HR Hub – Legal Update

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Case Law Update

***Uber BV and others v Aslam and others* (Supreme Court, 19 February 2021)**

Facts: This was a group of claims brought by a number of Uber drivers for failure to pay national minimum wage or provide annual leave. Uber's argument in response was that its drivers were self-employed contractors, rather than workers, and so were not entitled to NMW or holiday pay (or any other rights contingent upon worker status).

Uber (which for the purposes of the case was comprised of two entities, its London operating arm Uber London Ltd ("ULL") and its Dutch parent corporation Uber BV ("UBV")) asserted that the contractual arrangement for each ride was concluded between the driver and their passenger. ULL then acted as agent for the drivers to arrange rides using the Uber app, which was owned and controlled by UBV. There is no written contract between ULL and its drivers; all written terms are entered into between drivers and UBV.

Decision: The Employment Tribunal, Employment Appeal Tribunal and Court of Appeal had all found in favour of the drivers before the case reached the Supreme Court. The Supreme Court has now followed suit by unanimously finding in favour of the drivers. The basis for this was as follows.

ULL could not be considered merely a booking agent for the drivers, as this was not reflected in the factual pattern. Rather, the obvious conclusion on the facts was that ULL instead contracted with passengers in its own name to provide transportation services. The lack of a

written agreement between ULL and the drivers meant that the nature of their relationship instead had to be inferred from the factual context, and here a contract could be inferred as otherwise ULL would have no way of performing the transportation services it had contracted to provide to the passengers. There must have been an unwritten contract in place for the drivers to undertake to provide these services.

A number of factors then made it clear that the drivers were workers for Uber, rather than self-employed contractors:

1. The drivers' remuneration was fixed by Uber and they could not negotiate a different fee with a passenger; Uber also took a service fee from the price paid.
2. Uber dictated the contractual terms upon which drivers provided their services to passengers.
3. Drivers were subordinated to Uber, in the sense that while a driver could refuse a ride request, cancelling too many trips in a certain period of time would be penalised by Uber logging the driver out of the app and making them unable to accept further rides for a period of time.
4. Uber also exercised control over the drivers by restricting, for example, the type of car that drivers could use, as well as by controlling the app technology and imposing the driver "star rating" system which was used as a performance management tool.
5. Uber also restricted the degree of communication between driver and passenger to the absolute minimum, to prevent drivers forming outside commercial relationships with individual passengers.

These factors were significant enough to override the wording of the contract which stated that drivers were contractors, not workers. There was a significant degree of control exercised over the drivers by Uber, and there was no scope for the drivers to exercise their own professional skill or benefit from customer loyalty. The first instance tribunal was thus perfectly entitled to have concluded that the drivers were workers.

The court also found that the drivers' working time started when they logged into the Uber app to accept rides within their licenced territory. The key factual point here was that even though the drivers could reject trip requests (and so did have a right to refuse work), the penalties applied for failing to accept trips meant there was still a compulsion to carry out a certain degree of work. Indeed, Uber's own documentation described logging in as "going on duty", implying an undertaking by the driver to accept work offered.

Takeaways: This case will be a significant decision for the wider "gig economy", making it clear that the important factor in determining worker status is the employment legislation and not the contractual arrangement alone. The indication seems to be that the courts will prioritise protecting workers to the extent that the law intends based upon the facts of how they work, notwithstanding that their contracts may say something different. It will be important for businesses engaging staff on this sort of ad-hoc basis to carefully review their contractual arrangements but also how these arrangements actually operate in practice.

Kubilius v Kent Foods Ltd **(Employment Tribunal, 10 February 2021)**

Facts: Mr Kubilius was employed as a delivery driver for the respondent. He regularly drove to a particular customer site as part of his delivery duties. Due to the COVID-19 pandemic, that customer required face masks to be worn at all times on-site. Mr Kubilius refused to wear a mask while inside the cab of his vehicle, stating that it was his own space and he was not legally required to do so, despite the customer's staff pointing out that the elevated position of his cab made it likely that droplets from his breath would land on others. The customer reported this incident to Kent Food and banned Mr Kubilius from its site. After a disciplinary investigation, Mr Kubilius was dismissed by Kent Foods for failing to ensure a safe working environment and maintain good customer relationships. Mr Kubilius then claimed that he had been unfairly dismissed.

Decision: The Employment Tribunal ruled that the dismissal was fair. Though it was possible that other employers might have simply issued a warning rather than deciding to dismiss, dismissal was within the band of reasonable responses. This was particularly so given that Mr Kubilius continued to insist he had done nothing wrong, and that his ban from the customer site (which was where most of his deliveries had taken place) presented substantial practical difficulties in his carrying out work. There had also been damage to the client relationship as a result.

Takeaways: Though this represents an instance of dismissal being a fair response to refusal to wear a mask, this will not necessarily always be the case. Rather, the refusal to wear a mask must justify a particular response in light of the context in which it takes place. Here, it was due to the relationship damage and practical difficulties that resulted from the fallout of the incident; in other contexts, the health hazard presented might be significant. By contrast, in certain roles where in-person contact is minimal and the risk of transmission is very low, it might be less reasonable to immediately jump to dismissal as a sanction.

Rodgers v Leeds Laser Cutting Ltd **(Employment Tribunal, 12 March 2021)**

Facts: Mr Rodgers worked for Leeds Laser Cutting Ltd ("LLC") as a laser operator in its large, warehouse-like workplace. Following the announcement of the first national lockdown, LLC intended to keep its business open but with substantial measures being taken to make the workplace COVID-secure. These included social distancing (there were only 5 employees usually in the large workplace), thorough cleaning and staggering start/finish and break times. However, shortly after the lockdown commenced, Mr Rodgers left work and did not return, stating that it would be unsafe due to his child having sickle cell anaemia. He obtained an NHS note advising self isolation until 3 April, but did not return to work after that point. Eventually, on 24 April, he was dismissed for failing to attend work. Mr Rodgers brought a claim for automatically unfair dismissal, on the grounds that he had been dismissed because he refused to return to work in circumstances of danger that he believed to be serious and imminent.

Decision: The Employment Tribunal dismissed Mr Rodgers' claim. Though he had serious and understandable concerns about the risk of catching coronavirus outside his home, he had accepted that in fact it was "not hard" to socially distance at his workplace, and that regular handwashing was practised. As such, the circumstances of serious and imminent danger did not relate to the workplace, but rather the wider world. Indeed, Mr Rodgers did not raise any concerns with LLC about issues in the workplace specifically. It would have been reasonable for

him to attend work and rely upon the preventive measures put in place by LLC. The alternative interpretation of the law, upon which Mr Rodgers tried to rely, would mean that the dangerous global circumstances created by coronavirus could entitle any employee to refuse to work in any circumstances simply by virtue of the pandemic, which was not a sustainable conclusion.

Takeaways: Though the coronavirus pandemic continues to present challenging circumstances for employers and employees alike, the legitimate health concerns this may generate do not create carte-blanche for employees to refuse to work. The sort of steps taken by Mr Rodgers will likely only be appropriate in situations where a particular employer is showing a flagrant disregard for the risks posed by coronavirus. Where an employee or their dependent has particular health concerns that mean even reasonable steps to mitigate COVID risk may not suffice to protect them, the proper way to address this would be through dialogue with the employer and medical professionals, rather than simply refusing to attend work.

***Allay (UK) Ltd v Gehlen* (Employment Appeal Tribunal, 4 February 2021)**

Facts: Mr Gehlen, a former employee of Allay (UK) Ltd ("Allay") complained that prior to his dismissal he had been subjected to racist comments against his Indian ethnicity by another employee. Allay investigated and found that the comments had taken place, and despite two managers and another employee being aware of them, only a mild rebuke was issued to the offending employee. Notwithstanding this, Allay argued that it could not be held responsible for the comments, as it had taken all reasonable steps to prevent such incidents by providing equality and anti-harassment training to its employees approximately 18- 24 months prior to the incidents, and it had corresponding policies in place.

Decision: At first instance, the Employment Tribunal found that the training Allay had carried out was "stale" and no longer in the employees' minds, and so could not be relied upon as a defence. The fact that not only were the comments made, but the other employees who heard them barely reacted, clearly indicated this. The Employment Appeal Tribunal upheld this decision, emphasising that it would have been reasonable for Allay to run refresher training – and indeed it had done so subsequent to the investigation of the original incident. Even if it might not have prevented a given incident of harassment, it would have been a reasonable and sensible step to take to prevent discriminatory behaviour more broadly, and so Allay could not rely on the defence without it.

Takeaways: Employers must take care to ensure that their training on topics such as equality, diversity, anti-harassment and the like is thorough and regular. A single training course, or a blanket policy that employees may often not even read, will be unlikely to satisfy the requirement of taking all reasonable steps to avoid harassment, and so risks leaving the employer on the hook. Instead, refresher training should be commenced on a regular basis and policies re-circulated, so that staff are fully aware of what is expected of them and the training does not become "stale".

***Phones4U v Deutsche Telekom AG and others* (Court of Appeal, 2 February 2021)**

Facts: Phones4U brought a competition law claim against various mobile network operators. As part of this, the judge ordered a number of the defendants to contact certain employees and

former employees to request them to voluntarily give access to their personal devices and email accounts, so that IT consultants could search for work-related communications for the sole purpose of the disclosure exercise in the competition case. The defendants objected to this on the basis that the order infringed the various privacy rights of the employees, as well as breaching the GDPR.

Decision: The Court of Appeal ruled that the order was appropriate and proportionate. It was reasonably possible that there would be relevant work-related documents on these personal devices and accounts, and while the defendants could not be outright ordered to provide such documents as they were outside their control, pragmatically it was sensible to order them to approach the employees for permission to search for documents. The individuals in question had chosen to use these devices for some business purposes and so their privacy rights had to be balanced against the purposes of administrating justice relating to those business purposes. The court also noted that the competition case was concerned with an unlawful, probably covert, agreement, and so those involved might have deliberately avoided using work devices in order to conceal it. It would not serve the interests of justice to constrain the courts from ensuring that such documents are disclosed.

Takeaways: While this is a case with wider implications for lawyers than employers, it does still act as a timely reminder for employers that work-based communications should be kept to work systems and devices. This will be especially relevant during the advent of remote working brought on by the coronavirus pandemic. However, should this rule not be followed, the courts will still take all pragmatic steps that they are able to in order to access relevant commercial documents even where these are stored on personal devices.

Northbay Pelagic Ltd v Anderson **(Employment Appeal Tribunal, 28 January 2021)**

Facts: Mr Anderson was an employee and director of Northbay Pelagic ("NP"), until he was suspended and later dismissed on grounds of misconduct. Mr Anderson appealed but was unsuccessful in relation to five of the seven grounds of misconduct alleged against him. One of these grounds was that he had set up a secret camera in his office to covertly monitor whether anyone attempted to access his work computer during his suspension without his knowledge.

Decision: At first instance, the Employment Tribunal found Mr Anderson's dismissal to be unfair on all grounds. The Employment Appeal Tribunal overturned part of the decision, but upheld that the decision to dismiss for the covert surveillance had been unfair. The tribunal stated that NP should have conducted a balancing exercise between Mr Anderson's wish to protect his own confidential information, and the rights to privacy of the other employees and the public. The camera was set up in Mr Anderson's own office, to which he usually had exclusive access, and nobody was actually captured upon it while it was operational. As such, it was (on the facts in this particular case) outside the band of reasonable responses to jump straight to dismissal.

Takeaways: Cases such as this will always turn on the detailed facts, but this serves as a reminder to employers that those facts must be thoroughly investigated, including not only the behaviour of employees, but also the actual consequences of that behaviour. Some acts – such as producing covert recordings – may frequently give rise to circumstances justifying summary

dismissal, but sometimes may not. It is crucial that employers bear this in mind rather than jumping to conclusions prematurely.

***Chell v Tarmac Cement and Lime Ltd* (High Court, 5 October 2020)**

Facts: Mr Chell was a contractor site fitter at a Tarmac Cement and Lime Ltd ("TCL") quarry site. Tensions arose between the external contractors and TCL's own employees, who thought their jobs might have been at risk. Mr Chell reported this tension to one of his supervisors. Later, one of the employees played a practical joke on Mr Chell, striking some pellet targets with a hammer causing them to explode close to Mr Chell, who suffered a perforated eardrum. Mr Chell brought a claim against TCL for his injuries, arguing that it was vicariously liable for the acts of its employees as well as having failed to provide a safe working environment.

Decision: At first instance, and upheld on appeal, Mr Chell's claim was dismissed. The risk assessment that TCL had in place for its site did not account for practical jokes and horseplay, but it would not be reasonable to expect it to. Even though Mr Chell had reported concerns about the tensions in the workforce, there was no foreseeable risk that this would lead to injury or violence, and this was reflected in the fact that Mr Chell had not asked to be taken off the site. The actions of the employee that caused injury were completely his own and could not sensibly be attributed to his work activities, so there could be no implication that TCL should have taken steps to avoid such behaviour. The only connection between the employer and the incident was that it took place in the workplace.

Takeaways: This will be a relief to employers that they will not always risk being held liable for the actions of their employees in the workplace. Employers cannot be held vicariously liable for actions such as horseplay and practical jokes which are entirely unconnected with an employee's work and simply happen to take place in the workplace. Nor will such actions be likely to put the employer in breach of its health and safety obligations, as long as they are not foreseeable.

***Page v Lord Chancellor and another* (Court of Appeal, 26 February 2021)**

Facts: Mr Page, a magistrate of 17 years' experience, was responsible for hearing criminal and family cases. He was put on a panel of magistrates responsible for hearing an adoption application from a same-sex couple. Mr Page expressed doubts about the appropriateness of the adoption, based upon his Christian beliefs. After the chair of the panel complained, Mr Page was reprimanded and required to undergo equality training.

Mr Page then spoke to the media, including appearing on BBC News, alleging that he had been disciplined for his religious views as a Christian and for stating that a child should be raised by a mother and father. As a result, he was made subject to further disciplinary action and ultimately removed from the magistracy, on the basis that his comments had brought his role into disrepute by expressing a personal view that did not reflect the law. This had breached his judicial oath and would cause any reasonable person to assume Mr Page would be biased against same-sex adopters.

Decision: At all three stages – Employment Tribunal, Employment Appeal Tribunal and Court of Appeal – Mr Page's claim for religious discrimination and victimisation was dismissed. Mr Page was not removed from office for his Christian views, nor for the protected act of reporting discrimination, but rather because he chose to advertise the bias he intended to apply in exercising his judicial functions. This, importantly, was separate from the act of reporting apparent discrimination.

Takeaways: The key point to note here is that, especially with roles that owe duties to the public or demand a degree of objectivity, there may be a fine line between lawful censure and unlawful victimisation. This will especially be the case in situations of religious discrimination. Employers ought to take care to ensure that where an employee is disciplined in relation to an expression of their beliefs, this is not for holding such beliefs but rather for the unacceptable impact that a particular expression of those beliefs has on the requirements of their role. Here, Mr Page's breach of the public duty to exercise objectivity and uphold the law could be separated from the beliefs he held that had led him to do that.

***Smith v Pimlico Plumbers Ltd* (Employment Appeal Tribunal, 21 March 2021)**

Facts: This case was a follow-up to the 2018 Supreme Court decision between the same parties, which was widely discussed at the time. Having been found by the Supreme Court to be a worker rather than self-employed, Mr Smith followed this up with a claim for £74,000 of backdated holiday pay, for times when he had taken unpaid holiday between 2005 and 2011. Prior to the Supreme Court decision, Pimlico Plumbers had believed Mr Smith was self-employed, and so unpaid holiday was all that he had been offered.

Decision: The Employment Appeal Tribunal ruled that Mr Smith's claim failed for being out of time. The basic time limit in the Working Time Regulations 1998 and Employment Rights Act 1996 requires that a claim be brought within three months of (i.e. at the latest, on the day before the day three months from) the prohibited deduction of holiday pay.

Among other issues, the Tribunal considered whether the fact that the employer had refused to pay holiday pay (on the erroneous basis that Mr Smith was self-employed) meant that he had been prevented from exercising his rights under the EU's Working Time Directive, and so could bypass the time limit. However, in contrast to a previous case at the EU level (*King v Sash Windows*), Mr Smith had not been prevented from taking holiday, which then carried over. Instead, he simply had not been paid for the holiday he had taken, as it was understood at the time that he was not entitled to holiday pay. The fact that in the interim this had turned out to be an incorrect understanding did not change the position. The right to be paid for holiday that had been taken could not "roll over" in the same sense that the entitlement to take holiday could.

Mr Smith had in any event brought the holiday pay claim at the same time as the other claims relating to the termination of his employment – but while within three months of his dismissal, the claims were not brought within three months of the last period of unpaid leave he had taken.

Takeaways: This case will serve as a stark reminder to employees and employers alike to be mindful of time limits. In particular, *Smith* emphasises the significance of different time limits for different elements of a claim, even where (as here) findings in relation to the earlier claim may be wholly dependent on a point only raised in the later one. The tribunals will not necessarily act to "cure" a claim brought out of time simply because the claimant was under a misapprehension at the relevant time.

Royal Mencap Society v Tomlinson - 19 March 2021 Supreme Court.

On 19 March 2021, the Supreme Court ruled in the combined judgment in Royal Mencap Society v Tomlinson-Blake and Shannon v Rampersad t/a Clifton House Residential Home that under the NMW sleep-in provisions, an individual who is expected to sleep during their shift and only be woken infrequently (a sleep-in care worker) is only entitled to the NMW when they are awake for the purposes of work.

The Court said:

> *"If the employer has given the worker the hours in question as time to sleep and the only requirement on the worker is to respond to emergency calls, the worker's time in those hours is not included in the NMW calculation for time work unless the worker actually answers an emergency call. In that event the time he spends answering the call is included. …. It follows that, however many times the sleep-in worker is (contrary to expectation) woken to answer emergency calls, the whole of his shift is not included for NMW purposes. Only the period for which he is actually awake for the purposes of working is included."*

Employment Legislation and other matters

The Employment Rights Act 1996 (Protection from Detriment in Health and Safety Cases) (Amendment) Order 2021

The Employment Rights Act 1996 (Protection from Detriment in Health and Safety Cases) (Amendment) Order 2021, will extend the rights currently conferred under section 44(1)(d and (e), to workers - as opposed to just employees - not to be subjected to a detriment in health and safety cases where they reasonably believe to be in a position of danger that is serious and imminent.

The Order is currently awaiting Parliamentary approval and is due to come into force on 31 May 2021.

As it stands, workers currently do not have the same rights as employees when it comes to receiving protection when raising concerns about unsafe working environments. On approval of the Order, workers will be granted the same rights as employees with s44(1)(d) and (e) being repealed and a new provision at section 44(1A) being inserted.

This will require workers not to be subjected to a detriment by their employer for leaving or refusing to return to their workplace or for taking steps to protect themselves in circumstances of danger which the worker reasonably believes to be serious and imminent.

The protection, which is clearly introduced with the job of ensuring workplace COVID-security in mind, is designed to encourage employees and workers to raise any health and safety concerns without fear of being subjected to unfavourable treatment. The amendments will help to protect workers' rights and support workers through the challenges raised by the pandemic.

The Order follows the High Court's decision in the case of R (on the application of the IGWU) v Secretary of State for Work and Pensions, where it was held that restricting protection to employees only was a breach of the EU Health and Safety Framework Directive. This case was decided before the end of the Brexit implementation period so at the time of the High Court granting the declaration, EU law continued to apply.

Work is also being carried out to consult and extend the Personal Protective Equipment at Work Regulations 1992 (SI 1992/2966) (PPE Regulation) to all workers. Currently, the regulations only require employers to ensure that "suitable personal protective equipment is provided to… employees who may be exposed to a risk to their health or safety while at work except where and to the extent that such risk has been adequately controlled by others means which are equally or more effective".

March furlough extension

On 3 March 2021, the Chancellor announced in the Budget that the Coronavirus Job Retention Scheme 'CJRS' will be extended until 30 September 2021. The scheme, which was introduced on 20 March 2020, was intended to prevent redundancies by alleviating pressures on employers to continue paying wages in full during the crisis of the pandemic. When the scheme was first introduced, employees who were furloughed could not work.

Then from 1 July 2020, changes to the CJRS came into force when a new system of flexible furlough was introduced. This allowed furloughed employees to return to work on a part-time basis. They can be paid in full for the time worked and the employer can then claim from the CJRS in respect of the time they are not working.

Now from November 2020 through to June 2021, employers can claim the lower of 80% of wages or £2,500 per calendar month for hours not worked, but they must pay the National Insurance Contributions and employer auto-enrolment pension contributions on employees' furlough pay. Then for July 2021, employers would be required to make a 10% contribution to employees' furlough pay, rising to 20% for August and September 2021.

The Job Support Scheme 'JSS', a new scheme designed to replace the CJRS for a period of 6 months, has been postponed with the extension of the CJRS until the end of September 2021. At the moment it is unlikely the JSS will be introduced.

The Job Retention Bonus 'JRB', intended to be paid by the Treasury to every employer who took employees back after furlough and kept them employed until the end of January 2021, has also been withdrawn in light of the CJRS extension.

Since 1 November 2020, employers can furlough employees on a full or part-time basis if they are employed by the employer and were on the employers PAYE payroll before midnight on 30 October 2020 and an RTI submission to HMRC was made in respect of that employee between 29 March 2020 and 30 October 2020. There is no requirement for an employee to have been furloughed previously**.** If an employer was made redundant on or after 233 September 2020 – and they were on the employers payroll on 23 September 2020 and an RTI submission was made for them between 20 March 2020 and 30 October 2020, they can also qualify for the CJRS if they are re-employed by that employer. However, since 1 December 2020, claims cannot be made for employees serving their notice period. Remember, an employer is advised to keep all copies of furlough agreement for five years and a copy of all records relating to claims for reimbursement under the CJRS for six years.

Returning to work post-COVID When?

On 22 February 2021, the government set out a "roadmap" to cautiously build up to a return to "normal life". Understandably though, it is expected that there will now be a "new normal" to consider.

The official stance of homeworking wherever possible continues during the first three stages of the roadmap (i.e. 8 March, 12 April and 17 May 2021). At stage 4, on 21 June 2021, the government is establishing a four week programme to help decide how best to proceed.

COVID status certification

The government has mooted utilising a system of certification of COVID status, indicating the transmission risk in different settings based upon testing and reviews. Before this is implemented, the government will need to consider the ethical, discrimination, privacy, legal and operational aspects of this and what limits should be placed on organisations using certification.

Review of social distancing and other COVID-secure requirements BEFORE 21 June

Ahead of 21 June, the government will complete a review of social distancing measures and other long-term measures that the virus has placed. The results will help the government decide on the timing and circumstances under which the rule on social distancing, face coverings and other measures may be lifted and whether individuals should continue to work from home where possible. Meanwhile, the government will continue to provide guidance on how businesses can improve things such as fresh air flow in indoor workplaces, and introduce regular testing to reduce risk.

Testing

The government will continue to provide free tests kits for workplaces for staff who cannot work from home until the end of June 2021. Organisations need to register their interest before **31**

March 2021. A new "Community Collect" model is due to be launched, which will allow small businesses and the self-employed to pick up rapid tests from some government and local authority sites, or potentially to their home address.

Shielding

The government envisage that it will no longer be necessary for the clinically extremely vulnerable to continue shielding after 31 March 2021. However, there is ongoing consideration of the long-term support that may be needed by the clinically extremely vulnerable. From 1 April 2021, clinically extremely vulnerable employees should continue to work from home where possible. If they cannot work from home, then they can attend their workplace provided that their employer has taken steps to reduce the risks of exposure to COVID and it is COVID secure.

Move to flexible working – government and newspapers saying they are going to review this

Since 30 June 2014, employees with at least 26 weeks' continuous employment can make a statutory request for flexible working and employers must deal with that request in a reasonable manner. Given the working arrangements people have had to adopt during COVID, it seems likely that employers can expect an increase in flexible working requests. As COVID has allowed employees to work flexibly for some time, it will be difficult for employers to turn down these requests for flexible working.

When considering flexible working requests, employers should consider the following:

- The government's current stance on working from home wherever you can;
- Whether there may be a detrimental impact on quality or performance - which may now be informed from the experience of enforced working from home during lockdown;
- Whether you need to update your policies, or approach to flexible working more generally. COVID-19 may have shown it is more feasible than anticipated to have an efficient and flexible remote workforce;
- Consider alternatives to the request, and whether there is a suitable compromise that can be reached between you and your employees.

Vaccination requirements for work

You should discuss with your staff (and/or appropriate representatives such as a trade union) to discuss what steps to take in regard to vaccination. Any decision after that discussion should be put in writing and be in line with the organisation's existing disciplinary and grievance policy.

Consideration should also be given to the fact that some groups of people, such as those with immune system disorders, may not respond well to the vaccine, and that a small number of people may not be able to get the vaccine for health reasons.

It is best to support staff on getting their vaccination and employers can do so, for example, by offering paid time off to attend vaccination appointments. You cannot force an employee to be vaccinated without their consent. In certain circumstances, such as in frontline healthcare, employers could decide to prevent unvaccinated employees from entering the workplace, or

restrict their duties, but again this should only be done with caution and after considering all alternative options.

Employers should keep in mind that requiring an employee to be vaccinated as a condition to providing work could amount to a repudiatory breach of contract, entitling the employee to claim constructive dismissal. Also, allowing only vaccinated people to return to work could potentially lead to indirect or direct discrimination claims, and a vaccination requirement may be difficult to justify on health and safety grounds. Although vaccination reduces the chance of the vaccinated individual becoming ill, the extent to which vaccination reduces transmission is still being reviewed. Accordingly, a vaccination is not a substitute for workplace COVID-secure measures. An employee who was required to be vaccinated, and who then later suffers an adverse reaction, may attempt to bring personal injury proceedings against the employer.

In light of this, employers should instead consider how best to achieve voluntary vaccination within workforces. This could be achieved by promoting the available information on the potential advantages and disadvantages of having the vaccination to assist employees on making an informed decision.

Where an employer decides that requiring vaccination is necessary, they will first need to undertake a detailed risk assessment to evidence why COVID-19 vaccination is required and why alternatives are not suitable, and consult with workplace representatives or trade unions.

Briefly, when considering if employees who refuse to get the vaccination should sign a vaccination waiver - to indicate that they understand the medical risks of that decision, to then permit them to enter the workplace - liability for personal injury caused by an employer's negligence cannot be waived under section 2 of the Unfair Contract Terms Act 1977. Therefore, such a waiver would be ineffective.

Practical tips

Employers should continue to try to resolve concerns that employees raise and to protect the health and safety of their employees. Therefore, if an employee for instance has severe anxiety and is afraid to attend the workplace, if possible, the employer could offer flexible working, or allow the employee to take holiday or unpaid leave. As to travelling into the workplace, ACAS offers a suggestion that an employer could perhaps offer extra parking where possible to avoid the need for employees to use public transport, or arrange for them to temporarily work different hours to avoid peak time travel.

The government's non-statutory guidance makes practical suggestions on how work can be undertaken safely, and is intended to help employers when undertaking an appropriate COVID-19 risk assessment. The HSE has produced guidance named "Managing risk and risk assessment at work", which contains a risk assessment template and may be of use to you, to assist you in undertaking risk assessments. There are now 14 guides covering a range of different types of work, and as many businesses operate in more than one type of setting, employers may need to use more than one of the guides.

The HSE suggests that the minimum an employer must do under the Management of Health and Safety at Work Regulations 1999 is:

- Identify what in their business could cause illness or injury (hazards).
- Decide how likely it is that someone could be harmed and how seriously (the risk).
- Take action to eliminate the hazard, or if this isn't possible, to control the risk.

The COVID-19 Secure guidelines are intended to help employers when undertaking an appropriate COVID-19 risk assessment in their workplace. They make practical suggestions on how work can be undertaken safely. However, an employer will need to consider the particular size and nature of their business.

Employees should carry out a COVID-19 risk assessment. Once this has been concluded, employers should then manage the risk and reduce it to the lowest reasonably practical level by taking the suggested preventative measures.

The guidelines also state that an employer's assessment should have particular regard to whether the people doing the work are especially vulnerable to COVID.

Other developments on the horizon

IR35

The government's much-anticipated extension of the IR35 rules to private sector workers will be introduced from the start of the new tax year on 6 April, after being postponed from 2020 due to the coronavirus pandemic. Due to the postponement, the changes have already been widely covered, but just as a recap of the significant points:

- The IR35 regime is intended to catch situations whereby a worker provides services to a business through an intermediary such as a personal service company. If the circumstances are such that the worker would be considered employed by the end business were it not for the presence of the intermediary, the worker will be treated as employed by the business for tax purposes.

- The obligation to determine whether IR35 applies will be the responsibility of the end user. However, if the end user is a "small" company – that is, with at least two of:
    - an annual turnover of £10.2m or less;
    - a balance sheet value of £5.1m or less; and/or
    - 50 employees or fewer

  then IR35 will not apply.

- The question of whether or not a worker could be considered employed by the end user will depend on a number of factors, such as:
    - Personal service – if the contractor is entitled to send a substitute to do their work, this may point away from an employment relationship.
    - Control – the higher degree of control the end user has over the contractor's services and the way they are performed, the more likely this will be contextualised as an employment-style relationship.

    - Mutuality of obligation – if there are mutual obligations for the contractor to do work and the end user to provide work and pay for it, that will point towards an employment relationship.
    - Integration – the higher degree, to which the contractor is integrated into the end user's organisation, for example using a uniform and being provided with equipment, the more likely they are to be an employee.

- Any medium or large companies that engage workers through service companies will therefore need to urgently review those arrangements, so that the status of all such workers can be determined. This can be done using HMRC's online CEST tool. Where contracts with PSCs are likely to fall foul of IR35, it may be worthwhile to review those contractual arrangements in light of the extra administrative burden and cost of national insurance contributions that you will be required to apply.

Gender pay gap reporting

Another item pushed back as a result of the coronavirus pandemic is the deadline for gender pay gap reporting for the 2020-21 reporting year. Previously this deadline would have been 30 March for public and 4 April for private sector bodies; both deadlines are now instead 5 October. This does not affect the dates for the reporting period. Similarly, as far as we are aware it is not envisaged to push back the deadline for 2021-22, so employers will likely need to prepare a further report for March/April 2022.

Employment Bill

In the December 2019 Queen's Speech, the Government proposed a new Employment Bill, including the following:

- Creating a single central labour market enforcement body, to ensure that vulnerable workers are aware of their rights and to support businesses in complying;
- Requiring employers to pass on all tips, service charges etc. to workers and distribute these on a fair and transparent basis;
- Giving workers (particularly zero-hours workers) the right to request a more predictable and stable contractual working arrangement after reaching 26 weeks' service;
- Extending the period of redundancy protection for pregnant employees and those on maternity leave until six months after the end of the maternity leave;
- Creating a new right to leave for neonatal care, aimed at parents of premature or unwell babies;
- Granting a week's automatic leave for employees who undertake unpaid care duties; and
- Making flexible working arrangements the default for all roles unless the employer can show good reason why it would not be suitable.

The status of this Bill is presently unknown, with no preparatory work having yet been undertaken. Accordingly, it may be something the Government choose to revisit once the coronavirus pandemic has abated, or it may be shelved for further down the line. Regardless, though, the Queen's Speech does give a useful indication of the current political priorities in employment law.