CORONAVIRUS – SOME KEY RIGHTS AT WORK

The Coronavirus crisis has quickly given rise to severe difficulties for UK businesses and UK workers. Workers face a variety of acute risks, ranging from termination of their employment to being required to work in unsafe conditions.

In this note I address ***four sets of legal rights*** which may be of particular value to workers ***who remain at work***[1] during the Coronavirus outbreak:

(1) *Rights to safety at work;*
(2) *Rights to sick pay;*
(3) *"Whistleblowing" rights;*
(4) *Rights not to be subjected to other detriments.*

The intention is to provide a broad guide to ***some*** of the key rights at work which should be respected by employers responding to the Coronavirus crisis. This note is not comprehensive and does not substitute for the need to obtain legal advice to understand how the rights set out might apply in the individual circumstances of a particular worker.

Unless otherwise stated, references to "employees" in this note are to employees as defined in s230(1) of the Employment Rights Act 1996 ("**ERA 1996**").

1. SAFETY AT WORK

Extensive evidence is emerging that workers not only in the healthcare sector but in sectors such as construction, retail and goods distribution are being required to attend work in circumstances which they do not feel are safe.[2]

Employers' general duty of care

Employers owe a duty of care to their employees (and no doubt to many of those who would be considered limb (b) workers under the ERA 1996) to take such steps as are reasonably

[1] It is assumed that those who remain at work are by definition those whose contracts of employment cannot be said to be "frustrated" (and thus terminated) at the present time. This may be an issue for some workers, for example workers in businesses which have been compulsorily closed under the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 ("**the Restrictions Regulations 2020**").

[2] See e.g. *BBC*, "Coronavirus: 'We are not working in safe conditions'", 26 March 2020, available at: https://www.bbc.co.uk/news/business-52052580; *The Guardian*, "'Cradle of disease': Asos warehouse staff reveal coronavirus fears", 30 March 2020, available at: https://www.theguardian.com/global/2020/mar/30/asos-workers-coronavirus-fears-online-fashion-safety-barnsley-warehouse.

necessary to ensure their safety.[3] In simple terms, any employer requiring employees to come to work must take all reasonable steps to protect them against foreseeable risks to their health arising from Coronavirus. Employers should be mindful not only of the threat to workers of physically contracting Coronavirus but also to foreseeable damage to mental health arising from current working conditions. For example, many frontline health workers are currently working in exceptional conditions which pose a plain risk to their mental health. The fact their work is "inherently stressful" does not mean that no duty of care arises; no occupations should be regarded as intrinsically dangerous to mental health.[4]

The requirements of "reasonableness" are obviously very fact-dependent and involve considering a wide range of factors such as the nature of the work environment, the severity of the risk of harm, the ease or difficulty of taking particular steps which reduce that risk and the characteristics of the particular employee. For example, with regard to Coronavirus, the duty is likely to demand more in the case of an employee with known underlying health conditions. The margin afforded to the employer is likely to be somewhat more generous given the complex nature of the Coronavirus threat and its relatively sudden emergence; but that logic should only be taken so far.

Employers are more likely to comply with the common law duty if they (a) give all employees the chance to express their concerns or identify any vulnerabilities they face with regard to Coronavirus (b) carry out and record a risk assessment of risks associated with Coronavirus[5] and (c) not only implement protective measures but take steps to ensure they are followed.[6] The duty is not necessarily met just by taking obvious or standard precautions; the employer's duty also extends to seeking to identify and understand risks which are not themselves obvious.[7]

If an employer fails to comply with the duty, the employer may be liable in respect of any foreseeable physical injury (including Coronavirus itself and foreseeable complications of that illness) or foreseeable psychiatric injury suffered by an employee as a result. In cases of

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[3] This duty is underpinned by statutory duties (which are not directly actionable) to similar effect: see for example s2(1) of the Health and Safety at Work etc Act 1974 and article 5(1) of Directive 98/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work ("**the Framework Directive**").

[4] *Hartman v South Essex Mental Health and Community Care NHS Trust* [2005] IRLR 293 at [5].

[5] In *Kennedy v Cordia (Services) LLP* [2016] UKSC 6, the Supreme Court emphasised that the quality of risk assessment would be an important part of a Court's determination of whether an employer had taken adequate precautions with regard to a risk to an employee's health: at [89].

[6] See e.g. *Bux v Slough Metals* [1974] 1 All ER 262.

[7] *Kennedy v Cordia* at [111].

serious breach of duty an employee may even be entitled to resign and claim constructive unfair dismissal.

Specific statutory health and safety duties

Beyond the duty to take reasonable steps to protect workers' health, the broader law of health and safety at work provides a myriad of rights and duties which may avail workers required to go to work in current circumstances. These rights cannot be comprehensively addressed here,[8] but by way of brief summary of a few relevant statutory health and safety duties:

(a) Employers must ensure that "*suitable personal protective equipment*" ("**PPE**") is provided to those who may be exposed to "*a risk to their health and safety while at work*" except and insofar as the risk has been adequately controlled by other means.[9] Before choosing the PPE in question the employer must ensure an assessment is made to determine whether the PPE it intends to provide are suitable;[10]

(b) Employers must make a suitable and sufficient assessment of the risks to the health and safety of employees (and to others) to which they are exposed whilst they are at work and the assessment must be reviewed if there has been a significant change in the matters to which it relates.[11] Importantly in the Coronavirus context, that duty to assess involves specifically assessing risks to any pregnant woman (who has notified the employer of her pregnancy in accordance with statutory requirements) or that of her baby. Assuming those risks cannot otherwise be avoided the employer must alter her working conditions to avoid the risk or, if that is not reasonable, offer suitable alternative work or suspend her for as long as necessary;[12]

(c) Employers must provide employees various kinds of specified information regarding identified risks to their health and safety, measures introduced to prevent and protect against those risks, and safety procedures;[13]

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[88] As a further example of duties beyond those addressed in the text, the duties under the Control of Substances Hazardous to Health Regulations 2002 probably apply in respect of employees whose work brings them into close contact with persons (other than colleagues) who are liable to be carrying the virus.

[9] Personal Protective Equipment at Work Regulations 1992 ("**PPEW**"), regulation 4.

[10] PPEW, regulation 6(1).

[11] Management of Health and Safety at Work Regulations 1999 ("**MHSWR**"), regulation 3(1)-(3).

[12] MHSWR, regulation 16.

[13] MHSWR, regulation 10.

(d) Employers when assigning tasks to their employees must take account of their capabilities as regards health and safety.[14]

A further layer of protection arises from statutory protections for workers against facing detrimental treatment because they complain or take steps to avoid health risks in certain situations. These are discussed further below.

2. SICK PAY

Contractual sick pay

Many workers will enjoy contractual rights expressly set out in their contracts entitling them to pay at a certain level and for a certain period of time where they are off sick owing to illness or injury. Insofar as a contract confers a "*discretion*" on an employer as to whether or not to pay sick pay, that discretion must still be exercised lawfully; thus for example it should not be exercised in a way which is discriminatory and contrary to the Equality Act 2010, or in a way which is irrational or *Wednesbury* unreasonable.[15]

Even where a worker's contract itself says nothing about sick pay, it can often be argued that there is an implied term of the contract entitling the worker to sick pay. A court would determine this by considering all of the relevant facts and circumstances; the actual conduct of the parties since the contract came into effect will often provide the best evidence of what the parties agreed (expressly or by implication) at the time the contract was made.[16] This suggests that where an employer has previously and clearly operated a practice of paying staff who are off sick in the usual way, a worker will have a strong argument that this should continue if the reason for absence is Coronavirus-related illness.[17]

One question which arises in the context of Coronavirus is whether contractual sick pay will extend to protect workers who take absence from work not because of their own illness, but because of the need to follow government guidelines (for example, where a member of the worker's household has developed symptoms of Coronavirus). This will ultimately depend on the terms of the particular contract, but in some cases it will certainly be possible to argue that the contract term entitles the worker to pay in that situation.

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[14] MHSWR, regulation 13.

[15] For examples of the application of concepts of "rationality" and "reasonableness" when assessing how employers have exercised a contractual discretion vis-à-vis an employee, see the decisions in *Braganza v BP Shipping* [2015] IRLR 487 and *IBM UK v Dalgleish* [2018] IRLR 4.

[16] See *Mears v Safecar Security Ltd* [1982] IRLR 183 at [37] and [42]-[43].

[17] See e.g. *Bellingham v Secession Ltd T/A Freud* [2005] UKEAT/0069/05 at [23].

Statutory Sick Pay

Statutory sick pay ("**SSP**") may avail those who do not enjoy contractual sick pay entitlements. Under the applicable legislation SSP is owed to "*qualifying employees*".[18] This does not have the same meaning as "*employees*" under s230 ERA 1996; while the definition of "qualifying employees" is complicated and careful analysis of the relevant legislative provisions will be required in a given case, it can be said in broad terms that "qualifying employees" includes almost all of those who are employees under the ERA 1996 and excludes almost all of those who would constitute workers under s230(3) of the ERA 1996 or who would be classed as "self-employed". Moreover, certain groups of employees are excluded, such as employees whose normal weekly earnings are less than £118 per week do not qualify for SSP[19] or those who had recently claimed for employment and support allowance.[20]

The right to SSP generally arises for those who lack capacity for work on a given day, meaning they are "*incapable by reason of some specific disease or bodily or mental disablement of doing work which he can reasonably be expected to do under [the] contract*".[21] However, the Government recently enacted Coronavirus-specific legislation to make clear that SSP is also now owed to those who are "self-isolating" in accordance with government guidance and are as such unable to work.[22]

For those employees who are entitled to SSP, their employer must pay SSP at the stipulated rate (currently £94.25, but rising to £95.85 per week from 6 April) up to a value of 28 weeks in any one period of entitlement. The period of entitlement normally only begins on the fourth day of absence. However, where the reason for absence relates to Coronavirus and the first day of absence was on or after 13 March 2020, the entitlement to SSP kicks in on the first day of absence.[23]

3. WHISTLEBLOWING PROTECTION

In these stressful and difficult times worker and employer will not always see eye-to-eye over how the employer is responding to the Coronavirus crisis. For example, a worker may make a complaint to the employer if she feels that her employer is requiring her and her colleagues to work in unsafe conditions or to work in a way which violates the law (for example, the new

[18] See the Social Security Contributions and Benefits Act 1992 ("**SSCBA**"), ss151 and 155.
[19] SSCBA, Sch 11 para 2(c).
[20] SSCBA 1992, Sch 11 para 2(dd).
[21] SSCBA 1992, s151(4).
[22] Statutory Sick Pay (General) (Coronavirus Amendment) Regulations 2020.
[23] Statutory Sick Pay (Coronavirus) (Suspension of Waiting Days and General Amendment) Regulations 2020.

laws requiring closure of certain non-essential businesses). There have been reports of NHS staff being threatened with disciplinary action for speaking out about conditions in hospitals treating Coronavirus patients.[24]

In certain circumstances, complaints of this nature can qualify as "protected disclosures" within the meaning of s43A ERA 1996. Employers cannot legally dismiss a worker or subject the worker to *any* detrimental treatment (for example, any disciplinary action or non-trivial criticism) because the worker has made a protected disclosure. There is an expanded definition of "worker" for these purposes.[25]

The definition of protected disclosure is however quite technical. The following conditions must be met:

(a) The disclosure must be a "disclosure of information", which in broad terms means that it must be a statement of a factual nature rather than a statement of opinion or of vague allegations.[26] Thus the statement that "some of my colleagues are coughing and there is a risk they'll infect the rest of us" probably is a disclosure of information; a statement that "working here is dangerous" by itself probably is not (though it would be important to analyse the context of the statement);

(b) The worker making the disclosure must also genuinely and reasonably believe that the disclosure:

    a. is in the public interest. Whether it is reasonable to believe that disclosing the information is in the public interest depends on a multi-factorial test which takes account of the number of people whose interests are served by the disclosure, the seriousness of the wrongdoing disclosed, and the identity of the employer.[27] It is certainly arguable that complaints relating to responses to Coronavirus have an inherent public interest given the critical importance to the public generally of reducing the spread of the infection; and

[24] See e.g. *The Guardian,* "NHS staff 'gagged' over coronavirus shortages', 31 March 2020, available at: https://www.theguardian.com/society/2020/mar/31/nhs-staff-gagged-over-coronavirus-protective-equipment-shortages.

[25] ERA 1996, s43K.

[26] See the decision of the Court of Appeal in *Kilraine v London Borough of Wandsworth* [2018] IRLR 846.

[27] See the decision of the Court of Appeal in *Chesterton v Nurmohamed* [2017] IRLR 837 at [34]-[37].

b. tends to show breach or likely breach of a legal obligation, the endangering of an individual's health and safety or one of the matters identified at s43B(1)(a)-(f) ERA 1996. Reasonable complaints about working practices which do not protect workers from Coronavirus are also likely to meet this condition; and

(c) The disclosure must be made in the right way. This would include any disclosure to the employer itself but can also include disclosures to certain others in specific and quite narrowly prescribed circumstances set out at 43D-H ERA 1996. Disclosure to the public as a whole – for example, by way of a Tweet or social media post exposing a dangerous working practice – could only qualify for protection if the strict terms of s43G[28] or s43H ERA (applicable only to disclosures of "*exceptionally serious failures*") are met.

The technical definition of "protected disclosures" in the ERA 1996 means that some complaints about matters arising from the Coronavirus concerns will not attract the protection of the statutory whistleblowing rules. Even then, however, rights from other sources may protect workers. For example, an employer who punishes an employee for making a genuine and legitimate complaint would arguably violate the employment contract by violating the implied contractual duty to maintain trust and confidence in the work relationship.

4. PROTECTIONS AGAINST OTHER KINDS OF DETRIMENTS

The ERA 1996 creates protection against various kinds of detriments which might be especially common in the current circumstances.

Health and safety related detriments

It is unlawful[29] for the employer to dismiss an employee or subject an employee to any other detriment on the ground that:

[28] This requires that (a) the worker reasonably believes the information disclosed and any allegation contained in it are substantially true; (b) it is not made for the purposes of personal gain; (iii) it is in all the circumstances reasonable to make the disclosure; and (d) the worker either (i) reasonably believes she will be subjected to a detriment by his employer if she makes it in one of the other permitted ways; (ii) reasonably believes her employer will likely conceal or destroy evidence if she makes a disclosure to her employer; or (iii) has previously made substantially the same disclosure to her employer or to a prescribed person.

[29] See ERA 1996, sections 44 and 100. These protections create other related protections which may also avail employees in current circumstances: for example, an employee may not be subjected to any detriment for carrying out functions as a workplace health and safety representative or for using reasonable means to bring circumstances to his employer's attention which he reasonably believed were harmful or potentially harmful to health or safety.

(a) In circumstances of danger which the employee reasonably believes to be serious and imminent and which they could not reasonably be expected to avert, the employee left, proposed to leave, or refused to return to their workplace or any dangerous part of it*; or*

(b) In circumstances of danger which the employee reasonably believes to be serious or imminent, the employee took or proposed to take appropriate steps to protect themselves or other persons from the danger. The steps which are appropriate are to be judged by reference to all the circumstances including the facilities and advice available to the employee at the time. The right does not however protect an employee whose response is so negligent that a reasonable employer would have taken action against him.[30]

These rights are potentially very significant in the current crisis. Not least because recent Regulations themselves describe Coronavirus as a "*serious and imminent threat to public health*",[31] there are powerful arguments that it is reasonable to believe that exposure to Coronavirus infection is exposure to a serious and imminent danger. If so, and if there is no other way round it, then an employee[32] whose working arrangements offer inadequate protection in effect has a right to walk out, or to take any other appropriate action, to protect not only her own but other people's health.

Family-related detriments

On a different note, an employee may not be subjected to any detriment where they have taken or sought to take various kinds of family-related leave which may become necessary in the present crisis.[33] Thus for example:

(a) Eligible employees who are parents or carers and whose children are no longer attending school may be (or have been) forced to apply to exercise their right to take unpaid parental leave for a period of at least one week and up to four weeks (per eligible child).[34] The value of this right in current circumstances is lessened by the fact that the employee must give at least 21 days' notice of their intention to take leave[35]

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[30] ERA 1996, ss44(2) and (3).

[31] See the recitals to the Restrictions Regulations 2020.

[32] On their face these protections do not extend to those who are not employees but are "workers". Given that the rights derive from article 8(4) of the Framework Directive, which probably uses a wider definition of "employee", it is open to question whether the scope of the domestic law protections is compatible with EU law.

[33] Section 47C ERA 1996 creates the basic framework for this protection, which is then confirmed in specific circumstances in various statutory instruments.

[34] Maternity and Parental Leave etc Regulations 1999 ("**MAPLE**").

[35] MAPLE, Sch 2, para 3.

and that the employer may require the leave to be postponed for up to six months if it considers that taking the leave earlier would unduly disrupt the business.[36] Nevertheless, an employer may not dismiss or subject the employee to any detriment either for taking or for *seeking to take* parental leave;[37]

(b) Employees are also entitled to take a reasonable amount of (unpaid) time off to take action which is necessary, for example, to provide assistance to a dependant[38] who has fallen ill, to arrange for the care of such a dependant or to deal with an unexpected incident involving a child.[39] The right generally depends upon the employee telling the employer (a) the reason for the need to take leave "as soon as reasonably practicable" and (b) how long she expects to be absent. Again, an employer may not dismiss or subject an employee to any detriment for taking or seeking to take this kind of leave;[40]

(c) Finally, if the most tragic of circumstances were to arise, an employee may not be dismissed or subjected to any detriment, because they took or sought to take parental bereavement leave in respect of a child who died on or after 6 April 2020.[41]

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[36] MAPLE, Sch 2, para 6.
[37] MAPLE, regs 19(2)(e)(ii) and 20.
[38] As defined this includes a spouse, child, parent and others who reasonably rely on the employee to make arrangements for their care: see s57A(3)-(5) ERA 1996.
[39] The precise scope of the right is set out at s57A ERA 1996.
[40] MAPLE, reg 19(2)(e)(iii).
[41] Parental Bereavement Leave Regulations 2020, regulations 12 and 13.