EMPLOYMENT LAW REPORT 2021

Daniel Barnett, Outer Temple Chambers

6 September 2021

FREE SAMPLE

This is a taster sample
of the Workbook for the
Employment Report 2021.

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About Daniel Barnett

Daniel Barnett is a leading employment law barrister practising from Outer Temple Chambers. With 25 years' experience defending public and private sector employers against employment claims, he has represented a Royal Family, several international airlines, and FTSE-100 companies. Employee clients include a former Chancellor of the Exchequer and many senior executives.

Daniel is a member of the BAILII advisory board, and a past chair of the Employment Lawyers' Association's publishing committee and electronic services working party. He is the author or co-author of eight books, including the Law Society Handbook on Employment Law (currently in its 8th edition). He is the creator of the Employment Law (UK) mailing list, an email alerter bulletin service sending details of breaking news in employment law three times a week to 32,000 recipients.

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Legal directories describe him as "extremely knowledgeable and [he] can absorb pages of instructions at lightning speed", "involved in a number of highly contentious matters", "singled out for his work for large blue-chip companies", "combination of in-depth legal knowledge, pragmatism, quick response times and approachability", "inexhaustible", "tenacious", "knowledgeable" and "an excellent advocate".

He is one of the leading speakers and trainers on the employment law and HR circuit. He has presented seminars for the House of Commons, the BBC, Oxford University, HSBC, Barclays Bank, Ocado, and dozens of other organisations in-house, and keynoted at national and international conferences. In 2013, 2014, 2016 and 2019 he wrote and presented the Employment Law MasterClass national tour, speaking to thousands of employment lawyers and HR Professionals around the UK. He produces the Employment Law Matters podcast, ranked #1 on the Apple Podcast Store for management podcasts in the UK.

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As well as full-time practice as a barrister and speaker, Daniel is an experienced entrepreneur. He is the founder and owner of Employment Law Services Ltd (a legal publishing company), which provides marketing and educational services to employment lawyers and HR professionals. In 2007, he co-founded CPD Webinars Ltd, then the UK's leading webinar training company for lawyers, and sold it to Thomson Reuters in 2011. In 2015 he founded the HR Inner Circle (www.hrinnercircle.co.uk), a membership club for smart, ambitious HR Professionals.

Daniel has presented the legal hour, a weekly phone-in radio show, on LBC Radio since 2010. He is widely sought after as a commentator in both broadcast and print media on all legal issues.

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- **TOUKER SULEYMAN**
BBC'S DRAGON'S DEN

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SESSION 1:
COMPULSORY VACCINATION

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Introduction

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Compulsory Vaccination in the Workplace (non- Care Homes)

Public Health (Control of Diseases) Act 1984

1. Contractual considerations
2. Health and Safety
3. Unfair dismissal
4. Discrimination
5. Data protection issues
6. Other considerations

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1. Contractual considerations

F C Shepherd & Co Ltd v Jerrom [1987] 1QB 301

1. there has to be some extraneous change of situation, which was not foreseen by employer and employee at the time that employment started.

2. that change of situation makes it impossible for the contract to be performed at all, or at least renders its performance radically different from what the parties contemplated when they entered into the contract.

3. the change of situation, and the fact it has become impossible to work, must have occurred without the fault of either employer or employee

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2. Health & Safety

Health and Safety at Work, Act 1974
Management of Health and Safety at Work Regulations 1999

Potential requirements of 'reasonableness':

- appointing a competent person to help manage health and safety,
- preparing a health and safety policy,
- carrying out regular risk assessments,
- consulting with workers,
- providing workers with information and training,
- ensuring that the right workplace facilities and first aid arrangements are in place,
- displaying a health and safety poster or giving staff the equivalent leaflet,
- getting employers' liability insurance and
- having a regime for reporting injuries, near misses and work related illnesses to the HSE.

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Covid-19 risk assessment checklist:

- identifying what work activity or situations might cause transmission of the virus
- thinking about who could be at risk
- deciding how likely it is that someone could be exposed
- acting to remove the activity or situation, or if this isn't possible, controlling the risk

3. Unfair Dismissal

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- are they an employee? If not, they do not have unfair dismissal rights.
- have they got two years' continuous employment? If so, what is the reason for dismissal? Has the employer followed a fair procedure?
- even if not, is the reason for dismissal an automatically unfair one?

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The seven common objections

- Vaccination is not necessary or reasonable when other less invasive measures could be taken
- We've managed without compulsory vaccination up to now
- The government does not require our industry to implement compulsory vaccination, so it can't be reasonable
- You can't legally compel me to be vaccinated, so how can you dismiss me when I refuse
- I can't get vaccinated because of my health or beliefs
- I can't get vaccinated because of my pregnancy or because I am breastfeeding
- I am very anxious about needles or about the side effects of the vaccine.

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The basic process

- Invite the employee to a meeting in writing, explaining what you need to discuss with them, and informing them of their right to be accompanied.
- Carry out a reasonable investigation, assessing all sides of the issue, from the point of view of the employee and the business.
- Hold the meeting with the employee where the reason for concerns is explained and the reason for refusal to be vaccinated is explored. In addition, and specifically, the employee has to be given the opportunity to give reasons why their employment should not be terminated.
- Having heard all the information available, consider the employee's reasons why they won't be vaccinated and should not be dismissed together with any alternatives to dismissal.
- Decide whether the only reasonable option available is to dismiss.
- If so, give the employee the right of appeal.

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4. Discrimination

Direct discrimination

Equality Act 2010, s13

13 Direct discrimination

1. A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
2. If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.
3. If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.
4. If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.
5. If the protected characteristic is race, less favourable treatment includes segregating B from others.
6. If the protected characteristic is sex—
   a. less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;
   b. in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.
7. Subsection (6)(a) does not apply for the purposes of Part 5 (work).
8. This section is subject to sections 17(6) and 18(7)

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Indirect discrimination

Equality Act 2010, s19

19 Indirect discrimination

1. A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
2. For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
   a. A applies, or would apply, it to persons with whom B does not share the characteristic,
   b. it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
   c. it puts, or would put, B at that disadvantage, and
   d. A cannot show it to be a proportionate means of achieving a legitimate aim.
3. The relevant protected characteristics are—

   age;

   disability;

   gender reassignment;

   marriage and civil partnership;

   race;

   religion or belief;

   sex;

   sexual orientation

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Refusal related to health – discriminatory?

Examples

- They could suffer a severe allergic reaction leading to anaphylaxis.
- They may suffer from severe needle phobia.
- They may suffer anxiety about the adverse effects of vaccination.
- They may have been advised not to be vaccinated for other medical reasons.

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Refusal related to pregnancy or breastfeeding – discriminatory?

The Green Book, Public Health England - https://www.gov.uk/government/collections/immunisation-against-infectious-disease-the-green-book
Dobson v North Cumbria Integrated Care NHS Foundation Trust UKEAT/0220/19
Equality Act 2010, s18

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Refusal related to religion or belief – discriminatory?

Potential 'belief' objections:

- Not enough research has been done into the covid-19 vaccines and no long-term trials have been carried out;
- The regulatory approval process has been truncated and has not been as thorough as usual;
- Adverse reactions have been under reported;
- Vaccines do not stop you catching covid and they do not stop transmission;
- The overall death rate from covid is small anyway;
- Young people don't need vaccines;
- The vaccine may hurt my fertility;
- My faith will protect me from Covid;
- Covid-19 is a hoax, the vaccine will change my DNA, it will magnetise me, and/or it will plant a chip in me so I can be tracked.

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Grainger plc v Nicholson [2010] IRLR 4

Gray v Mulberry Company (Design) Ltd UKEAT/0040/17/DA

Grainger 1 - The belief must be genuinely held

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Grainger 2 - The belief must not simply be an opinion or viewpoint based on the present state of information available

Grainger 3 - The belief must concern a weighty and substantial aspect of human life and behaviour

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Grainger 4 - The belief must attain a certain level of cogency, seriousness, cohesion and importance

Farrell v South Yorkshire Police Authority (2011) ET/2803805/10

Lisk v Shield Guardian Co Ltd (2011) ET/3300873/11

Costa v The League against Cruel Sports ET/3331129/18

Vavřička v Czech Republic, (ECtHR April 8, 2021

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Grainger 5 - The belief must be worthy of respect in a democratic society, not be incompatible with human dignity and not be in conflict with the fundamental rights of others.
Forstater v CGD Europe and others UKEAT/0105/20/JOJ
Costa v The League against Cruel Sports ET/3331129/18

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Refusal related to culture – discriminatory?

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Age discrimination

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Other Issues

Can you require staff to tell you whether they've been vaccinated or not?

Data Protection Act 2018
General Data Protection Regulation
Equality Act 2010, s60
ICO Guidance - https://ico.org.uk/global/data-protection-and-coronavirus-information-hub/coronavirus-recovery-data-protection-advice-for-organisations/vaccination-and-covid-status-checks/

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Personal Injury Claims from catching Covid at work, or being 'encouraged' to vaccinate

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Compulsory Vaccination in Care Homes

The Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021 SI 2021/891
Coming into force 11 November 2021

DHSC Operational Guideance - https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1010601/coronavirus-covid-19-vaccination-of-people-working-or-deployed-in-care-homes-operational-guidance.pdf

Who is affected?

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What are the main exceptions?

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Requirement for vaccination

Some points to note…

1

2

3

4

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Enforcement

The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 regs 22(2) and 23(4)

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Can Care Homes dismiss staff who are not vaccinated (and not medically exempt)?

Grounds of challenge

Parent Act = The Health and Social Care Act 2008
which (at s129) amends The Public Health (Control of Disease) Act 1984 to add ss45C and 45E

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45C Health protection regulations: domestic

1. The appropriate Minister may by regulations make provision for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in England and Wales (whether from risks originating there or elsewhere).

45E Medical treatment

1. Regulations under section 45B or 45C may not include provision requiring a person to undergo medical treatment.
2. " Medical treatment " includes vaccination and other prophylactic treatment.

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STATUTORY INSTRUMENTS

2021 No. 891

NATIONAL HEALTH SERVICE, ENGLAND
SOCIAL CARE, ENGLAND
PUBLIC HEALTH, ENGLAND

The Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021

Made - - - - 22nd July 2021

Coming into force - - 11th November 2021

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The Secretary of State makes the following Regulations in exercise of the powers conferred by sections 20(1) to (3) and (5) and 161(3) and (4) of the Health and Social Care Act 2008(**1**).

A draft of these Regulations was laid before Parliament in accordance with section 162(3) of the Health and Social Care Act 2008 and approved by a resolution of each House of Parliament.

In accordance with section 20(8) of that Act, the Secretary of State has consulted such persons as the Secretary of State considers appropriate.

Citation and commencement

1. These Regulations may be cited as the Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021 and come into force 16 weeks after the day on which they are made.

Extent and application

2.—(1) These Regulations extend to England and Wales.

(2) These Regulations apply to England only.

Amendment of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014

3. The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014(**2**) are amended as follows.

(**1**) 2008 c. 14. Section 20(1) and the opening words of section 20(2) were substituted by section 1 of the Health and Social Care (Quality and Safety) Act 2015 (c. 28). Section 161(3) was amended by section 294(4) of the Health and Social Care Act 2012 (c. 7).

(**2**) S.I. 2014/2936, to which there are amendments not relevant to these Regulations.

Amendment of regulation 2 (interpretation)

4. In regulation 2—

(a) at the end of the definition of "premises", after the words "care or treatment", insert "and in regulation 12(3), does not include any surrounding grounds"; and

(b) after the definition of "premises" insert—

""processing" in regulation 12(5) and 17(2)(d)(iii) has the meaning given in section 3 (terms relating to the processing of personal data) of the Data Protection Act 2018(**3**) and "process" in regulation 12(4) is to be construed accordingly;".

Amendment of regulation 12 (safe care and treatment)

5. In regulation 12, after paragraph (2), insert—

"(3) For the purposes of paragraph (2)(h), a registered person ("A") in respect of a regulated activity specified in paragraph 2 of Schedule 1 (accommodation for persons who require nursing or personal care) in a care home must secure that a person ("B") does not enter the premises used by A unless—

(a) B is a service user residing in the premises used by A;

(b) B has provided A with evidence that satisfies A that either—

(i) B has been vaccinated with the complete course of doses of an authorised vaccine; or

(ii) that for clinical reasons B should not be vaccinated with any authorised vaccine;

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(c) it is reasonably necessary for B to provide emergency assistance in the premises used by A;

(d) it is reasonably necessary for B to provide urgent maintenance assistance with respect to the premises used by A;

(e) B is attending the premises used by A in the execution of B's duties as a member of the emergency services;

(f) B is a friend or relative of a service user and that service user is or has been residing in the premises used by A;

(g) B is visiting a service user who is dying;

(h) it is reasonably necessary for B to provide comfort or support to a service user in relation to a service user's bereavement following the death of a friend or relative; or

(i) B is under the age of 18.

(4) A registered person provided with information as evidence in accordance with paragraph (3) may process that information.

(5) Nothing in this regulation authorises the processing of personal data in a manner inconsistent with any provision of data protection legislation.

(6) In this regulation—

"authorised vaccine" means a medicinal product—

(a) authorised for supply in the United Kingdom in accordance with a marketing authorisation; or

(**3**) 2018 c. 12. Section 3 was amended by S.I. 2019/419.

(b) authorised by the licensing authority on a temporary basis under regulation 174 (supply in response to spread of pathogenic agents etc) of the Human Medicines Regulations 2012(**4**)

for vaccination against coronavirus;

"care home" has the meaning given in section 3 (care homes in England) of the Care Standards Act 2000(**5**);

"complete course of doses" means the complete course of doses specified—

(a) in the summary of product characteristics approved as part of the marketing authorisation for the authorised vaccine; or

(b) in the instructions for usage approved as part of the authorisation by the licensing authority on a temporary basis under regulation 174 of the Human Medicines Regulations 2012 for the authorised vaccine;

"coronavirus" means severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2);

"data protection legislation" and "personal data" have the meaning given in section 3 (terms relating to the processing of personal data) of the Data Protection Act 2018;

"marketing authorisation" has the meaning given in regulation 8(1) (general interpretation) of the Human Medicines Regulations 2012;

"medicinal product" has the meaning given in regulation 2 (medicinal products) of the Human Medicines Regulations 2012; and

"the licensing authority" has the meaning given in regulation 6(2) (the licensing authority and the Ministers) of the Human Medicines Regulations 2012.".

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Amendment of regulation 17 (good governance)

6. In regulation 17—

(a) at the end of paragraph (2)(d)(i) replace "activity, and" with "activity,";

(b) at the end of paragraph (2)(d)(ii) replace "activity;" with "activity, and"; and

(c) after paragraph (2)(d)(ii) insert—

"(iii) processing evidence provided to a registered person under regulation 12(3);".

Review

7.—(1) Before the end of each review period, the Secretary of State must—

(a) carry out a review of these Regulations,

(b) set out the conclusions of the review in a report, and

(c) publish the report.

(2) The report in particular must—

(a) set out the objectives intended to be achieved by these Regulations,

(b) assess the extent to which those objectives are achieved, taking into account clinical advice, and availability and accessibility of authorised vaccines; and

(**4**) S.I. 2012/1916, to which there are amendments not relevant to these Regulations.

(**5**) 2000 c. 14. Section 3 was amended by paragraph 4 of Schedule 5 to the Health and Social Care Act 2008 (c. 14). There are other amendments to section 3 which are not relevant to these Regulations.

(c) assess whether those objectives remain appropriate and, if so, the extent to which they could be achieved with a system that imposes less regulation.

(3) In this regulation, "review period" means—

(a) the period of one year beginning with the date that these Regulations come into force, and

(b) subject to paragraph (4), each successive period of one year.

(4) If a report under this regulation is published before the last day of the review period to which it relates, the following review period is to begin with the day on which that report is published.

Signed by authority of the Secretary of State for Health and Social Care.

Helen Whately
Minister of State,
Department of Health and Social Care

22nd July 2021

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SESSION 2:
TRIBUNALS' APPROACH TO COVID CASES

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Employment Rights Act 1996
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—
   a. having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,
   b. being a representative of workers on matters of health and safety at work or member of a safety committee—
      i. in accordance with arrangements established under or by virtue of any enactment, or
      ii. by reason of being acknowledged as such by the employer,the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,
   c. being an employee at a place where—
      i. there was no such representative or safety committee, or
      ii. there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,
   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.
3. Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in subsection (1)(e), he shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them.

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Key Dates

14 February 2020	The Department of Health gives notice in the states Gazette that "the Secretary of State for Health and Social Care has declared that the incidence or transmission of novel Coronavirus constitutes a serious and imminent threat to public health…"
16 March 2020	The Prime Minister addresses the nation and stated that all non-essential contact and travel should cease.
20 March 2020	Rishi Sunak, the Chancellor, announces the Coronavius Job Retention Scheme (the furlough scheme)
23 March 2020	The Prime Minister announces a National Lockdown. The rules provide that people would only be allowed to leave their home for very limited purposes which included "travelling to and from work, but only where this is absolutely necessary and cannot be done from home".
26 March 2020	The Coronavirus Act 2020 comes into force, making lockdown legally enforceable.
17 April 2020	Furlough having been due to finish on 31 May, the Chancellor extends it until 30 June
12 May 2020	Furlough having been due to end on 30 June, the Chancellor extends the furlough scheme to 31 October, and introduces 'flexible furlough' from 1 July.
29 May 2020	The Chancellor announces that 10 June is the last date anyone can be placed on furlough for the first time (that being three weeks before the 1 July changes, and there then being a three week minimum period for furlough)
1 August 2020	Between this date and 31 October (anticipated date for furlough ending) the furlough scheme begins tapering, with employers now funding NIC and pensions on full salary, and the government's contribution reducing to 70% and then 60%
1 November 2020	Furlough having been extended, the government's contribution returns to 80%. Revised furlough agreements potentially needed due to technical changes.
1 July 2021	Government contributions begin tapering off in anticipation of scheme closure on 31 October 2021
19 July 2021	Freedom Day
30 September 2021	Coronavirus Job Retention Scheme expected to close

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Cases referred to in this session

Gibson v Lothian Leisure
Case No 4105009/2020
Employment Tribunals Scotland
EJ Brewer
Reasons 29 January 2021

Kubilius v Kent Foods Ltd
Case 3201960/2020
East London
EJ Barrett
Reasons 10 February 2021

Rodgers v Leeds Laser Cutting Limited
Case 1803829/20
CVP
EJ Anderson
Reasons 1 March 2021

Khatun v Winn Solicitors
Case 2501492/2020
Newcastle
EJ Morris
Reasons 22 March 2021

Sharma v Lily Communications Ltd
Case 1800437/21
CVP
EJ Davies
Reasons 29 March 2021

Montanaro v Lansafe
Case 2203148/2020
CVP
EJ Walker
Reasons 1 April 2021

Ham v ESL BBSW Ltd
Case 1601260/2020
Cardiff
EJ O'Rourke
Reasons 22 April 2021

Accattatis v Fortuna Group (London) Limited
Case 3307587/2020
Watford
EJ Alliott
Reasons 29 April 2021

Prosser v Community Gateway Association Ltd
Case 2413672/20
Manchester
EJ Warren
Reasons 13 May 2021

Handley v Tatenhill Aviation Ltd
Case 2603087/20
Nottingham ET
EJ Ayre
Reasons 2 June 2021

Mhindurwa v Lovingangels Care Ltd
Case 3311636/2020
Reading
EJ Gumbiti-Zimuto
Reasons 6 July 2021

Fyfe v Aracadis Human Resources Ltd
Case 4102033/2020
Employment Tribunals Scotland
EJ Cowen
Reasons 20 July 2020

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Will Covid always represent a 'serious and imminent danger', to trigger automatic unfair dismissal claims?

Accattatis v Fortuna Group (London) Limited
Gibson v Lothian Leisure
Ham v ESL BBSW Ltd
Montanaro v Lansafe

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BUT Rodgers v Leeds Laser Cutting Limited

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Is the position likely to change?

Examples of ‘appropriate steps’ (such as to render a dismissal for that reason automatically unfair)

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Asking to be furloughed

Accattatis v Fortuna Group (London) Limited

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Asking to be given PPE

Gibson v Lothian Leisure

Refusing to visit someone's house who is self-isolating

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Ham v ESL BBSW Ltd

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Asking an employer for advice

Montanaro v Lansafe

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Is an employer obliged to consider furlough before dismissing for redundancy?

Mhindurwa v Lovingangels Care Ltd

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Handley v Tatenhill Aviation Ltd

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Lessons to draw, and issues still to be decided

Is dismissing someone for refusing to wear a mask within the range of reasonable responses?

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Kubilius v Kent Foods Ltd

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When does the urgency of lockdown allow employers to impose changes to terms and conditions of employment?

Khatun v Winn Solicitors

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Sharma v Lily Communications Ltd

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Other issues

Compensation issues

Ham v ESL BBSW Ltd

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Montanaro v Lansafe

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Sending a pregnant woman home based on government advice / risk assessment is not sex discrimination

Prosser v Community Gateway Association Ltd

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Extension of time for ET3

Fyfe v Aracadis Human Resources Ltd

SESSION 3:
ALTERNATIVES TO REDUNDANCY

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Withdrawing job offers

TULR(C)A 1992, s295

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Eliminating temporary staff

Agency Workers Regulations 2010
Pulse Healthcare v Carewatch Care Services [2012] UKEAT/0123/12

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Pay cuts

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Changes to pension schemes

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Other policy changes

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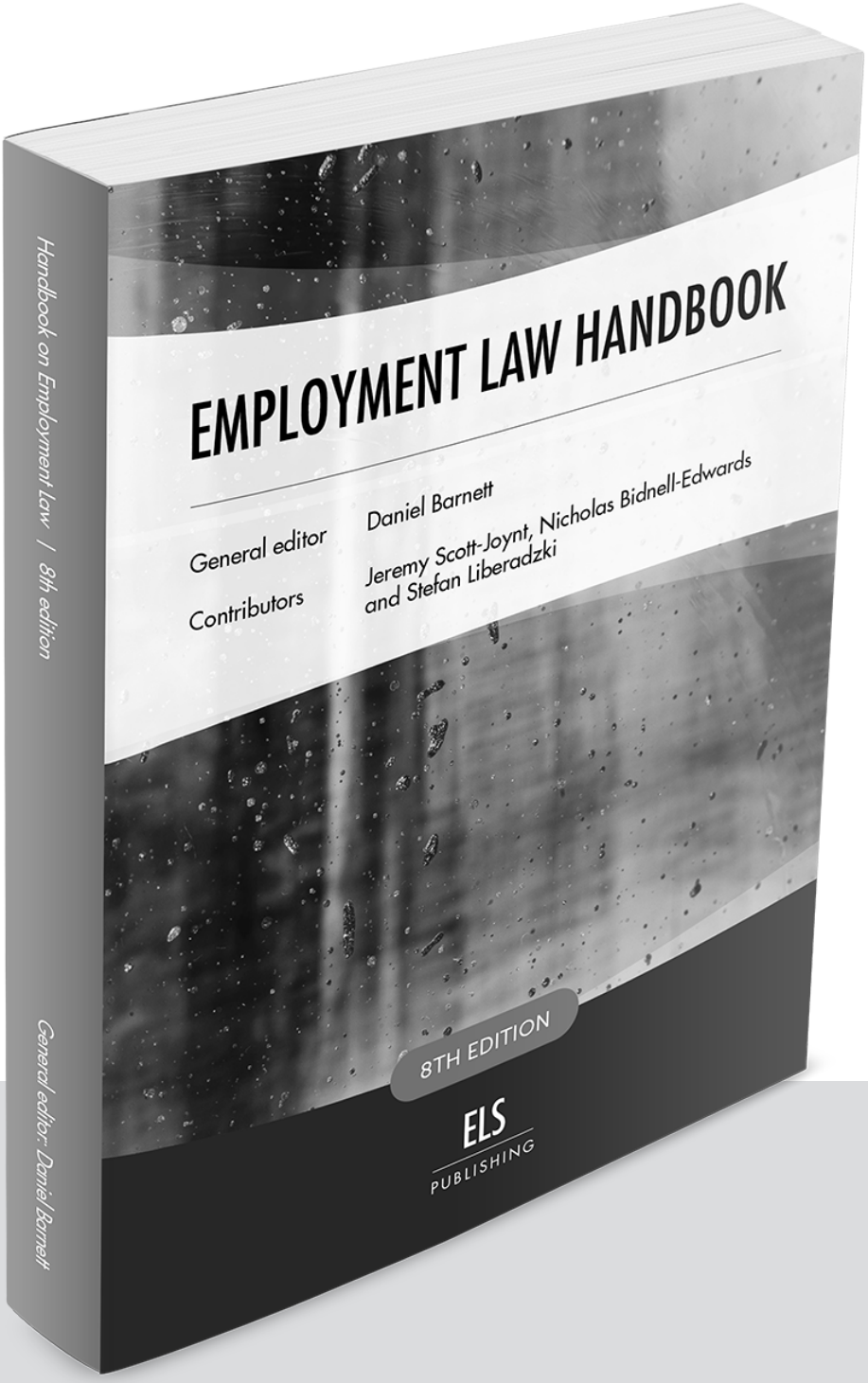

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