occupational health has said that's he's, clinically, extremely vulnerable, and he can't be expected to go to sites, even though he wants to; in that situation, would you recommend payment? And would you also say that he could be entitled to SSP?

**Daniel Barnett:** Well, I think, if he's not capable of doing his job because he's unwell, doesn't he just go off on sick anyway, and get SSP? Or am I misunderstanding the question?

**Andrew Lloyd:** He can do his job, but he has an underlying health condition. And occupational health have said it's not reasonable for him to go to work. He has to go to people's homes as part of his work; he does things inside.

**Daniel Barnett:** I see. Well, then, he can't do his job, can he? Either, he … Okay, so, is he willing to do his job? Let me start again. Is this a situation where you want to stop him doing the job, or has he says he wants to stop; because that will make a difference.

**Andrew Lloyd:** No, he wants to do his job, but we're acting for a reasonable employer, and they don't want to put him in danger, given that occupational health said that he shouldn't be doing the job, essentially.

**Daniel Barnett:** Well, the law is pretty clear, that in almost all circumstances, and there are some exceptions for this, such as with pregnant women in certain situations, but in almost all circumstances, the employer is not your mummy or your daddy, and if the employee takes an informed decision to go to work, knowing they are in danger, the employer doesn't have the right to stop them.

Which means that, if the employer does say, "Don't go to work," and takes that paternalistic approach, they will have to pay full pay, because it is the employer that is stopping the employee doing the work, and not the employee. Section

44 doesn't come into it, it's just a question of the employee being ready, willing and able to work, and the employer saying, "No, I don't want you to." In which case, the employer has to pay the salary anyway.

**Andrew Lloyd:** And there's no risk of a fine for potentially putting him in danger, by saying that … For example, if we said he won't be paid if he doesn't go to the site?

**Daniel Barnett:** Well, then, you'd be in breach of contract, because it's you telling him not to do his work when he's ready, willing and able to do it.

**Helen Craik:** Hi. It's a question on staff who work regularly, but very variable hours, over the yeah. And so, their annual leave is generally calculated at 15% of hours' worked; that's how we've arrived at it. And now, I'm wondering how that's calculated; is it going to be on the actual hours worked, or what would have been the hours' worked if it hadn't been for the fact that they can't work normally?

**Daniel Barnett:** You calculate annual leave the way that annual leave is meant to calculated is by taking the average over the last 52 weeks. And if somebody's done no work at all in any of those 52 weeks, you ignore that week and go a week further back; so, back to Week 53 or 54. If someone's done 10 hours rather than 30 hours during one of those weeks, then it does count, and it lowers that average that's used for when you're calculating 15%. But you basically go back 52 weeks and work it out from that.

**Helen Craik:** So, by the time we get to, let's hope, 2021, and everything's normal again, will they be penalised because they haven't worked what they would have worked had we not been on short-term working?

**Daniel Barnett:** The word "penalised" is slightly judgemental. But their holiday pay will be calculated, based on the average of their working hours over the last 52 weeks.

**Helen Craik:** So, working, not worked?

**Daniel Barnett:** I don't understand the distinction.

**Helen Craik:** They work varying hours, up and down, school holidays, term time, weekends, that sort of thing, and it follows a pattern. But, now, they'll be working about 40% of what they would have been working, had it not been for the virus. So, by the time we get to calculating … So, is it hours they would have worked?

**Daniel Barnett:** If they take holiday this week, Helen, you go back, look at the number of hours they've worked over the last 52 weeks, and multiply by 0.15, if that's your contractual arrangement.

If they take their holiday in six months' time, you go forward six months, you then look back 52 weeks, and you take the average and multiple it by 0.15.

**Helen Craik:** Of what they've actually worked?

**Daniel Barnett:** That they've actually worked.

**Helen Craik:** Right, so they will essentially lose out on holiday entitlement?

**Daniel Barnett:** Well, yes, because they haven't accrued it, through working.

**Helen Craik:** I wondered if it was going to be based on what they would have worked, not what they actually worked.

**Daniel Barnett:** The only times when you ignore weeks with low hours is if they've worked no hours.

**Helen Craik:** Thanks, that's really helpful.

**Dawn Bacchus:** Hi Daniel. Mine follows on from the last question, actually, I think. So, an employee with a normal working week, so 40 hours each week, when they're on the job support scheme, do they still accrue their normal holiday as they did back on furlough? So they'll still get those 30 days, but, obviously, they might get paid less when the average pay is done?

**Daniel Barnett:** Yes. Because in Helen's question it was someone with irregular hours, whose holiday is calculated under Section 224 of the Employment Rights Act. Someone with normal working hours has their holiday calculated with reference to Section 221; it's a different section. And with that, you take what they would be working if they were working full-time hours under their contract.

**Dawn Bacchus:** Brilliant. Thank you very much.

**Daniel Barnett:** Thank you. And thanks for that, because that actually helps clear things up a little, Dawn, so thank you.

**Julie Potts:** Interim relief orders, Daniel. Do they only potentially apply in a dismissal? What happens in a resignation; could somebody who resigns then apply?

**Daniel Barnett:** It only applies for unfair dismissal claims. If the resignation is such that it amounts to a constructive dismissal, then it's a dismissal for the purpose of unfair dismissal claims, and so, she or he could claim interim relief.

**Julie Potts:** Okay. Thank you.

**Daniel Barnett:** So, just to give a practical example of that, Julie, if you employ me, I blow the whistle on something, and you start treating me really badly, and I resign as a result, that would be a constructive, unfair dismissal on the grounds of whistle-blowing, for which I can seek interim relief.

**Julie Potts:** Lovely, thank you.

**Carl Atkinson:** Hi Daniel. I've got a question about redundancy on the JSS. I appreciate you can't make somebody redundant while they're on it, but I'm interested to know

whether you think you could start the redundancy consultation, and rundown the consultation period, while people are on the scheme. Obviously, mindful of collective redundancy scenarios.

**Daniel Barnett:** Unless the guidance says, when it comes out, that you can't, I think you will be able to. Because the current note put out by the Treasury, says that people just can't be working their notice, and pre-notice consultation is not working notice.

**Carl Atkinson:** So you run it down to the point of providing notice?

**Daniel Barnett:** Yes. And also, of course, the whole point of consultation … Well, at least, in theory, the primary point of consultation is to minimize and avoid job losses, so it is entirely consistent with the purpose of the job support scheme.

**Carl Atkinson:** Okay, great. Thank you.

**Alex Scott:** Hi Daniel. Thank you very much for the session this morning, very helpful. Just a very quick one, because the holiday entitlement point has been already answered. But, essentially, we've got an employer, a client, who has an employee that's moving from furlough to the JSS, when it commences. Now, they asked whether you can reduce holiday entitlement, because of course they're only working a third of the time; but I think that's been covered off.

They also asked if the employer pension contributions can be reduced, because of the reduced salary of the employee. Obviously, there's no guidance on this as of yet, but I wondered what your view was, in that respect? I assume it's something to do with not going below the 3% minimum, but I just wanted to get your opinion.

**Daniel Barnett:** If the pay is being reduced, then wouldn't the 3% fall with it? Or am I missing something?

**Alex Scott:** Well, that's sort of what they were asking, with the reduced salary, whether pension contributions were reduced with that, for the period of time that they're on the JSS?

**Daniel Barnett:** Yes, but the employer, of course, is still responsible for paying those pension contributions on the government's contribution, and on its uplift bit.

**Alex Scott:** Perfect. Thank you very much.

**Denise Waite:** Hi Daniel. Because the rules keep changing, can you just clarify what the entitlement to pay is when people are shielding, and when they're self-isolating? I'm getting confused, isn't there a £500 payment, now, if you're told to self-isolate?

**Daniel Barnett:** I do remember reading something about that, but I'm not sure it has come into force, yet. Jennie, could you call up the article in the HR inner circular that we ran on this about a month ago.

**Daniel Barnett:** What we're going to do is put a link in the chat box to this article, so that everyone can download it and read the answer in there. https://www.dropbox.com/s/ruoyu96x0q8s9sq/Corona%20and%20absence%20pay.pdf?dl=0

Tracy Hudson has said, Denise, that the £500 payment is only for those on very low pay. There we go.

**Choy Lau:** Sorry if I've missed this one, because I had to leave your earlier session a little bit early. But I wanted to ask a question on what your view might be on the merits of a disability discrimination, or racist relation claim, if somebody's basically saying that they're refusing to come to work because they are more at risk than others of catching Coronavirus, either due to a disability, or due to ethic minority status?

**Daniel Barnett:** In terms of discrimination, that's a interesting question. Let's think this through. For someone suffering from a disability, there's the duty to make reasonable adjustments, which doesn't exist for race. Is it a reasonable adjustment to not work? I don't think it is. Because the essence of reasonable adjustment is to get people back into the workplace to compensate for the detrimental impact caused by their disability, it's not to keep people out of the workplace. The duty to make reasonable adjustments may require the employer to make additional efforts to find other work for them, maybe work that can be done from home, but I don't think it's going to extend to paying them to stay at home, if Section 44 doesn't give them that right.

So that's the position with disability. And then, race, where there are fewer rights, because there's no right to have reasonable adjustments made, will even more clearly be the same. The way that I think race will feed into things is that if somebody is from a BAME background, and is particularly susceptible to higher risk of death, higher risk of long-term illness, it may be easier for them to argue that they have a reasonable belief in serious and imminent danger, so as to make it more likely they'll come within Section 44.

**Choy Lau:** Do you think that there might be an indirect discrimination claim for race, then; i.e, somebody in BAME saying, "Because you're making everybody come to work, I am more affected"?

**Daniel Barnett:** I can see the argument. It all turns on justification, doesn't it? And surely, if an employer can't justify a rule, saying, "If you can't work from home, you've got to come into work if you want to get your salary," if an employer can't justify that most fundamental aspect of employment, it would be difficult to justify anything. And the extension of your argument being right, would be that every BAME person in the country in any job has a right to stay at home on full pay, which the courts aren't going to say is the case.

**Choy Lau:** That's great. Thank you.

**Alison Benney:** Question about the grants for the JSS. It says about, companies wouldn't be expected to pay dividend, or do share buy backs during that period of time. If it's a limited company, where an employer is taking most of their income via dividends, presumably, in order to be able to make the claim for their employees, they would have to stop doing that for that period of time?

**Daniel Barnett:** No. The point about not taking dividends, or making any capital distributions, are for large companies only. For SME's that doesn't apply.

**Alison Benney:** Oh, okay. Right, sorry.

**Daniel Barnett:** And you won't get the situation you've just described in a large company.

**Alison Benney:** No, that's fine. I just wanted to check.

Can I quickly ask something about top-up? Because you sort of covered it this morning. The bit on the fact sheet that said, "Employers cannot top up employees' wages." If they do, is that going make them ineligible for the grant?

**Daniel Barnett:** I don't think it says, "Cannot," does it? I think it says, "Are not expected,"-

**Alison Benney:** "Our expectation is that they cannot top-up." I didn't know whether it meant, "Cannot," as in, cannot afford it, or, "Cannot," as in, not allowed to?

**Daniel Barnett:** It's just totally unclear. I mean, you could wait for the Treasury Direction to tell us. I'd be surprised if employers are not allowed to top-up.

**Alison Benney:** Okay. Thank you.

**Jacqui Swift:** Thank you again for the sessions. It was just a quick one. We've got a client in hospitality, so they're pretty much financially on their knees, like most hospitality, but they have a contractual short time in lay-off clause. Now, one of the managers is advocating for the JSS. scheme, as opposed to putting individuals on short-time working, in line with contract. And my view is that, if they've got the short-term working clause, and you're struggling financially, to speak to individuals about the contractual position, and put them on short-time working on the hours that they can afford to have them in, and pay them what they actually work, rather than put them on the JSS. scheme and pay for 33%, and then one-third of un-worked hours.

But the manager is saying that, if we approach that, that it'll be in bad faith and employers will sue. And I'm, like, Well, no. That's the position, my advice remains the same." But I'm being really confronted by it, and I just wanted to know your thoughts on it. Because it seems like a no-brainer for me, financially.

**Daniel Barnett:** Totally, 100% what you say, the manager's just wrong.

**Jacqui Swift:** Great. That's fantastic, thank you.

**Daniel Barnett:** The only disadvantage, of course, of putting people onto the short-time working is that, if they have four weeks' consecutive short time, or six weeks in a rolling 13-week period, they can claim a redundancy payment, subject to jumping through some hoops.

**Jacqui Swift:** Yes. Is that if we take them below 50%-

**Daniel Barnett:** Correct

**Jacqui Swift:** … half a week's pay?

**Daniel Barnett:** Correct.

**Jacqui Swift:** So if they stay slightly above, because most of the time, they'll be able to give some 70, some 60%, put them on short-time working, but they don't want to be paying for hours that they're not working, because they can't afford it.

**Daniel Barnett:** Yes. The manager who you're dealing with a blithering idiot.

**Jacqui Swift:** I do agree with that! Thanks Daniel.

**Lesley Thompson:** A very quick question. I haven't found anything about people who are under dismissal, or going to be dismissed for a reason other than redundancy, like a capability, or something like that, in the scheme. Now, it could just be I've missed it, but do you know anything about that?

**Daniel Barnett:** Well, of course, we don't have the scheme yet, it hasn't been published.

**Lesley Thompson:** Well, this is very true. But it is silent, it's really only about redundancies, isn't it? It doesn't seem to be touching on any other dismissal.

**Daniel Barnett:** I can't remember the wording without looking it up. Have you got the words in front of you?

**Lesley Thompson:** No, I haven't, now. But when I actually looked at it, it was a bit unclear I thought. But it may come out with the wash.

**Daniel Barnett:** If you want to give me a second, I'll look it up for you. Just give me, just, a moment.

**Lesley Thompson:** My logic was that the job's still viable if they're being dismissed for capability; it's still there, isn't it? It's just that they're not going to be there.

**Daniel Barnett:** Here's the Job Support Scheme Fact Sheet. Now, where is it that you think this is?

**Lesley Thompson:** I didn't look on your fact sheet, I looked on the Corona website, to be honest.

**Daniel Barnett:** Oh. Well, we don't do that.

**Lesley Thompson:** We don't do that, no.

**Daniel Barnett:** This is the only information the Government's issued.

**Lesley Thompson:** That's where I saw it. So, yeah, I am being a bit lazy, I just thought it would be something that you'd know off the top of your head.

**Daniel Barnett:** Yeah, that's what it says. "Employees can't be made redundant or put on notice of redundancy." So, certainly on the wording in the Fact Sheet, it does seem to be…

**Lesley Thompson:** It does seem to be only that, doesn't it? Yeah. I've not missed anything then.

**Daniel Barnett:** No, I don't think you have.

**Lesley Thompson:** Thank you.

**Toni Evans:** Hi. I hope you don't mind me asking this one, it's a redundancy question, which you answered lovely for me, last week, regarding a contractor with years of service, prior to becoming an employee.

**Daniel Barnett:** Has this come out of this morning's talk?

**Toni Evans:** It hasn't.

**Daniel Barnett:** Would you mind if we didn't, because there's a lot of people who were on this morning's talk, who want to focus on that stuff.

**Toni Evans:** Just one thing on this morning's talk, and the JSS., can you answer what the position is in Wales? Now, we're in shutdown for two weeks, as of Friday, the Furlough Scheme ends 31st of October; you cannot give somebody a third of their contracted hours to work, if you're shop is shut down. So what do you do about paying the people?

With a business that totally has to shut down because it's not an essential service, and you can put your staff back on furlough up until the 31st, but then, after the 31st, we're in shutdown, I think it's until the 7th or the 9th of November.

**Daniel Barnett:** Was the Extended Job Support Scheme going to apply?

**Toni Evans:** No, because it's not hospitality, or one of the ones …

**Daniel Barnett:** Are you sure? Because Extended Job Support Scheme is any business that's been ordered to close because of COVID restrictions.

**Toni Evans:** Oh right, okay. Yeah. Because, with the new restrictions, if you're not an essential service, i.e., a supermarket, takeaway food place, or chemist, or a financial services-

**Daniel Barnett:** … then you have to close. So the Extended Job Support Scheme is going to apply, and the they'll get 67% of their wages.

**Toni Evans:** Right, thank you very much.

**Leo Liceri-Hood:** My question is from this morning, but it's not Coronavirus related. It's about Ezsias v North Glamorgan NHS Trust. And my question is, can a vote of no confidence, in itself, ever be an SOS after the purpose of unfair dismissal, in a situation, where, for example, no process, be it contractual or ACAS, has been followed?

**Daniel Barnett:** Well, it can, but, as always, the employer would need to establish why, going through a proper process, which might include some form of reconciliation, would have been futile.

**Leo Liceri-Hood:** That's really helpful. Thank you.

**Michael Foster:** If someone turns down the opportunity to go onto JSS, you were discussing this morning the possibility of them being redundant, and that could be very costly. Could you use other substantial reason; is it unreasonably for them not to go onto JSS, and therefore dismiss them simply for that reasons, rather than redundancy?

**Daniel Barnett:** No. That would be an utterly hopeless and futile argument to run on a tribunal. If the role is redundant, it's redundant. The fact that they're not willing to take a pay cut as an alternative to redundancy, doesn't mean that the role is not redundant.

**Michael Foster:** But they haven't been dismissed for redundancy, have they? They're being dismissed because they refuse to take the deal.

**Daniel Barnett:** Because they refuse to take a pay cut. Are they going to be replaced? Presumably not, if you can't afford to pay them, so that's redundancy. It's a futile argument, I'm afraid.

It sounds like the sort of thing you've spent a lot of time trying to think up, and a tribunal would knock down in about two seconds. Sorry, Michael.

**Susan Galashan:** My question is actually about employers who can't afford the Job Support Scheme, but have a contractual right to enforce unpaid layoff, and they're asking about the risks of enforcing layoff for a long period, and a longer period than would normally be the case. And so, other than a claim for redundancy pay for those with more than two years' service, what other risks might exist there?

**Daniel Barnett:** Nil. There is absolutely clear case law that says there is no implied term that limits the amount of time for which people can be on layoff. So the statutory layoff scheme enables the employee to claim a redundancy payment if certain

boxes are ticked, mainly, they're been for layoff for four weeks or more. But the fact that, if they choose not to go down that route, and choose not to claim a statutory redundancy payment, they cannot resign and claim constructive dismissal on the basis they've been laid off for an unreasonably long period of time.

**Susan Galashan:** If they're laid off during notice, and their contractual notice is at least one week later than statutory, do you think they could- they don't have to pay anything, in that case, during the notice period as well?

**Daniel Barnett:** No, I wouldn't have thought so. No.

**Susan Galashan:** Thank you.

**Susan Barker:** Great session this morning, thank you. My question is probably quite simple, but I'm an HR consultant, so I deal with a lot of small to medium employers. We have quite a number of employees who we think may be trying to claims isolation, when they perhaps don't need to be. Can an employer reasonably ask to see, for a child's test results, if they're claiming isolation because of a child testing positive, or dependent leave?

**Daniel Barnett:** You say, can the employer reasonably ask to see, what is the significance of the word, reasonable, in there?

**Susan Barker:** Because, in effect, the employee is pushing back, and saying, "Data protection. You can't ask to see my child's information." And we're saying, "Well, if you want to be-

**Daniel Barnett:** They've said that the child's tested positive for Coronavirus.

**Susan Barker:** Yes, so that's what they're saying, but they're not proving it.

**Daniel Barnett:** Well, it's certainly not a confidentiality issue. I think they'd be perfectly entitled to remove their child's date of birth from a certificate, to redact that. But relying on that explanation, I think, foregoes there entitlement to keep the underlying documentation confidential.

But, again, back to the question I asked, what's the significance? Is the employer thinking of dismissing the individual?

**Susan Barker:** No. It's down to whether they're going to pay them SSP, or not. This is the third period of isolation that the employee is claiming.

**Daniel Barnett:** Is it still retainable from the government, I forget?

**Susan Barker:** No, it's only one claim per employee.

**Daniel Barnett:** Only one claim per employee. I don't know the answer to that, without reviewing the SSP regulations, which, again, I don't carry in my head. But

instinctively, I would have thought that you're right, you're entitled to request a copy of the confirmation. And presumably, if the child is self-isolating, they've been taken off school, and the school has been notified. So, maybe, instead of that, ask to see a copy of the notification from the school, or ask for permission to contact the school and confirm it. That's a way of getting round it, that doesn't involve producing the actual documents generated by the NHS.

Lots of people, by the way, are saying they agree with you. A good point from Alison Benney. Alison says, "If a child had a positive test result, the individual will have been told to isolate by Test & Trace, in other words the parent, and issued an isolation note, and that would be the proof." That's a very good point.

**Susan Barker:** Great. Thank you, everybody.

**Lorna Mapson:** Hello Daniel, thank you for this morning. Just a quick question on the JSS., please. If part of our business is told to close, so we run a bar and café, for example, attached to a leisure centre. But the leisure centre is allowed to stay open, the gym. Can we still claim if the hospitality side is instructed to close under the JSS? So it's only part of the business that's closing.

**Daniel Barnett:** Yep, I understand. I don't know, for the very simple reason that this will be stuff that's in the detail of the direction, which hasn't been published yet. The guidance note doesn't deal with that. But I would astonished if it didn't cover parts of businesses, as well as entire businesses.

Because, otherwise … so that I'm not defaming a company, let's choose a company that's bankrupt; Woolworth's. If Woolworth's had branches all over the country, yet they couldn't open in Liverpool because they're in Tier 3, it would be bonkers to say they couldn't rely on JSS. because other parts of the company are open.

**Lorna Matson:** Yeah, it makes sense.

**Hazel Messenger:** My question is, if an employee on the Job Support Scheme refuses to sign that contract, so they're taking a pay cut, regardless of what hours we want them to work, and the job is not at risk of redundancy, Daniel, is the ultimate option open to us, based on a consultation, dismiss and reengage, based on a SOSR?

**Daniel Barnett:** Yes.

**Hazel Messenger:** Because they're refusing to sign. It is?

**Daniel Barnett:** Yes. But if the job is underlying redundant, they'd be entitled to a redundancy payment. If the job isn't underlying redundant, then they wouldn't be, it would be an SOSR.

**Hazel Messenger:** Perfect. Thank you very, very much for taking my question.

**Nada Ousta:** Sorry, just a quick question. Thank you very much for this morning, it was really great and very informative. Can an employer change the terms of the contract, let's say, a week, two weeks before going into work? I do shift work, and they've created a new shift for us to do nights, all of a sudden, and that wasn't in the contract when we originally started work, it's just a two-shift basis. Now, they're saying that they're actually looking for volunteers. If they do get the volunteers then we stick to what we're doing. But the two main shifts have been changed, and there's only one original staying the same.

**Daniel Barnett:** So you're an employee, and your employer is trying to introduce a new shift and to change your contract?

**Nada Ousta:** Yeah. They're trying to do the night shift, without anything in writing. It was just all done, verbally, on a mobile call.

**Daniel Barnett:** How long have you worked?

**Nada Ousta:** I've worked nearly six years now.

**Daniel Barnett:** Well, employers are entitled to change the terms and conditions of employees if they have a good business reason for doing so. So if they can establish a good business reason for wanting to introduce a night shift, which, let's face it, most employers who introduce night shifts can probably do, then, subject to going through proper consultation, does your employer recognise a union?

**Nada Ousta:** I presume so, yes.

**Daniel Barnett:** Are you a member of the union?

**Nada Ousta:** Me? No.

**Daniel Barnett:** No. Subject to giving you proper consultation, which may or may not involve a union, but will probably involve electing employee representatives, if there's no union involved, it can impose those changes, and dismiss staff members who won't agree to those changes.

Now, I suspect, Nada, that's not the answer you wanted to hear, but it is the answer. Okay?

**Nada Ousta:** Thank you very much, anyway.

**Tracy Madgwick:** Hi Daniel. I've got a client in the hospitality industry, who is looking to make redundancies. They pay statutory redundancy, they want to enhance it to encourage voluntary redundancy, by paying everyone an additional £300. A bit, not much. Is there any problem with that?

**Daniel Barnett:** No.

**Tracy Madgwick:** No, that's what I thought. But since you're there, and I just leapt on. Thank you very much.

**Ailsa Hobson:** A quick question about the JSS. If an employer has already changed the terms and conditions after they've utilized the Furlough Scheme, so brought staff back, and as an alternative to making redundancies has got consent to reduce hours, when you're calculating what normal hours are for the 33% JSS qualification, do you use the new contractual hours, or do you think there's going to be an obligation, I know it's going to be subject to guidance, to use the pre-furlough hours, I suppose the furlough reference period?

**Daniel Barnett:** Oh, that's a great question. Because the notes at the moment say that you look at the pre-furlough period and assume there hasn't been a formal contract variation to the hours. So the answer to the question is, I don't know, we'll have to wait and see what the Treasury direction says when it comes out.

**Ailsa Hobson:** Great. Okay, thank you.

**Daniel Barnett:** Everybody, thank you so much for watching. Goodbye.

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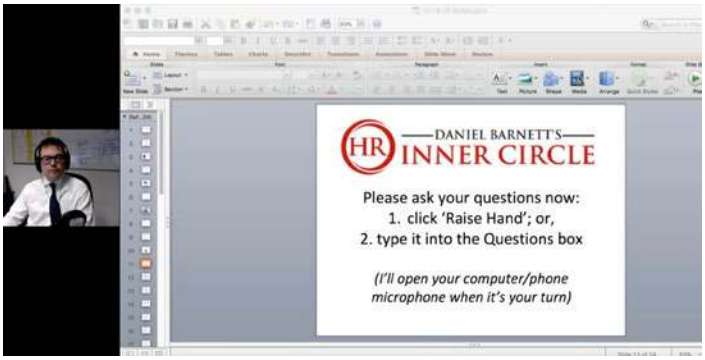


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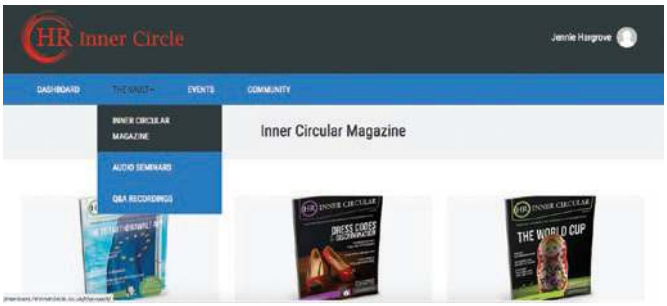


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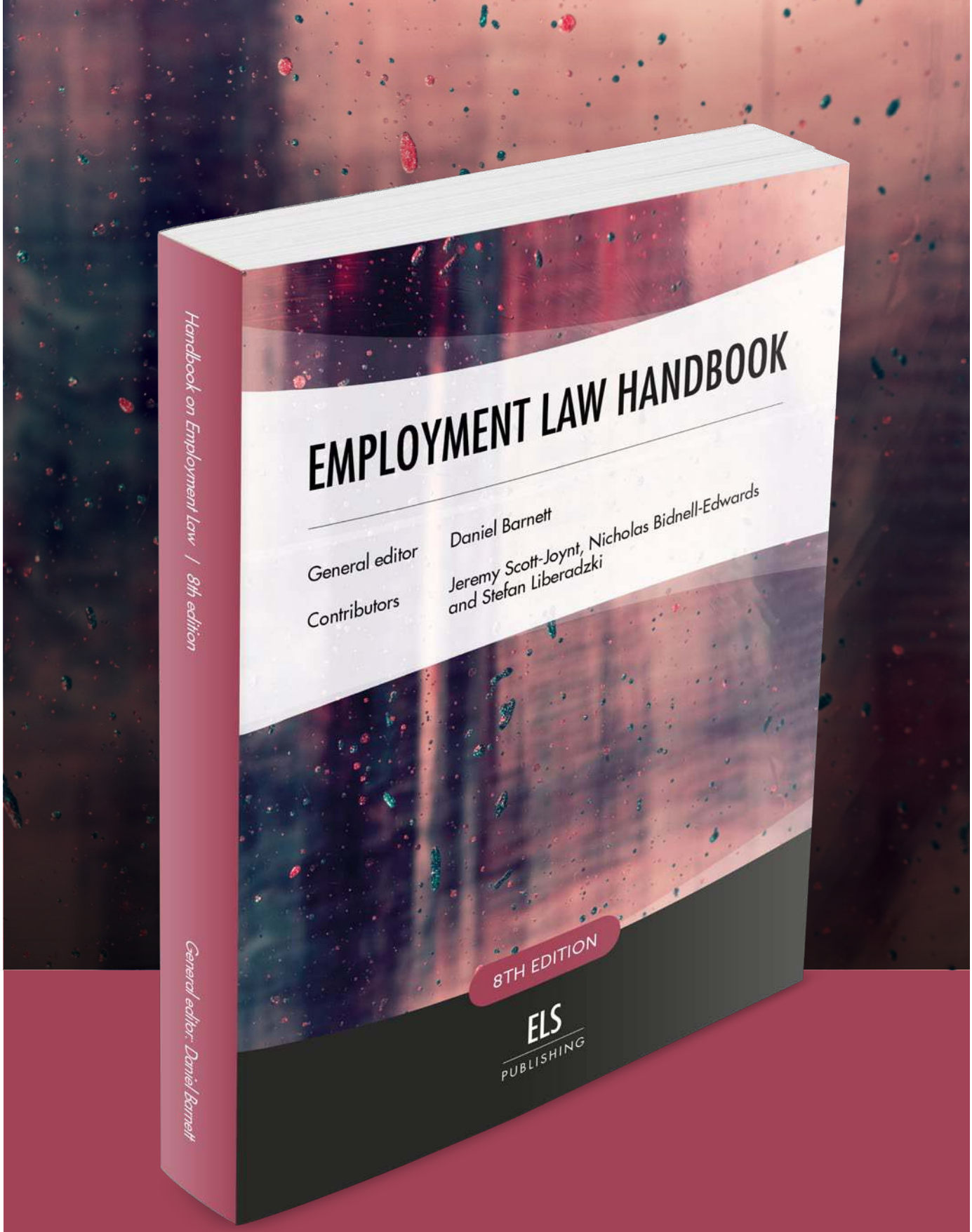


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