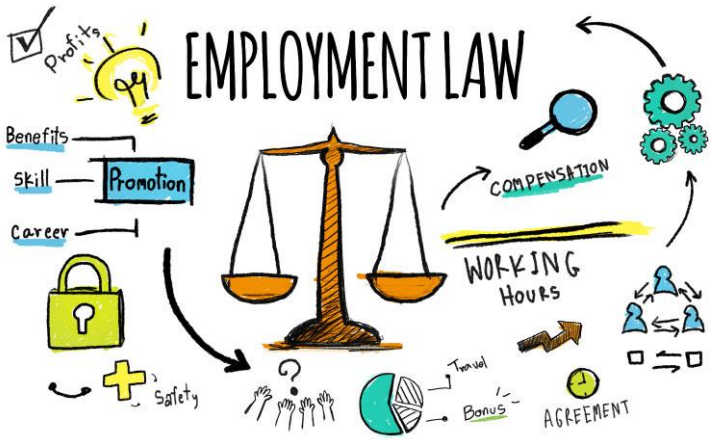
COVID-19 and UK Employment Law

10 COVID related claims that Employers could face in 2021.

QED Training Briefing- Winter 2021

Information Pack



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Introduction

COVID 19 is taking us all into unchartered waters as citizens, customers, and service providers. And it is likely to be the same for employers and employees. New grievances. New disciplinary proceedings. New definitions and perspectives on well established legal norms. And of course, new caselaw.

Caselaw will emerge from laws on employment, equalities, and health & safety. But there will be other statutes that might be connected to legal proceedings such as the General Data Protection Regulation (GDPR) and personal injury at work claims.

This short briefing profiles 10 potential scenarios that we think will start to emerge based on our advice line work and what we read in the media. This listing below does not claim to be an exhaustive list. There will be other issues. And of course, these scenarios in part are speculative with the additional caveat that every case that emerges will be treated on its own merits.

But hopefully these short narratives will be of assistance and be something of a compass to help navigate the challenges ahead.

Get in touch if you need our help. Our contact details are on the final page.

This briefing looks at: -

1. Breach of contract when cutting furloughed employees' pay.
2. Selection for furlough: Decision-making to be scrutinised?
3. Redundancy: Selection process and informing and consulting
4. Health and safety duties towards pregnant workers
5. Health and safety: Refusal to attend dangerous workplace.
6. Whistleblowing: Raising concerns about employer's conduct
7. Flexible working requests: When are employers' decisions discriminatory?
8. Handling discipline, capability, and grievance procedures
9. Disability discrimination: Reasonable adjustments for disabled workers
10. When will long COVID count as a disability?

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1. **<u>Breach of contract when cutting furloughed employees' pay.</u>**

The lack of clarity within the Government's guidance on agreement to furlough means that there is trouble on the horizon for employers that have unilaterally imposed a pay cut on furloughed employees. For example, the guidance on the extended Coronavirus Job Retention Scheme, states that employers must "*have confirmed to their employee (or reached collective agreement with a trade union) in writing*" that they have been furloughed, but "the employee does not have to provide a written response". Strictly speaking, employers that are reducing an employee's pay to furlough them should have obtained the employee's explicit written agreement, as this constitutes a variation to their terms and conditions of employment.

2. **<u>Selection for furlough: Decision-making to be scrutinised?</u>**

There will be employees who are aggrieved at being placed on furlough, particularly where this is accompanied by a pay cut. Equally, there will be employees who would prefer to have been furloughed, but their employer has turned down their request. Normal employment law principles should have been applied to any furlough selection process, so employers may face discrimination claims and arguments that their furlough decision-making has breached the implied term of mutual trust and confidence. While employment tribunals are likely to be sympathetic to employers that have had to make quick decisions, furloughing decisions still need to be as fair and objective as possible.

3. **<u>Redundancy: Selection process and informing and consulting</u>**

With many employers having to make large-scale redundancies often with little warning because of coronavirus, will tribunals be inundated with these claims in the next few years? Both individual and collective redundancy issues should feature. Employers need to bear in mind that: > a failure to warn and consult individually with an employee about their proposed redundancy could result in an unfair dismissal claim; and > collective consultation obligations are triggered when they are proposing to make redundant 20 or more employees at a single establishment over a period of 90 days or less, and that failure to comply can result in a protective award of up to 90 days' pay for each affected employee.

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4. Health and safety duties towards pregnant workers

While employers have a duty to look after the health and safety of every worker, they have additional obligations in relation to pregnant workers. Employers that fail to fulfil these obligations could face pregnancy and maternity discrimination claims. When maintaining safe working practices during the coronavirus pandemic, employers should ensure that:

- the risks to pregnant workers are assessed individually; and
- pregnant workers are consulted about potential adaptations to their role.

5. Health and safety: Refusal to attend dangerous workplace.

Employees are required to obey their employer's reasonable instructions. However, employees are protected against detriment or dismissal where, *in "circumstances of danger*" that they reasonably believe to be "*serious and imminent*", they leave their workplace or refuse to return. There must be actual "circumstances of danger" and the employee must also "*reasonably believe*" that the danger is "serious and imminent". Coronavirus-related employment tribunal claims for detriment or dismissal following a refusal to attend work are likely to revolve around whether the claimant's belief in "*imminent and serious*" danger was reasonable, depending on the safe working practices the employer put in place.

6. Whistleblowing: Raising concerns about employer's conduct

The raising of concerns about how an employer is handling workplace issues during the coronavirus pandemic would count as a disclosure. To be protected under whistleblowing legislation, the worker must be making the disclosure in the reasonable belief that they are doing so in the public interest. This means that a worker who is dismissed (for example put to the top of the list for redundancy) or subjected to a detriment (for example bullied), for raising genuine concerns about their employer's safe working practices could bring a whistleblowing claim. Another scenario that could lead to a whistleblowing claim is an employer retaliating against an employee who has raised genuine concerns about its use of the Coronavirus Job Retention Scheme. HM Revenue & Customs has a hotline for reporting misuse of the scheme.

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7. **Flexible working requests:**

When are employers' decisions discriminatory? While the law on the right to request flexible working has not changed, employers are likely to be seeing a shift in employees' expectations around flexible working. Some employees who have been working flexibly for a sustained period during the pandemic may wish to make this arrangement permanent. The employee may be able to show that they have continued to perform to the required level, or even exceeded expectations, with these changes in place. Now more than ever, employers need a strong reason for refusing flexible working requests or could find themselves on the losing end of indirect disability, sex, or age discrimination cases.

8. **Handling discipline, capability, and grievance procedures**

How employers have been handling disciplinary and grievance procedures is sure to be examined by employment tribunals in the next couple of years. Claims are likely to involve:

- disciplinary action where employees refuse, or fail, to comply with the employer's COVID-19 rules put in place to reduce the risk of transmission.
- and the handling of disciplinary, grievance and capability procedures during the pandemic.

Claimants may focus on delays caused by the pandemic tainting a process's overall fairness, and remote meetings and hearings being conducted unfairly.

9. **Disability discrimination: Reasonable adjustments for disabled workers**

The number of disability discrimination claims reaching an employment tribunal could substantially increase in 2021. For years to come, employment tribunals will be assessing:

- how employers considered their disabled employees' requests for flexible working, particularly when it was reasonable to allow the employee to work from home and what equipment was provided to help with this; and
- where a disabled employee's job does not allow for homeworking, what additional safe working adaptations employers put in place to allow the employee to work safely despite their health condition. Several disability discrimination claims seem destined to focus on mental health. For example, did the employer do enough to help employees experiencing mental ill health during the pandemic?

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10. <u>When will long COVID count as a disability?</u>

Managing employees with "long COVID" is likely to be an important issue for employers in the next few years. While there is no agreed medical definition yet and patients' experiences can be wildly different, symptoms can include feeling fatigued all the time, persistent pain, headaches, ongoing breathing difficulties and long-term loss of smell and taste. In 2021, employment tribunals could face difficult questions about if, and when, an individual's long COVID symptoms meet the definition of a disability under the Equality Act.

Get in touch if you need our help for training or advice.

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Our specialist legal topics include: -

- Bribery Act
- Care Act
- Charities Act and Corporate Governance
- Employment Law
- Equality Act
- Data Protection & General Data Protection Regulation (GDPR)
- Defensible Documentation
- Disclosure Barring Service -DBS
- Mental Health Acts
- Modern Slavery Act
- Privacy and Electronic Regulations
- Prevent Duty-Counter Terrorism Laws
- Safeguarding
- Social Media and Employment Law
- UK Citizenship and Brexit
- Volunteers and the Law
- Welfare Benefits - Universal Credit -and Social Security/Immigration Laws

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- Talk and Chalk!
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- Plenary Debates and Discussions
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- Benchmarking best practice
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- Problem Solving – Problem Sharing
- You the jury!
- A Parking Bay to capture any additional needs identified by learners.

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All courses are prefaced with agreed ground rules and suitable handouts with supporting manuals where appropriate. Extracts from a client's own policies and procedures on a given subject are threaded into a course as well as the key organisational messages we are asked to impart. A 12 month after care service is built into all fees when the client can appoint a designated colleague to liaise with our trainer on any further issues for clarification from the course or advice about a given issue.

- Our e mail is qedworks@hotmail.co.uk
- Facebook is: - https://www.facebook.com/qedworks/
- LINKED IN Group -QED Associate Freelancers and Friends of Freelancers Worldwide. There are a huge range of freelance consultants AND associates/ friends of freelance consultants from all over the world. You are very welcome to join us. https://www.linkedin.com/groups/4070140/

P.S. – Our other free booklets include: -

- Six ways to deal with difficult people.
- CV Toolkit with over 300 typical job interview questions classified under 12 headings.
- 116 ideas for Time Management

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