

## Returning to the workplace

**The Talent in Logistics team caught up with Mike Hayward, Partner and Head of Crime, Transport and Regulatory and Maria Gallucci, Partner and Employment Solicitor at Woodfines Solicitors about the duty of employers to review their policies and procedures during these unprecedented times, the rules around Annual Leave in 2020/21, Data Privacy for Covid-19 Employee Testing and finally the Future after Furlough including Redundancy Protocols.**

**What steps do you think need to be taken by employers when re-integrating their teams into the workplace?**

Everything here will depend on the size and type of business, and how it is organised, managed, and regulated. Whatever sector you work within, there will be regulatory bodies giving specific guidance, so it is important to start there.

I urge employers not to panic. Look at the core, fundamental legal requirements (largely set by the health and safety at work regulations) which say that every business has a duty of care to those that come into their businesses as visitors or workers. Although we are all adapting to the world with Covid-19, let's keep track of some of the fundamental safeguards that have to be in place.

You can only do your best. And one of the things that I would certainly advise businesses on, is to keep note of the measures taken. The Health and Safety Executive and the Government are talking about trying to take reasonable steps to achieve best practice, rather than this being set in law.

**Are there any specific workplace policies/procedures that may need a review as they will now be inaccurate in light of the pandemic?**

Yes, so this is a really important opportunity to review all of those policies and handbooks! Use this time as an opportunity to look at the procedures and processes you already have in place, refresh them and, where you can, apply the Covid-19 guidance from the Health and Safety Executive and the Government.

Ensure that these changes are communicated to teams effectively. Share your updated risk assessments so people are knowledgeable about the changes made, even if they are working from home. You may want to set up "toolbox talks", whether remotely or in the workplace (with social distancing) giving updates to the staff as to what your expectations are, and what measures you are putting in place. Also, to keep a record when you communicate this to your teams. Include when it took place, who attended, and get people to confirm that they read the instructions (get signatures if you can). It's all about the documentation showing the steps you are taking in order to do what you can reasonably in these circumstances.

Rules can be very debilitating. You can feel bogged down by the amount of guidance that's coming through. So, step back, consider what you need to do, implement all that you can, get advice where it's necessary, and talk it through with associations, and people around you.

Are there are current considerations businesses need to be aware of around business travel, particularly HGV Drivers?

I still find it utterly incredible to hear the stories of HGV Drivers who are unable to access basic welfare facilities at the points that they drop at. The Health and Safety Executive has clearly stated that people visiting from an employment point of view, should be given access to welfare facilities. Not only is that the fundamental right of somebody's own welfare to go to the toilet, but when there's an expectation of frequent hand-washing, those facilities must be in place.

There are also aspects to consider in relation to sharing vehicles. Some businesses are providing a situation where the vehicle is entirely cleaned and sprayed after every use. But, it's about what is reasonable and practical. We want to encourage hand-washing and that there is a reduction in the amount of time that two people are close to one another. For example, when delivering something, that sites are told in advance, so there is sufficient space between the person taking and the person receiving the delivery.

We've also seen the temporary relaxation of drivers' hours for certain essential deliveries. This was not a green light for anybody to drive outside of their hours. I cannot emphasize enough that nobody should be being placed under additional time pressure or in any situation where driver fatigue may set in. Let's not lose sight of the principal basic rules that are already there for driver safety.

A question about hygiene now, it's so important as no-one wants to catch Covid-19 and risk the chance of becoming unwell. Some employees have taken the step to do Coronavirus symptom checks, such as temperature checks when they arrive at work. Are there any rules around that, in particular, regarding data privacy?

We have had lots of enquiries around this, and the first thing I would say is that it needs to be approached with caution. Yes an employer has health and safety obligations towards its employees. But, it is arguable whether temperature checks can be part of a series of measures that assess employees to protect the health and safety of their employees in a pandemic, and it is not a measure that's currently recommended by the government or the World Health Organization.

So, the first thing to think about for businesses when considering bringing in checks such as temperature checks, they need to think about consent of the employees because predominantly it will be them that they're thinking of checking, they also need to consider if they're going to extend that to visitors as well. Whatever they decide, they do need consent because, otherwise, it could be a fundamental breach of contract. Taking action without consent could be deemed as assault.

Need to think about communication by explaining the reasons it's necessary and why they want to do it. They might want to take the approach that, this is to protect your health and safety, and, actually employees and visitors might feel re-assured that the business is taking steps to protect their health, and safety, and so might be quite happy to give that consent.

Regarding data protection, this is something that has to be thought about, health information is a special category of personal data, and a data controller can only process that data on certain grounds. They will require consent again, in relation to data protection, not just in relation to carrying out temperature checks.

They need to consider on a practical level, how they are going to do those temperature checks. Will they do them themselves or will they use an occupational health professional to do them. If they decide to use

an occupational health professional, then, there is a health exemption under data protection legislation GDPR, which enables occupational health professionals to process data relating to health.

Where that processing is necessary for the purpose of Preventative or occupational medicine, or for the assessment of the working capacity of the employee medical diagnosis, or management and treatment. It only applies to occupational health professionals who are subject to confidentiality obligations.

So, they just need to think about whether it might be from a data protection point to view to use an occupational health professional to carry out those checks.

The ICO has issued guidance on workplace testing. So it's definitely worth reading through that if any employer is considering carrying out temporary checks. The guidance advises that employers should ensure that they don't collect and unnecessary or excessive information. They say that employers will probably only require information about the test result rather than details of any underlying conditions and they should only collect results that are necessary and proportionate.

So a number of considerations there for them to think about. And again, communication to staff, so, before carrying out any testing, they should inform staff about what personal data is required, what it will be used for, who it will be shared with, how will it be kept, and what decisions will be made based on the test results.

And then, last but not least, they also need to consider, from a discrimination perspective, that all the checks are applied consistently to all employees, workers, or visitors. So only testing certain groups who perceived to be at higher risk could potentially lead to discrimination claims. So that's something else that they need to think about.

**We may see an increase in whistle-blowing due to health and safety concerns in the workplace, do you have any guidance for employers on how to manage that?**

It essentially comes back to health and safety, it's not just the risk of whistle-blowing claims if employers don't take health and safety seriously, employees also have rights not to be dismissed or treated detrimentally if they raised health and safety concerns.

So, firstly, to avoid complaints and certainly then to avoid any claims, the employer should ensure that they comply with health and safety regulations and their duty of care towards their employees. Employers have a duty of care for the health and well-being of their employees under health and safety legislation.

Secondly, is dealing promptly and comprehensively with any complaints that are raised. So if an employee does raise a complaint, then the employer should take steps to investigate it, take it seriously, and also take steps to address the concerns. What they shouldn't do is treat that employee adversely because they've raised those concerns.

They should also ensure that others don't either, because the employer can be vicariously liable for the actions of other employees. The employer should make sure that all employees know that if, if another employee raises a concern about health and safety. That they don't treat them badly because of that, that their co-workers, don't decide to treat them detrimentally. Directors and senior managers also have a duty to disclose wrongdoing anyway.

So, yeah, firstly to ensure they're taking all the steps that they should be, and secondly, that they're listening to any concerns that are raised by employees. That they ensure that they are dealing with concerns in a sympathetic way and taking steps to address those concerns, because if that person is treated detrimentally or even ultimately dismissed, and they can say that the reason was, because they

raised those issues of health and safety, then they could potentially bring a claim as well.

And if the employer doesn't take things seriously, than they have the option of report issues to the Health and Safety Executive as well. So it could be all kinds of trouble for the employer if they don't take it seriously.

**Can you give us some guidance around the work retention scheme and government guidance here?**

There's been an awful lot that has happened. So, essentially, the government job retention scheme, enabled employers to place employees on furlough leave. For a period of time, and for a minimum of three week period, and they were entitled to a grant from the government, which covered 80% of wages. And employers can choose whether to pay just the 80% or whether to top it up to 100%.

When placing somebody on furlough leave, you have to inform them formally in writing and make sure you have their consent as you are temporarily changing the terms of their employment.

We are now coming to a point where the government is reducing the scheme and essentially getting those employees back into the workplace. So from July it will be possible to get furloughed employees back into the workplace, before now it was very strict in that employees could not work at all. Employers can now think about bringing back employees full or part-time. Over a period of time leading up to October the government grant will slowly be reduced as well.

It's a good point now for employers to start thinking about how they're going to manage, reducing or ending that furlough leave. Whether they are going to reduce it, step by step, by bringing people back part time or whether there's going to be a point where they're going to essentially end it. There is no set procedure for ending furlough. It depends on whether the agreement put in place by the employer, when they put their employees on furlough, refers to a process for ending furlough, for example, any notice that should be given.

If no period of notice was specified, the employer should aim to give reasonable notice anyway, and notice to end the furlough should be given in writing. There's quite a lot of guidance on the ACAS website, and they have produced a template letter to notify employees of the end of furlough that may help employers.

So again it comes down to communication, not just in terms of the legalities, as there are no real legalities, around ending furlough. But I think it's more for employee relations, employees have potentially been out of the workplace for quite a while, so they may be quite apprehensive about returning, they'll want to know that the workplaces is a safe place to return to, and they'll also want to know, whether they are going to be paid full pay, or whether there have been any salary reductions, Those salary reductions have to be agreed because again, they're a change to employment terms.

They'll want information around any working arrangements, there'll be nervous about commuting to work, so they may want to know if there is any possibility of flexible working, will the employer provide parking so that they can drive to work if they used to commute on public transport and they'll also want some reassurance around their annual leave entitlement as well.

Of course, the guidance is for employees to continue to work from home where they can at the moment. So if employees are thinking about bringing back furloughed employees at the moment, it might not necessarily be back into the workplace and that might be a good transitional thing to do, can they work from home, as an introduction, before they fully go back into the workplace?

If you've got a job where you have to be in the workplace and you can't physically do it from home. Where do you stand if the employer asks for you to come back? But you have, special health care needs or you've got childcare needs still or you are very anxious about returning to the workplace. Can the employer make someone go back to work?

It really depends on the circumstances, and, again, there's some ACAS guidance around this, which I would really recommend employers reading this as well as the government guidance. I should explain as well that with ACAS guidance, in employment tribunals when they're looking at claims, they really give weight to ACAS guidance. So if employers follow ACAS guidance, they can be fairly re-assured that they're not going to go far wrong in terms of good employment relations and good employment processes. So the guidance says that an employer should listen to any concerns that staff may have and try to resolve them in order to protect the health and safety of their staff. So, again, the place to start is with communication.

Employers, essentially, do have to consider whether employees can continue to work from home, or whether they need to look at other options such as holiday or unpaid leave. Or whether they could be regarded as on sick leave, particularly if an employee has a health condition, and that health condition can include severe anxiety. That type of condition can bring them within the definition of a disabled person under the Equality Act, which gives them certain protections.

The employer has to ensure that it doesn't discriminate against those people, so particularly those with special health care needs, including acute anxiety. The employer has to be quite careful that it doesn't discriminate, requiring employees to continuing to continue to attend work in a pandemic, that could constitute the provision criterion or practice which is indirectly discriminatory against disabled employees.

So, there is an obligation on the employer, in those circumstances to consider, whether it's possible to make reasonable adjustments. Adjustments can take all kinds of forms. It could be adjusting workplace arrangements such as the place of work, or hours. It could be providing, appropriate equipment such as a screen to reduce their concerns and to reduce the barriers that are preventing that disabled person from coming into the workplace.

You need to carry out risk assessments to make sure that they're protecting health and safety of their staff. But particularly those who have health care concerns.

Now where employees have childcare needs, they don't necessarily have that same protection under the Equality Act. So there isn't a legal obligation for employers to consider reasonable adjustments. But the guidance says that they should be dealt with sympathetically as well and consideration given to, allowing them to continue to work from home, or to have flexible working.

So again, it's really all about communication and speaking to the individual about what you can do, rather than just saying you must work or else, or else we won't pay you, or else we'll dismiss you. Employers do need to tread very cautiously around that. Ultimately, if they've done everything they possibly can to relay that person's concerns and they still refuse to come into the workplace, they can consider things such as not paying or dismissing them. But those are very much last resorts and it should be approached with extreme caution. The advice is to communicate and try to be as flexible as possible.

What support does the employer need to be providing for people working from home? Is there a duty for employers to be completing remote workstation assessments and providing adequate equipment for those employees?

The short answer here is, Yes! It is the employer's duty of care and responsibility for the employees' welfare, health and safety extends to homeworking in just the same way.

Employers are supposed to conduct a suitable and sufficient risk assessment of all the work activities carried out by their employees, to identify hazards and assess the degree of risk.

So, in the same way as they carry out those risk assessments in the workplace, they are supposed to carry those out for homeworkers as well. Now, obviously, that's been a little more difficult at the moment, but as we come out of lockdown as you mentioned, it may be possible to carry out those assessments remotely. So, absolutely, the obligation, should not be forgotten just because people are working from home and they can't necessarily see them, so essentially, yes, they should be carrying out risk assessments.

They also need to think about putting in place homeworking policies as well. There's whilst there's not necessarily any obligation to provide equipment or to, for example, pay for broadband or things like that. What they should be doing is putting in place a good, home working policy that addresses all of those things, so that the employee knows where they stand in terms of who's going to provide the equipment, who's going to pay for it, who's going to insure it and all of those things.

The other thing also that the employer has a responsibility for, and that we shouldn't forget about is mental health, and, again, ACAS have produced a Coronavirus Mental Health at Work Guide, which is to help employers spot and handle mental health problems in the context of homeworking and furlough as well. So that's, that's worth looking at.

**Many of us have been working from home for weeks, some have cancelled holidays and annual leave and just carried on working. There's potentially going to be a lot of people with lots of annual leave leftover, so what are the rules around this?**

So essentially the annual leave continues to accrue during lock down, for those people who are working but also for anybody who's been placed on furlough leave

Employers can give employees notice to take their holiday at specified times. They have to give twice as much notice as the length of the period of leave. So if the employer wants them to take a week's holiday, they must give the employee two weeks' notice.

The purpose of the leave is to allow period of rest and relaxation and there's been some debate over whether it counts whilst people are in lockdown and essentially confined to their own home. As we start to see the lock down ease, then it might become possible for employers to give notice to employees to, to take some of that leave. Employees themselves can also choose to take leave if they want to.

There has been some new legislation that came in, on 26th of March. The government amended the working time regulations, so that those workers who haven't been able to take the working time directive annual leave entitlement (which is the four week entitlement) due to the Covid-19 pandemic, they've now got two years to take that leave.

There are a number of considerations around this though, the first is that they can only carry over what was not reasonably practicable to take, as a result of the effects of the coronavirus.

And there is government guidance that relates to holiday entitlement during coronavirus, which sets out factors that should be considered so whether it's practicable to take the leave in the relevant year. There is also further ACAS guidance around this.

I don't think however, that we should get too bogged down in whether it was reasonably practicable or not. I think most employers are quite glad of the extension, rather than the employees having to take all that annual leave in the last six months of the year, they will mostly be happy that they are able to spread it out over a longer period.

There is another tricky issue - the amendment to the regulations applies only to the Working Time directive, which is four weeks annual leave whereas under the working time regulations there's an additional 1.6 weeks of annual leave. Now to carry that over, employers have to put in place the relevant agreement allowing that leave to be carried over as well.

So there are some practicalities where the employer will have to put an agreement in writing if they want to allow employees to carry over all of their annual leave, the working time directive leave, the working time regulation leave and any additional contractual leave that they may have given in addition to that.

So, they may have to think about temporarily changing their annual leave policies to allow that carry over.

**There will be many organisations that might need to restructure and make people redundant, some will never of have to do this before, do you have any guidance that could help them?**

Things that they should consider very carefully are if there are any ways to avoid redundancies, whether they can reduce costs in other ways, whether they can perhaps limit or stop over time, whether there can be salary reductions, reduced recruitment. Asking themselves is redundancy the only option?

If, however, they come to the conclusion that redundancies are unavoidable, then essentially now they're under an obligation to follow a fair procedure, which includes fairly selecting employees for redundancy and also consulting with them.

When considering large-scale redundancies, which is essentially over 20 employees a minimum consultation period applies. So, they need to be mindful of that. Again, ACAS has some useful guidance that is worth looking at on their website which talks through what the redundancy process looks like.

It includes warning employees about redundancies, and then consulting with them as well. Then there is fair selection, where they'll have to think about whether they do a scoring process for selecting employees. And what kind of criteria they look at for that scoring process.

### **Let's Celebrate the Sector...**

The Undersecretary of State for Roads and Transport actually said that the whole nation will owe the haulage and logistics sector a huge debt of gratitude. Keeping the supply chain going was an unprecedented challenge, and the logistics sector faced it with outstanding dedication and professionalism. I absolutely echo those words – whether it's the person behind the wheel of the truck or the people back in the transport operation, this has been a really mammoth task and one that everybody should be very proud of.

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