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Employment & Workforce Survey 2021: Redundancies & Changing Contractual Terms

Our first commentary looks at redundancy trends, updates on changing terms and conditions, and the potential employment claim impact on insurers of any increase in insolvencies.

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Redundancies

The Coronavirus Job Retention Scheme (CJRS) was introduced specifically to try to avoid or reduce the need for redundancies arising as a result of the impact of the pandemic on businesses and organisations. The initial CJRS was announced towards the end of March 2020 and was due to run until the end of May 2020. Even with this scheme, potential redundancies were on the rise from around 27,800 in February 2020 to around 73,250 in May 2020.

On 12 May, a further extension was announced until the end of October 2020, although employers would have to take an increasing share of the costs from August onwards. Despite this extension, redundancies were still clearly being considered, with potential redundancies increasing to around 155,500 in June and then falling slightly to around 149,300 in July. Since then, potential redundancies notified as part of the collective consultation regime have continued to fall, with around 13,800 potential redundancies notified in September 2021.

With the CJRS scheme ending in September 2021, and no direct replacement in sight, for some employers the CJRS will have been a way of delaying – but not avoiding – redundancies. However, early indications suggest that the outlook has not been as bleak as initial concerns may have been – data published by the Office for National Statistics in November 2021 gives a LFO ILO redundancy level of 104,000 for July to September 2021 (quarter 3), up only slightly from the quarter before from 99,000, and down considerably from the peak in quarter 4 of 2020 of 357,000.

Our survey certainly supports the above – with over 90% of responders across a wide range of sectors confirming that there were no current plans for multiple redundancies over the coming 12 months. The remaining responses were fairly evenly split between actively considering redundancies and keeping the situation under review – again, with no clear sector trends across responses.

In respect of lay-off provisions (provisions which allow an employer to respond to downturns in work by providing no work and no pay for staff on a temporary basis), the majority of responders (over 74%) did not include such provisions in their contracts. Of those that did include such provisions (nearly 17%), the majority of responders were from manufacturing and industrials. There may, however, be some increase in this area, with one responder already having included such provisions as a result of the pandemic, and a number of others (over 6%, across different sectors) considering their introduction.

CJRS and redundancy case law

Employment tribunals have already considered a number of claims of unfair redundancy associated with the CJRS. By way of example:

In Handley v Tatenhill Aviation Limited, the Claimant tried to argue that he should have been allowed to continue on furlough, rather than be made redundant. The Employment Tribunal accepted that there was a genuine redundancy situation here. Although the Tribunal decided that the redundancy was procedurally unfair, it disagreed with the Claimant's suggestion that he should have been allowed to remain on

furlough. It was for the employer to decide how to structure its business and the Employment Tribunal accepted that the employer needed to cut costs regardless of furlough, and wanted to use the scheme to pay some of the costs of the redundancy.

In Mhindurwa v Lovingangels Care Limited, the Claimant was dismissed due to redundancy after the live-in care work for which she was employed was no longer required as the service user had been admitted to hospital and then moved to a care home. The employer could only offer domiciliary care work, which the employee could not accept. The Employment Tribunal decided that the failure to consider whether the employee should be furloughed for a period of time to see what, if any, change there was in the availability of live-in care work, along with a failure to offer the employee a proper appeal, made the dismissal unfair.

Changing terms and conditions

Other employers will be considering changes to terms and conditions of employment. In many cases, this will be through a process of agreement with the affected employees – potentially presented as a "group effort" to avoid or minimise the need for redundancies. Where this is not possible, employers may go through a process of dismissal and re-engagement – or using the more emotive terminology: "fire-and-rehire".

"Fire and rehire"

At the moment, so called "fire and rehire" is not illegal – on the contrary, many employers view the process as preferable alternative to redundancies, seeking to avoid the "fire without rehire" position. Process is important, and in many cases, this will include the obligation to comply with the collective consultation regime. However, many unions and employee representative groups view the practice unfavourably, seeing it as a way to diminish terms and conditions and undermine genuine workplace dialogue.

In June 2021, Acas published a paper titled Dismissal and re-engagement (fire-and-rehire): a fact-finding exercise. This followed a request in October 2020 from BEIS due to concerns raised about the use of fire-and-rehire practices in the context of the pandemic. A number of potential options to address fire-and-rehire were included within the paper, although these were not Acas recommendations. The options included legislative reform, non-legislative options and wider policy options.

In October 2021, a second reading of the Employment and Trade Union Rights (Dismissal and Re-engagement) Bill took place; this Bill did not go so far as to ban the practice of fire-and-rehire (although Labour has indicated that it would do so if it won power) but rather proposed a statutory consultation process, restrictions on the variation of employment contracts and amendments to unfair dismissal principles. Before voting on the bill, MPs voted on a closure motion which was opposed by the government; the vote on the bill did not then take place due to those opposing the vote continuing to speak up to the allotted finishing time for discussion.

The government indicated that although the practice of fire-and-rehire should not be used as a negotiating tactic, it was looking for further guidance for employers, rather than new law. Acas was asked to produce more detailed guidance on how and when the process should be used and this guidance was published on 11 November 2021. This goes much wider than simply the practice of fire-and-rehire and provides advice on changing contractual terms more generally. However, in respect of fire-and-rehire, it advises that this should only be considered as a "last resort" and that all reasonable attempts must have been made to reach an agreement through full consultation before it is used.

Unlawful inducement

Employers who are looking to change contractual terms which have been determined by collective bargaining will also need to think about the recent Supreme Court decision in Kostal UK Ltd v Dunkley & Ors. This case is the first case in which appeal courts have considered how section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992 should properly be interpreted. The broad purpose of s.145B is to avoid trade union member workers receiving offers made by their employer where, if such offers were accepted, one or more of the workers' terms of employment would not (or would no longer) be determined by collective agreement (and where the employer's sole or main purpose was to achieve this result). This is known as "unlawful inducement".

The majority decision of the Supreme Court was that on the proper interpretation of s.145B, "*an offer would have the prohibited result if its acceptance, together with other workers' acceptance of offers which the employer also makes to them, would have the result that the workers' terms of employment, or any of those terms, will not (or will no longer) be determined by collective agreement negotiated by or on behalf of the union when, had such offers not been made, there was a real possibility that the terms in question would have been determined by collective agreement*" (underlining added).

Here, in Dunkley, as the collective bargaining process was clearly still ongoing at the time the offers were made, there was a contravention of s.145B.

If an employer is found to have made such an unlawful inducement, a fixed amount of compensation is payable – the current amount of this compensation is £4,341 for each complainant.

Insolvency

There have been many press reports about the financial pressures of the pandemic and the resultant impact that this may have on insolvency numbers. Figures published by the Insolvency Service in November 2021 show an increase of over 60% in registered company insolvencies for October 2021, compared to the same period in 2020. However, the 2020 figures may have been artificially lowed by the government support available at that time – the October figures in 2019 were in fact slightly higher than the 2021 numbers. The report notes that although the October 2021 figures are the first to be published after many of the government measures ceased on 30 September or were replaced with tapering measures, it is not yet possible to state the impact of these changes.

In the middle of the pandemic, in January 2021, the Court of Appeal considered the rather timely case of Irwell Insurance Company Ltd v Watson & Ors, albeit one relating to a significantly earlier – and entirely non-pandemic-related – set of insolvency proceedings.

Mr Watson had brought claims of unfair dismissal and disability discrimination against his employer. His employer subsequently entered a creditors' voluntary liquidation and Mr Watson sought to add his employer's insurer, to the Tribunal proceedings. The insurer disputed that cover was in place. The Court of Appeal was asked to consider whether an employment tribunal can determine liability under the Third Party (Rights Against Insurers) Act 2010.

The CoA was in no doubts that an employment tribunal fell within the meaning of "court" under the 2010 Act and therefore that it had jurisdiction to consider such claims. This means that, moving forwards, employment tribunals, already coping with a significant backlog of cases and under strained resources, will need to grapple with arguments on policy coverage and contractual interpretation of insurance policy wording in order to determine liability for employment-related claims under the 2010 Act.

If you would like discuss the impact of any of the issues raised above on your organisation, please feel free to contact James Tait.

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