



## Covid lessons for employers

There have been a number of employment tribunals involving Covid-related claims over the last 12 months and as Covid looks set to remain an issue for the year ahead, here is our round up of some of those rulings and the points which employers should be aware of.

Firstly, in the case of *Gibson V Lothian Leisure*, Mr Gibson was a chef in a restaurant and was furloughed. As the end of the lockdown approached, his employer asked him to return to work to help prepare for the restaurant reopening but he voiced concerns about the lack of safe-working measures and in particular the lack of PPE. Mr Gibson was concerned about his vulnerable father who was shielding and the risk of him catching the virus as a result of his work. Mr Gibson was dismissed by text with immediate effect and he brought a claim for unfair dismissal, as he had been taking steps to protect both himself and his father.

The tribunal agreed that he was unfairly dismissed, he had reasonably believed in the danger and he had taken steps to protect himself and his father. Mr Gibson was therefore awarded over £23,000.

In the case of *Rodgers V Leeds Laser Cutting Ltd*, it was established there is no blanket right to refuse to attend work during a pandemic. Mr Rodgers refused to attend his work in a warehouse and brought an unfair dismissal claim. The claim was made even though it was a large premises and there were typically only five other people working in the space. His employer, Leeds Laser Cutting Ltd had prior to Mr Rodgers refusal to attend work, sent communications to all staff confirming it was putting safe-working measures in place, which included social distancing and enhanced cleaning.

The tribunal rejected Mr Rodgers' claim for unfair dismissal because it drew a distinction between an employee refusing to attend work because of concerns about their safety which they had brought to their employer's attention in the workplace and more general concerns about serious and imminent danger experienced during the pandemic.

The case of *Prosser v Community Gateway Association Ltd* reinforces that employers should take steps to protect their vulnerable workers. Ms Prosser was employed on a zero hours contract and informed her employer she was pregnant. Following the public health advice announced by the government, she wasn't given any shifts but she returned to work after five months following a risk assessment being carried out.

Ms Prosser's claim centred around direct pregnancy discrimination for the failure to allow her to return to work and the loss of pay during her exclusion from work.

The employment tribunal however rejected her pregnancy discrimination claim as she was sent home due to being classed as vulnerable and the employer had followed government public health advice and regulations and she was also consulted on this reason. She was also financially compensated by 'generous' pay she received, which was beyond the requirements of her contract.

In the case of *Kubilius v Kent Foods Ltd*, Mr Kubilius was a delivery driver who was dismissed after an investigation and disciplinary



## Covid lessons for employers *Continued*

process after he refused to wear a mask whilst sitting in his lorry cab, although he wore one outside of it at the site of one of his employer's major clients.

The employment tribunal found Mr Kubilius' dismissal was fair due to the importance the employer placed on maintaining good supplier and customer relations, the difficulty in him continuing his role as the client had banned him from their site and the employers' concerns that he would continue to behave in this way as he insisted he had done nothing wrong.

Finally in the case of **Thompson V Scancrown Ltd**, Mrs Thompson an estate agent, requested flexible working in advance of her return from maternity leave, asking to work a four day week with hours finishing at 5pm instead of 6pm, so she could collect her child from nursery.

Mrs Thompson's request was turned down despite her having made a number of suggestions about how the arrangements could work, so she resigned and brought a claim for indirect sex discrimination.

Her claim was upheld by the tribunal which accepted this refusal placed her at a substantial disadvantage and the employer's refusal of her request was not proportionate to maintain successful relations with their customers. Mrs Thompson was awarded nearly £185,000 for loss of earnings and also due to her difficulty in obtaining further work at a comparable salary, due to the impact of the pandemic on the job market and her sector in the London housing market.

## Avoid Platinum Jubilee extra bank holiday woes

**2022 sees the Queen's Platinum Jubilee, marking her 70 years on the throne and the Government has announced there will be an extra bank holiday to celebrate. This means the traditional second May bank holiday will be moved to Thursday 2 June and an extra bank holiday will take place on Friday 3<sup>rd</sup> June.**

Whether your employees will have a contractual right to paid time off on both of these days depends on the wording in their employment contracts.

For example, if employees have a contractual right to paid time off on bank holidays they will be entitled to the leave on Thursday 2 June instead of the usual last Monday in May. To also be entitled to the additional bank holiday on 3 June, their contract would state they are allowed their x days holiday each year plus all bank holidays.

If their contract states they receive x days holiday, it means they can book any bank holidays using their holiday allowance, but there is no automatic increase as the result of the extra bank holiday.

If their contract states they have x days holiday each year plus 8 bank holidays, the employee can book the additional bank holiday off, but they will lose their entitlement to a later bank holiday in the year.

Where a contract lists each bank holiday ie x days holiday per year plus Christmas Day, New Year's Day, Good Friday etc then there is no entitlement to any bank holiday which isn't listed.

If employers decide to grant all employees the entitlement to the additional bank holiday as paid time off and if some members of staff cannot take the time for business reasons, they should be provided with time off in lieu as an alternative.

As ever it is important to communicate with your employees in advance of the day about whether you expect them to work or not, in line with the terms of their contract.

Fairness also needs to come into play when dealing with requests for holiday leave and there may be an increase in requests for those keen to benefit from the extra bank holiday.

Make sure you have a holiday policy in place so employees know what to expect when requesting leave. This could include allocating leave on a first come, first served basis, setting a limit on the number of employees who can be off at any one time, specifying when leave can and can't be taken, ie not during your busy periods, specify days which must be taken as holiday for example during a Christmas shut down, asking for a period of notice before leave is requested, ie at least two weeks before they want to take it and giving sufficient notice if a holiday request needs to be refused.

All of these measures along with a suitable means of reviewing and tracking holiday leave taken should help ensure a fair and consistent approach.





# New employers' guidance on unpaid carers leave

**In the UK 1 in 8 adults are carers and 1 in 7 of those adults are also in the workforce – some five million people. The majority of carers are women – 58% vs 42% men and it is estimated that 600 people each day give up work to care for an older or disabled relative.**

Many people have taken on additional caring responsibilities through the pandemic, so in 2020, the Government held a consultation into the right for unpaid carers to be entitled to unpaid carers leave.

The Government's response to the consultation is new guidance for employers, so how can you help support your employees who are also unpaid carers?

The new guidance covers all employees regardless of their length of service, but it doesn't extend to workers and the leave is currently one week of unpaid leave per year. Whilst this isn't yet covered by legislation employers might want to consider whether it is possible to implement this entitlement now to help motivate and keep employees in the workforce, at a time when many businesses are experiencing recruitment difficulties.

An employees' entitlement to the leave will depend on their relationship to the person, so it will cover employees caring for their spouse, civil

partner, child, parent, or someone living in the same household (excluding a tenant, lodger, or boarder), or someone who relies on them for care, such as a grandparent or sibling.

To qualify for the care the person being cared for must also have long-term care needs which includes someone with a disability, someone with issues relating to old age or someone with a terminal illness.

The government wants the leave to be flexible, so it can be taken either as a whole week or individual whole days or half days. Employees should give notice of their intention to take the leave at least twice the length of the time requested plus a day, however in practice this may not be possible if it is an emergency situation. Employees will be able to self-certify that they qualify and will not need to produce evidence, although any false claim would be dealt with as an employer would a false claim for sick leave or any other disciplinary matter. It is important that your employee contracts, handbook, and other internal documents are updated to cover this and any other changes you make, along with staff training for those authorising the leave and ways of tracking it.

Employers, once the legislation is enacted, must make sure that employees who take the leave are not treated differently to those who don't need to take it, as employees will be protected from unfair dismissal including those who do not have two years' service (as the entitlement starts from day one of their employment).



# Rehiring employees

All businesses evaluate their staffing needs but some might also decide they need to go a step further to help make changes to employment terms and conditions. Sometimes this is done by dismissal and re-engagement on new amended terms.

Whilst this can help to avoid redundancies for businesses genuinely struggling to meet costs, it can also be used to create consistency of terms and conditions between different groups of employees, perhaps brought about by a previous merger or just developed over time, where disparities have crept in. It can also help to increase flexibility in employment contracts as business models change and adapt to new markets and opportunities.

This so called fire and rehire strategy is often controversial and it can be unsettling for employees, so it is recommended that it is only used where there are no other options available to the employer.

Due to an increasing number of employers using this fire and rehire practice since the start of the pandemic, the Government asked ACAS to conduct an investigation into fire and rehire, why it was being used and for their guidance for employers using it.

This guidance has now been published and it highlights how fire and rehire can damage employee relations and trust and increase stress for employees, which can result in increased absence or sick leave. It can also lead to the loss of valued employees and their knowledge if they decide not to re-join the firm and this policy could increase the risk of discrimination, unfair dismissal, breach of contract or constructive dismissal claims.

Acas are therefore advising that fire and rehire should only be used by business leaders as a last resort and

they highlight there are a number of other ways that employers can amend and implement new terms of an employment contract. These include:

- Consider if cost savings can be made elsewhere in the business first.
- Consult with employees about proposed changes and listen to their feedback and suggestions.
- Offer additional staff benefits to employees for agreeing to changes, for example increasing hourly rates for working different shifts.
- All changes need to be made with employees' agreement, but employee actions may also count as agreeing for example willingly working different hours.
- Where a business meets resistance from staff they should keep discussions ongoing and explore other ways to reach a compromise.

If you are considering ways to implement significant changes within your business, you should also check if your employment contracts contain a flexibility clause which would allow you to make reasonable changes to some of the conditions of employment.

If you decide that fire and rehire is the route you will take, you should ensure you:

- Follow a fair dismissal process
- Give employees sufficient notice (check what is in their contract and what is statutory and it is advised to give them whichever is the longest)
- Offer employees a right of appeal against their dismissal

There is clearly much to consider here and many things that an employer can get wrong, so get in touch to discuss the most appropriate way to achieve any changes within your business.

## Quick reference section

**Statutory minimum notice periods:**  
An employer must give at least:

- One week's notice to an employee who has been employed for one month or more, but less than two years.
- One week's notice for each **complete** year of service for those employed for more than two years.
- Once an employee has more than 12 year's service, the notice period does not extend beyond 12 weeks.

### National Minimum Wage

	April 2020	April 2021
Apprentices	£4.15	£4.30
16-17	£4.55	£4.62
18-20	£6.45	£6.56
21-24	£8.20	£8.36
25+	£8.72	£8.91

**Statutory Sick Pay** (from April 2021)  
Per week £96.35

**Statutory Shared Parental/Maternity/Paternity/Adoption Pay**  
(basic rate) (from April 2021) £151.97

**Statutory Holiday**  
5.6 weeks for a full time employee.  
This can include bank and public holidays.

**Redundancy Calculation**

- 0.5 week's pay for each full year of service when age is less than 22.
- 1 week's pay for each full year of service where age during year is 22 or above, but less than 41.
- 1.5 week's pay for each full year of service where age during year is 41 and over.

Calculation is capped at 20 years. Maximum week's pay is capped under the Statutory Scheme for dismissals after 6<sup>th</sup> April 2021 at £544.00.



### CONTACT

If you would like any additional information on any of the subjects discussed in this newsletter please do not hesitate to contact us.



**Amanda Finn**  
☎ 01622 689795  
✉ a.finn@gullands.com  
🐦 @Gullands\_HR\_Law



**Sarah Astley**  
☎ 01622 689727  
✉ s.astley@gullands.com



**Andrew Clarke**  
☎ 01622 689733  
✉ a.clarke@gullands.com



**Jonathan Haines**  
☎ 01622 689736  
✉ j.haines@gullands.com



**Gabriela Alexandru**  
☎ 01622 689716  
✉ g.alexandru@gullands.com

Gullands Solicitors are Authorised and Regulated by the Solicitors Regulation Authority, Number 50341

16 Mill Street  
Maidstone  
Kent ME15 6XT  
01622 678341

Whitehall Place  
47 The Terrace  
Gravesend Kent  
DA12 2DL  
01474 887688

www.gullands.com  
info@gullands.com



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