Q&A: Employment law issues following the ease of lockdown measures during the COVID-19 pandemic.

By Sarah Bowen
3PB Barristers

The law and guidance relating to the contents of this document are constantly evolving. All reasonable endeavours have been used to ensure that this document is correct as of the date it was written. This document should not be taken as legal advice and should not be relied on as such by anyone. Neither 3PB Barristers or the individuals accredited with writing the documents are providing any legal advice to ARAG or their policy holders by providing them with this information. Anyone considering this document should take legal advice before taking any action. ARAG policy holders should not rely on this document as a substitute for contacting the legal advice line.

Health & Safety and whistleblowing issues

Introduction

Employers and the workforce need to wrestle with the easing of lockdown and the ongoing complexities of the COVID-19 pandemic. This gives rise to matters that are likely to influence all aspects of "employment law", one aspect of which is health and safety.

This article considers the following:

- What the current government guidance is for returning to work and reopening workplaces.
- The legal matrix upon which associated health and safety obligations sit.
- The legal protection of employees who raise health and safety concerns.

As ever, I am obliged to remind those reading this document that the law is complex and more detailed that the summary provided within this article. Further, the content of this article must not be taken as legal advice on the facts of any particular case or the legal obligations that might arise. It should also be noted that the guidance (and law) is constantly evolving. This

article should not be relied on as a comprehensive statement of the law and advice should always be sought.

Another handout was produced considering discrimination and other related matters in April. This can be located on the 3PB website or via our newsletter. A further copy can be provided on request (sarah.bowen@3pb.co.uk).

Part 1: Government guidance

Q: On 11 May 2020, the government announced the recovery strategy. What did that say about work?

1. On 23 March 2020 the Prime Minister announced lockdown measures and the closure of non-essential businesses and premises. These measures have had a significant and disabling effect on businesses and in turn employment. Some businesses were required to close indefinitely (e.g. hotels, hairdressers, restaurants, clothing retailers, beauty salons, leisure facilities) while others have continued to operate through lockdown while adapting working practices to comply with the legislation and government guidance.

2. On 11 May 2020, the government announced easing of lockdown measures and published "Our Plan to Rebuilt: The UK Government's COVID-19 recovery strategy" (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/884760/Our_plan_to_rebuild_The_UK_Government_s_COVID-19_recovery_strategy.pdf). On 12 May 2020, in England, the Health Protection (Coronavirus, Restrictions)(England)(Amendment)(No. 2) Regulations 2020 came into force. The Regulations introduced a modest easing of some of the restrictions on movement as part of the recovery strategy. The strategy is currently still in differing states of progress in England, Wales, Scotland and Northern Ireland.

3. Under step one of the recovery strategy and from 13 May 2020 (and subject to local public health and safety requirements for Wales, Scotland and Northern Ireland) workers who cannot work from home are permitted to travel to work if their workplace is open. From the same date employers were advised to follow "COVID-19 Secure" guidelines as soon as practicable to try and minimise the infection rate (these Secure guidelines are considered below).

4. Step two comes into effect on 1 June 2020 (again subject to local requirements in the devolved states). It permits the phased opening of non-essential retail when and where it

is safe to do so and subject to the ability to comply with the Secure guidelines. From 15 June all other non-essential retail will be permitted to reopen. Again, this is subject to the ability to meet the Secure guidelines.

5. Step three will not be in effect before 4 July (and that date is dependent on scientific advice to the government). This will permit remaining businesses and premises to reopen such as those dealing with personal care, hospitality, public places and leisure facilities. Again, they will need to comply with the Secure guidelines and practically this might prove extremely difficult (or even impossible).

6. Five ministerial taskforces have been established to assist particular sectors of business e.g. non-essential retail; recreation and leisure and international aviation. They will provide further guidance over the coming weeks and months. Therefore, employers will need to ensure that they keep up to speed with significant developments around health and safety guidance and legal obligations.

7. The recovery strategy includes the following guidance (which are said to be the most important guidelines that people can follow) on staying safe in relation to work during the pandemic (in Annex A):

    a) **Work from home if possible:** Many people can do most or all of their work from home, with the proper equipment and adjustments (which employers should support). However, not all jobs can be done from home. When workplaces are open and employees cannot work from home, they can travel to work.

    b) **How and when people travel to work:** Where possible people should walk or cycle to work (and employers should consider expanding bicycle storage facilities, changing facilities and car parking to help). Where people have to use public transport, they should try to avoid peak times (so employers should consider staggering working hours) and wear face coverings when doing so.

    c) **Avoid crowds**: In addition to assisting staff to avoid peak travel times on public transport, employers should take reasonable steps to avoid people being gathered together, for example by allowing the use of more entrances and exits and staggering entry and exit where possible.

    d) **Keep hands and faces as clean as possible:** When people enter buildings and after contact with surfaces, they should wash their hands with soap and water and dry them thoroughly or use hand sanitiser.

e) **Reduce contact with people:** To reduce the risks of transmission, employers should, where possible, change shift patterns and rotas to keep the same staff in the same team and split people into smaller, contained teams.

f) **Keep two metres apart and avoid face-to-face contact:** Public Health England recommends trying to keep two metres from people as a precaution. It is recognised that this is not always possible, and it is not a rule. The key point is not to be too close to people for more than a short amount of time, as much as possible. There is a higher risk of being exposed to COVID-19 when in face-to-face contact and so people should stand side-to-side.

8. Whilst the recovery strategy is relaxing lockdown, it seems likely that the pandemic will remain a public health risk for the foreseeable future and it is envisaged that there might be periodic spikes in infection rates which might necessitate further lockdowns of businesses. Regional lockdowns to deal with localised spikes in infection rates have also been suggested. This is likely to give rise to complex and developing employment law and human resources issues.

Q: What are the 5 steps to working safely published by the government?

9. To support the opening (or reopening) of businesses and premises the government has published "5 steps to working safely" which provides practical actions for businesses to take. These basic 5 steps sit alongside the Working safely during COVID-19 guidance that is relevant to a particular workplace i.e. the Secure guidelines. The government has said that further guidance will be published as more businesses are able to open (therefore expect a lot of guidance this summer). Employers must implement the five key steps as soon as practicable.

10. The 5 steps for employers are:

(a) **Step 1 - Carry out a COVID-19 risk assessment in line with the HSE guidance.** Employers must consult with the workforce or trade unions and share the results of the risk assessment with the workforce. The Secure guidelines (see below) advise employers that if it is possible, they should consider publishing the results on their website and, in respect of employers with over 50 workers, that is the government's expectation. A draft notice is contained in the Secure guidelines documents which can be used to show employees, customers and visitors that they have followed the government's guidance.

(b) **Step 2 – Develop cleaning, handwashing and hygiene procedures.** Employers should increase the frequency of handwashing and surface cleaning by:

i. encouraging people to follow the guidance on hand washing and hygiene

ii. providing hand sanitiser around the workplace, in addition to washrooms

iii. frequently cleaning and disinfecting objects and surfaces that are touched regularly

iv. enhancing cleaning for busy areas

v. setting clear use and cleaning guidance for toilets

vi. providing hand drying facilities – either paper towels or electrical dryers

(c) **Step 3 – Employers should take all reasonable steps to help people to work from home by:**

i. discussing home working arrangements

ii. ensuring they have the right equipment, for example remote access to work systems

iii. including them in all necessary communications

iv. looking after their physical and mental wellbeing

(d) **Step 4 – Where possible, employers should maintain 2m between people by:**

i. putting up signs to remind workers and visitors of social distancing guidance

ii. avoiding sharing workstations

iii. using floor tape or paint to mark areas to help people keep to a 2m distance

iv. arranging one-way traffic through the workplace if possible

v. switching to seeing visitors by appointment only if possible

(e) **Step 5 – Where it is not possible for people to be 2m apart, employers should do everything practical to manage the transmission risk by:**

i. considering whether an activity needs to continue for the business to operate

ii. keeping the activity time involved as short as possible

iii. using screens or barriers to separate people from each other

iv. using back-to-back or side-to-side working whenever possible

v. staggering arrival and departure times

vi. reducing the number of people each person has contact with by using 'fixed teams or partnering'

Q: What are the COVID-19 Secure guidelines (working safely)?

11. As mentioned above, on 11 May 2020 the government also published the COVID-19 Secure Guidelines to try and make workplaces less infectious. They are addressed to employers, employees and the self-employed.

12. The Secure Guidelines have been prepared by the Department for Business, Energy and Industrial Strategy (BEIS) with input from firms, unions, industry bodies and the devolved administrations in Wales, Scotland and Northern Ireland, and in consultation with Public Health England (PHE) and the Health and Safety Executive (HSE). It is important to note that public health is devolved in Northern Ireland, Scotland and Wales; therefore, the guidance should be considered alongside local public health and safety requirements and legislation in Northern Ireland, Scotland and Wales.

13. The Secure guidelines are listed on the Working Safely during coronavirus (COVID-19) webpage: https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19 . Guidance was updated on 29 May 2020 to include the test and trace process. It is envisaged that they will continue to be updated.

14. The Secure guidelines currently apply to 8 workplace settings (some were updated on 25 May), but it is likely that one employer might need to apply several of the guidelines. The 8 workplace settings are:

    (a) Offices and contact centres.
    (b) Shops and branches.
    (c) Factories, plants and warehouses.
    (d) Labs and research facilities.
    (e) Construction and other outdoor work.
    (f) Other people's homes,
    (g) Restaurants offering takeaway or delivery.
    (h) Vehicles.

15. The guidelines apply to businesses that are currently open and for those who will be beginning a phased reopening from 1 June 2020 under the Recovery Strategy. There is

a significant amount of overlap in the workplace setting documents, but they are all being individually maintained, and an effort has been made to make them bespoke. Some examples are contained below. Guidance for remaining businesses will be provided before they are permitted to open and with sufficient time to enable them to plan (i.e. before 4 July 2020).

16. It is also important to note that educational and childcare settings and public transport operators have also been issued with guidance (albeit outside of the aforementioned Secure guidelines).

Q: How should the Secure guidelines be used?

17. It is important to remember that the primary position is that staff should work from home. The Secure guidelines consider steps that employer should take in each of the 8 workplace settings and contain common aspects such as the approach to risk, who can return to work (and communicating the same), PPE and face coverings, social distancing at work, travel and accidents.

18. The Secure guidelines also provides bespoke practical considerations and guidance on how to work safely in each sector such as dealing with customers, visitors and contractors. Each business is advised to translate the Secure guidelines into the specific actions it needs to take, depending on the nature of their business, including its size and type, how it is organised, operated, managed and regulated.

19. The Secure guidance is not a mandatory set of legal requirements set in stone to enable a return to work. It does not supersede any legal obligations relating to health and safety, employment or equalities. Therefore, existing legal obligations must be complied with including those relating to individuals with protected characteristics under the Equality Act 2010. Following this non-statutory guidance alone is very unlikely to be enough to satisfy legal obligations.

20. However, it is very likely to be taken into account when considering if an employer has complied with their legal obligations. Therefore, following it will assist in mitigating the risk of acting unlawfully. The Secure guidance does not just apply to employees but the entire workforce including agency workers, contractors and others.

Q: What do the Secure guidelines say about managing risk?

21. The government's objective is that employers take preventative measures to reduce the risk to the lowest reasonably practicable level, in order of priority. This mirrors an employer's legal duties and aforementioned 5 steps to working safety guidance. Employers must work with any other employers or contractors sharing the workspace to do this.

22. The guidance in the context of COVID-19 provides for working through the following steps (and in this order):

    (a) In every workplace, increasing the frequency of handwashing and surface cleaning.

    (b) Businesses and workplaces should make every reasonable effort to enable working from home as a first option. Where working from home is not possible, workplaces should make every reasonable effort to comply with the social distancing guidelines set out by the government (keeping people 2m apart wherever possible).

    (c) Where the social distancing guidelines cannot be followed in full, in relation to a particular activity, businesses should consider whether that activity needs to continue for the business to operate, and if so, take all the mitigating actions possible to reduce the risk of transmission between their staff.

    (d) Further mitigating actions include:

        i. increasing the frequency of handwashing and surface cleaning

        ii. keeping the activity time involved as short as possible

        iii. using screens or barriers to separate people from each other

        iv. using back-to-back or side-to-side working (rather than face-to-face) whenever possible

        v. reducing the number of people each person has contact with by using 'fixed teams or partnering' (so each person works with only a few others)

    (e) Finally, if people must work face-to-face for a sustained period with more than a small group of fixed partners, the employer will need to assess whether the activity can safely go ahead. No one is obliged to work in an unsafe work environment.

    (f) In this assessment the employer should have particular regard to whether the people doing the work are especially vulnerable to COVID-19.

23. The remainder of the 8 workplace setting documents provide guidance on what an employer should consider in going through this process. It is also likely that trade unions and associations will provide guidance throughout the pandemic.

24. This is non-statutory guidance, but it is very likely to be taken into account when considering if an employer has complied with their legal obligations in relation to health and safety.

Q: What do the 8 COVID-19 Secure guidelines (working safely) say in practical terms about managing the risk?

25. Some aspects of the Secure guidelines are common to all or the majority of the sectors. For example, the Secure guidelines provide that the following common steps will usually be required, in respect of coming to and leaving work:

    (a) Staggering arrival and departure times at work to reduce crowding into and out of the workplace, taking account of the impact on those with protected characteristics.

    (b) Providing additional parking or facilities such as bike racks to help people walk, run, or cycle to work where possible.

    (c) Limiting passengers in corporate vehicles, for example, work minibuses. This could include leaving seats empty.

    (d) Reducing congestion, for example, by having more entry points to the workplace.

    (e) Using markings and introducing one-way flow at entry and exit points.

    (f) Providing handwashing facilities, or hand sanitiser where not possible, at entry and exit points.

    (g) Providing alternatives to touch-based security devices such as keypads.

    (h) Defining process alternatives for entry and exit points where appropriate, for example, deactivating pass readers at turnstiles in favour of showing a pass to security personnel at a distance.

26. Alongside the common guidance, the Secure guidelines provide sector specific steps to enable employers to meet the objectives of the guidance. The Secure guidelines are together around 250 pages across the 8 sectors. However, for illustrative purposes I have

included extracts from Secure guidance on how to maintain social distancing in the context of offices and contact centres, shops and branches and working in other people's homes.

27. Within the offices and contact centres Secure guidance, the social distancing and workstations section includes the following:

    (a) Review layouts and processes to allow people to work further apart from each other.

    (b) Using floor tape or paint to mark areas to help workers keep to a 2m distance.

    (c) Only where it is not possible to move workstations further apart, arranging people to work side by side or facing away from each other rather than face-to-face.

    (d) Only where it is not possible to move workstations further apart, using screens to separate people from each other.

    (e) Managing occupancy levels to enable social distancing.

    (f) Avoiding use of hot desks and spaces and, where not possible, for example, call centres or training facilities, cleaning and sanitising workstations between different occupants including shared equipment.

28. Under the shops and branches guidance, there is a lengthy advisory in the context of social distancing and visitors/customers which includes the following (many will be familiar with this if they have visited supermarkets during lockdown):

    (a) Defining the number of customers that can reasonably follow 2m social distancing within the store and any outdoor selling areas. Take into account total floorspace as well as likely pinch points and busy areas.

    (b) Limiting the number of customers in the store, overall and in any particular congestion areas, for example doorways between outside and inside spaces.

    (c) Encouraging customers to use hand sanitiser or handwashing facilities as they enter the premises to reduce the risk of transmission by touching products while browsing.

    (d) Encouraging customers to avoid handling products whilst browsing, if at all possible.

    (e) Suspending or reducing customer services that cannot be undertaken without contravening social distancing guidelines. This may include re-thinking how

assistance is provided, for example, using fixed pairs of colleagues to lift heavy objects rather than a single colleague lifting with a customer.

(f) Encouraging customers to shop alone where possible, unless they need specific assistance.

(g) Reminding customers who are accompanied by children that they are responsible for supervising them at all times and should follow social distancing guidelines.

(h) Looking at how people walk through the shop and how you could adjust this to reduce congestion and contact between customers, for example, queue management or one-way flow, where possible.

(i) Ensuring any changes to entries, exit and queue management take into account reasonable adjustments for those who need them, including disabled shoppers.

(j) Working within the local area to provide additional parking or facilities such as bike racks, where possible, to help customers avoid using public transport.

(k) Using outside premises for queuing where available and safe, for example some car parks.

(l) Managing outside queues to ensure they do not cause a risk to individuals or other businesses, for example by introducing queuing systems, using barriers and having staff direct customers.

(m) Working with the local authority or landlord to take into account the impact of your processes, including queues, on public spaces such as high streets and public car parks.

(n) Shopping centres should take responsibility for regulating the number of customers in the centre and the queuing process in communal areas on behalf of their retail.

(o) Having clearly designated positions from which colleagues can provide advice or assistance to customers whilst maintaining social distance.

(p) Working with neighbouring businesses and local authorities to consider how to spread the number of people arriving throughout the day for example by staggering opening hours; this will help reduce demand on public transport at key times and avoid overcrowding.

(q) Avoid sharing vehicles except within a family, for example on test drives. If it is not possible, keep the number of people in the vehicle to a minimum and as distanced

within the vehicle space as possible, and use other safety measures such as ensuring good ventilation.

(r) Continuing to keep customer restaurants and cafes closed until further notice, apart from when offering hot or cold food to be consumed off the premises.

29. The Secure guidelines for working in other people's homes applies to those working in, visiting or delivering to home environments such as repair services, fitters, meter readers, plumbers, cleaners, cooks, surveyors and delivery drivers (but not nannies who spend all of their time with one household). The applicable guidance in respect of interacting with householders is surprisingly short and only states:

(a) If you are an employer or agency, providing your workers with information about how to operate safely in people's homes.

(b) Communicating with households prior to arrival, and on arrival, to ensure the household understands the social distancing and hygiene measures that should be followed once work has commenced.

30. In respect of deliveries the following steps are said to be usually required:

(a) Minimising contact during deliveries wherever possible.

(b) Where possible and safe, having single workers load or unload vehicles.

(c) Where possible, using the same pairs of people for loads where more than one is needed.

(d) Minimising the contact during delivery, for example, by calling to inform of your arrival rather than ringing the doorbell.

(e) Minimising the contact during payments and exchange of documentation, for example, using electronic payment methods and electronically signed and exchanged documents.

Q: What do the COVID-19 Secure guidelines (working safely) say about clinically vulnerable and extremely vulnerable individuals?

31. "Clinically vulnerable people" are those who may be at increased risk from COVID-19, including those aged 70 or over and those with some underlying health conditions. More information may be found on the government website (see also our previous handout

published following our previous COVID-19 webinar): https://www.gov.uk/government/publications/staying-alert-and-safe-social-distancing/staying-alert-and-safe-social-distancing#clinically-vulnerable-people

32. "Clinically extremely vulnerable people" are those who have specific underlying health conditions that make them extremely vulnerable to severe illness if they contract COVID-19. Clinically extremely vulnerable people will have received a letter telling them they are in this group or will have been told by their GP. It is also noteworthy that on 31 May 2020 Matt Hancock confirmed that such individuals who had received the initial letter, would be permitted to leave home from 1 June. At the time of writing this does not appear to mean that guidance on working has changed for those individuals. Further details are contained on the government's website: https://www.gov.uk/government/publications/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19#who-is-clinically-extremely-vulnerable

33. The objectives of the Secure guidelines around who should go to work include:

    (a) that everyone should still work from home, unless they cannot work from home;

    (b) to protect clinically vulnerable and clinically extremely vulnerable individuals;

    (c) to make sure individuals who are advised to stay at home under existing government guidance do not physically come to work. This includes individuals who have symptoms of COVID-19 as well as those who live in a household with someone who has symptoms.

    (d) To treat everyone in the workplace equally. In applying the guidance, employers should be mindful of the particular needs of different groups of workers or individuals. The guidance reminds employers that it is breaking the law to discriminate, directly or indirectly, against anyone because of a protected characteristic. Employers also are reminded of their responsibilities towards disabled workers and those who are new or expectant mothers.

34. The Secure guidance notes that clinically extremely vulnerable individuals have been strongly advised not to work outside the home. Furthermore, clinically vulnerable individuals, who are at higher risk of severe illness (for example, people with some pre-existing conditions), have been asked to take extra care in observing social-distancing and should be helped to work from home, either in their current role or in an alternative role.

35. The guidance states that if clinically vulnerable (but not extremely clinically vulnerable) individuals cannot work from home, they should be offered the option of the safest available on-site roles, enabling them to stay 2m away from others. If they have to spend time within 2m of others, an employer should carefully assess whether this involves an acceptable level of risk. The specific duties to those with protected characteristics, including, for example, expectant mothers must be taken into account.

36. The guidance also states that particular attention should also be paid to people who live with clinically extremely vulnerable individuals. Unfortunately, no further guidance has been provided (please refer to our first COVID-19 handout for our thoughts on this issue).

Q: What do the COVID-19 Secure guidelines (working safely) say about PPE?

37. There has been much debate in the media over the use of PPE and it is likely to be an ongoing employment and health and safety issue in the workplace. It is important to note that some sectors do recommend the use of PPE e.g. clinical settings such as hospitals or other roles that Public Health England advises use of PPE.

38. The Secure guidelines state the following about PPE:

    (a) Where PPE is already used in the work activity to protect against non-COVID-19 risks it should continue to be used. Additional PPE beyond that is "not beneficial" because COVID-19 risks need to be managed through social distancing, hygiene and fixed teams or partnering. The exception to this is the use of PPE in clinical settings.

    (b) Employers should not encourage the use of PPE outside of clinical settings (or when responding to a suspected or confirmed case of COVID-19).

    (c) Unless employers are in a situation where the risk of COVID-19 transmission is very high, their risk assessment should reflect the fact that the role of PPE in providing additional protection is extremely limited.

    (d) If the risk assessment shows that PPE is required, then employers must provide that free of charge to workers who need it and it must fit properly.

39. The Secure guidelines also address face coverings which are described as "marginally beneficial as a precautionary measure". This is currently optional and not required by law including in the workplace. Employers should support their workers if they chose to use a face covering which means telling workers:

(a) Wash your hands thoroughly with soap and water for 20 seconds or use hand sanitiser before putting a face covering on, and after removing it.

(b) When wearing a face covering, avoid touching your face or face covering, as you could contaminate them with germs from your hands.

(c) Change your face covering if it becomes damp or if you've touched it.

(d) Continue to wash your hands regularly.

(e) Change and wash your face covering daily.

(f) If the material is washable, wash in line with manufacturer's instructions. If it's not washable, dispose of it carefully in your usual waste.

(g) Practise social distancing wherever possible.

Q: Can an employer take action if an employee wears their own PPE to work?

40. Even if PPE is not necessary for the workplace it is possible that many employees will elect to wear it anyway. Where an employee, in circumstances of danger that they reasonably believe to be serious and imminent, takes appropriate steps to protect themselves or other persons from danger they are protected against dismissal (section 100(1)(e) ERA 1996) and detriment (s44(1)(e) ERA 1996). Many technical arguments might be taken by both sides. For a further discussion on sections 100 and 44 please see below.

Part 2: Legal obligations

Q: What is the general duty on employers in respect of health and safety?

41. Employers have statutory and common law duties for health and safety. The law is complex and beyond the scope of this article. The steps that an employer needs to take to manage health and safety for their workforce will depend on the industry operating and context.

42. The Health and Safety at Work etc. Act 1974 ("**HSWA 1974**") places a general duty on a company, its directors, managers and employees to ensure so far as is reasonably practicable, the health, safety and welfare at work of all their employees. It is the legal framework for numerous health and safety regulations.

43. In short, the following should be ensured under s2(2) HSWA 1974:

    (a) Provision and maintenance of plant and systems of work that are, so far as is reasonably practicable, safe and without risks to health.

    (b) Safe use, handling, storage and transport of articles and substances.

    (c) Information, instruction, training and supervision as is required to ensure, so far as reasonably practicable, the health and safety of employees at work.

    (d) Places of work under the employer's control are, so far as is reasonably practicable, safe for work and without risks to health (with safe entrances and exits).

    (e) Provision and maintenance of a safe working environment with adequate facilities and arrangements for welfare at work.

44. Each of the Secure guidelines notes that the HSE may take enforcement action against employers who do not take action to comply with the relevant public health legislation and guidance e.g. social distancing. The government has stated that extra funding of £14 million will be provided to HSE for more employees, inspectors and equipment.

45. It is also important to remember that parallel to the above, there is an implied duty that an employer will take reasonable care for the health and safety of employees. The implied term of mutual trust and confidence will also be relevant. Where the breach of an implied term amounts of a fundamental breach of contract, the employee may elect to resign and claim constructive dismissal (***Western Excavating v Sharp [1978] ICR 221***).

Q: What is the statutory obligation on an employer to consult on H&S?

46. There is a duty to consult with employees on health and safety at work under the **Safety Representatives and Safety Committees Regulations 1977**. The regulations apply where a trade union is recognised, and health and safety representatives have been appointed by the union. The employer must establish a safety committee of 2 or more safety representatives request it. The safety representatives must be consulted on an arrangement which will enable the employer and employees to co-operate effectively in promoting and developing health and safety measures and checking their effectiveness (s 2(6) HSWA 1974).

47. Where there is no recognised trade union then the **Health and Safety (Consultation with Employees) Regulations 1996** apply. Employers must consult with employees in good time on matters relating to their health and safety at work and, this includes the introduction of any matter which might substantially affect the health and safety of those employees (regulation 3). Consultation can be with the employees directly or elected representatives (regulation 4). The employer must provide information which will enable the employees or representatives to participate fully and effectively in the consultation (regulation 5).

48. The HSE has published guidance on the law surrounding consultation. Furthermore, the Secure guidelines state that employers have a duty to consult on health and safety around the COVID-19 issues. To that end HSE has also provided guidance about how to approach such consultations: https://www.hse.gov.uk/news/assets/docs/talking-with-your-workers.pdf

Q: Is there an obligation on an employer to have a health and safety policy?

49. Employers employing 5 or more people must have a written health and safety policy. Any revisions must be brought to the attention of all of its employees (s2(3) HSWA 1974 and **Employers' Health and Safety Policy Statements (Exceptions) Regulations 1975**).

Q: The Secure guidelines and five steps to working safely provide for a risk assessment. What is the legal obligation and is a COVID-19 risk assessment required?

50. Under Management of Health and Safety at Work Regulations 1999 ("**MHSW Regulations**") an employer is required to undertake risk assessments to:

    (a) Identify what in their business could cause illness or injury (hazards).

(b) Decide how likely it is that someone could be harmed and how seriously (the risk).

(c) Take action to eliminate the hazard, or if this is not possible, to control the risk.

51. In order to comply, the MHSW Regulations state that an employer needs to make; (1) a suitable and sufficient assessment of the risks to the health and safety of its employees to which they are exposed whilst they are at work; and (2) the risks to the health and safety of persons not in its employment arising out of or in connection with the conduct of its business (regulation 3(1)).

52. If there are 5 or more employees in employment the employer must record the significant findings of the assessment and any group of employees that the assessment identifies as being especially at risk (regulation 3(6)).

53. Overall, it seems inevitable that to comply with its legal obligations an employer will need to conduct a COVID-19 risk assessment. The Secure guidelines provide pointers to help employers when undertaking a COVID-19 risk assessment. However, each employer must consider their own particular circumstances including size, nature, organisation, operation, management and regulation.

Q: What information needs to be provided about the risk assessment?

54. Under Regulation 10(1) MHSW Regulations, employers must provide employees with "comprehensible and relevant information" on the following:

(a) The risks to their health and safety identified by the assessment.

(b) The preventive and protective measures that the risk assessment has shown the employer it needs to take to comply with its legal obligations.

(c) The procedures to be followed in the event of serious and imminent danger to persons at work.

(d) The identity of the people who will implement any evacuation of the workplace.

(e) Where they share a workplace with one or more other employers (whether on a temporary or a permanent basis), the risks to employee health and safety notified to them by the other employer(s).

55. As stated above, the 5 steps to working safely and Secure guidelines state that employers should share the results of their risk assessment with their workforce (and publish online).

Q: What are the statutory obligations on employees?

56. Employees have health and safety responsibilities at work to take reasonable care for their health and safety and that of anyone who may be affected by their acts or omissions while at work (s7(a) HSWA 1974). Employees must also cooperate with their employers so far as it is necessary to enable compliance with any statutory duty or requirement relating to health and safety (s7(b) HSWA 1974).

57. Employees have an obligation under regulation 14 MHSW Regulations 1999 to notify their employer or health and safety representative of any work situation that could reasonably be considered to represent a serious and immediate danger to health and safety or any shortcomings in the employer's protection arrangements which have not previously been reported.

58. Directors and some senior employees will have a duty to act in the best interests of the company and may have a duty to disclose wrongdoing.

59. Concerns may be raised internally or in certain circumstances externally such as to HSE. Employers need to be careful when reacting not to infringe upon the protection's employees (and as appropriate workers) have when taking such steps (see further discussion below).

Q: What additional health and safety duties apply where the employee is pregnant?

60. There are additional duties to protect new and expectant mothers including:

    (a) Risk assessments in respect of the employee or their child.

    (b) To alter an employee's working conditions/hours of work to avoid any significant risk (regulation 16(2) MHSW Regulations). Or if this is not reasonable, to offer suitable alternative work on terms that are not substantially less favourable (regulation 16(3) MHSW Regulations and s67 **Employment Rights Act 1996**). If suitable alternative work is not available or the employee reasonably refuses it an employer must suspend on full pay (regulation 16(3) and s67).

61. Given that pregnant women are identified as clinically vulnerable (and in some cases extremely vulnerable) under the government's socially distancing guidance if they cannot work from home and there is no suitable alternative work from home an employer should consider suspension on full pay under regulation 16(3).

Part 3: The protection of employees who raise health and safety concerns

Q: What protection do employees have against dismissal?

62. Section 100 Employment Rights Act 1996 provides that a dismissal will be automatically unfair where it is for one of the following reasons:

    (a) Dismissal for designated health and safety activities (s100(1)(a) and 100(1)(ba)).

    (b) Dismissal of health and safety representatives or committee members (section 100(1)(b)).

    (c) Dismissal for raising health and safety concerns through other reasonable means (section 100(1)(c)).

    (d) Dismissal for leaving or staying away from dangerous workplace (section 100(1)(d)). Where an employee reasonably believes that they are in serious and imminent danger and they could not be reasonably expected to avert it, they are protected from dismissal if they leave, propose to leave, or refuse to return to the workplace while the danger persists.

    (e) Dismissal for taking action to prevent danger (section 100(1)(e)). Employees who, in circumstances of danger that they reasonably believed to be serious and imminent, took or proposed to take appropriate steps to protect themselves or other persons from danger, are protected from dismissal on that basis. Section 100(1)(e) also protects those who communicate these circumstances by appropriate means.

63. Section 100 must be interpreted in the light of, EU Directive No.89/391 on the introduction of measures to encourage improvements in the safety and health of workers at work.

64. A dismissal for one of the aforementioned reasons (or where it is the principal reason) is automatically unfair, there is no qualifying service requirement and compensation is uncapped. A dismissal contrary to s100(1)(a) or (b) attracts a minimum basic award of £5,853 (from 6 April 2016)(s120(1) ERA).

65. Individuals employed in the police service are not excluded from bringing claims of automatic unfair dismissal under s100 - s200(1) (unlike claims of ordinary unfair dismissal).

66. Section 100 also covers constructive dismissal claims. It is not clear from case law whether a breach of s100 would in itself amount to a fundamental breach of contract of whether It would still fall upon questions of fact and degree in all of the circumstances of each case. There are conflicting ET level decisions on this issue and no appellate authority. In ***Baddeley v Metha t/a Supascoop ET Case No. 46041/94***, the tribunal held that a right to claim under the preceding legislation to s100 ERA only arises where the employer dismissed the employee or fundamentally breaches the employee's contract as punishment for the employee's health and safety activity. However, in ***Teasdale v Walker t/a Blaydon Packaging ET Case No. 2505103/98,*** the employee raised a concern with his employer over the condition of ropes used to secure pallets to his lorry. The employer took no steps to deal with the issue and required him to continue using the ropes. The employee treated himself as constructively dismissed. The tribunal identified a breach of the implied term to ensure the health and safety of the employee. The tribunal considered that this breach was fundamental because the employer had failed to comply with s100(1)(c) ERA.

67. It is noteworthy that ***Baddeley*** and ***Teasdale*** were decided in the '90s with no clarification thereafter. This is possibly because the point is somewhat academic given that tribunals could be persuaded that such matters breach the implied term of mutual trust and confidence (***WA Goold (Pearmark) Ltd v McConnell and anor 1995 IRLR 516, EAT*** – failure to deal with grievances).

68. An employee selected for redundancy on one of the grounds in s100(1) ERA will be treated as automatically unfairly dismissed where the reason (or principal reason) for the dismissal was redundancy but the redundancy situation applied equally to one or more other employees in the same undertaking who held positions similar to that of the employee and who were not dismissed (s105 ERA). There must be an actual comparator and if none exist the claim is bound to fail (***O'Dea v ISC Chemicals Ltd. 1996 ICR 222*** – applying a similar provision – selection on trade union grounds).

69. Whilst s100 and s105 only apply to employees there is an argument that this does not comply with the EU Directive which aims to protect "workers". The directive defines "worker" using the language of employment, but it also refers to an "employment relationship". It is possible therefore that a wider application is possible. In addition, there is a general power in s23 of the **Employment Relations Act 1999** allowing the government to extend to non-employees the protection of any right contained in the ERA. However, no such order has yet been made under that provision.

70. Where a claim under s100 or s105 is lodged and the employee meets the 2 years' service requirement for an ordinary unfair dismissal complaint the burden on proof is on the employer to prove the reason for dismissal (***Maund v Penwith District Council 1984 ICR 143, CA***). Where an employer can do so, the employee must adduce evidence to show there is a real issue as to whether the reason given is true. Thereafter, the onus remains on the employer to prove the real reason for the dismissal.

71. Where an employee does not have 2 years' service, the burden is on them to show an automatically unfair reason for the dismissal (***Smith v Hayle Town Council 1978 ICR 996, CA***).

Q: What protection is there against detriment?

72. Action short of dismissal (on the same grounds as summarised above) could amount to a detriment under s44 ERA 1996. There is no qualifying service requirement and compensation is uncapped.

73. Sections 100 and 44 ERA 1996 only apply to employees and not workers. There is a possible inconsistency in this regard with the underlying applicable EU Directive (see below). In any event, there is also an overlap with the whistleblowing regime which covers workers.

Q: How might the whistleblowing regime relevant?

74. Protection under the whistleblowing regime applies to workers who have made a qualifying disclosure as defined under s43A-B ERA. There must be a disclosure of information which in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the legal failures (as defined in s43B ERA) which are:

    (a) That a criminal offence has been committed, is being committed or is likely to be committed.

    (b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.

    (c) That a miscarriage of justice has occurred, is occurring or is likely to occur.

    (d) That the health or safety of any individual has been, is being or is likely to be endangered.

    (e) That the environment has been, is being or is likely to be damaged; or

(f) That information tending to show any matter falling within any one of the preceding paragraphs has been or is likely to be deliberately concealed.

75. It is immaterial whether the relevant failure has occurred, occurs or would occur and whether the law applying to it is that of the UK or any other country/territory. At first blush the most relevant in the workplace relating to COVID-19 are likely to be the criminal offence, health and safety and legal obligation provisions.

76. An employee is protected against dismissal where the reason or principal reason for the decision is that they have made a protected disclosure under s103A ERA 1996. This applies to both actual and constructive dismissals. Any such dismissal is automatically unfair.

77. Workers are protected against detriment on the ground that they have made a protected disclosure under s47(B)(1) ERA. The wider definition of worker applies (s43K ERA 1996).

Q: Would concerns about PPE or complying with government guidance be covered under s43(1)(d) 'health and safety'?

78. In principle PPE and government guidance are the type of matters likely fall within the relevant failures contained in s43(1) ERA for example, the legal obligation or health and safety provisions (ss43(1)(b) and (d)).

79. Failing to comply with mandatory or required protective equipment is capable of falling within s43(1)(d). In ***Martin v Facilicom Cleaning Services Ltd. ET Case No.2300462/14,*** the tribunal accepted that pointing out to a line manager that they were failing to comply with mandatory protective footwear requirements was a qualifying health and safety disclosure.

80. There are likely to be limits on the number of individuals who can be based in a particular premises (e.g. an office or supermarket) for health and safety reasons. This is mirrored in the Safety guidelines and also likely to be reflective of health and safety statutory obligations. If an employee raises this then in principle it is capable off falling within s43(1)(b). In ***Vaklinova v London Event Operations Ltd and ors ET Case No. 2201960/15***, raising concerns about the number of tickets being sold for a party versus the terms allowed under the licence due to premises capacity was a qualifying legal obligation disclosure.

81. Whether or not in fact a particular disclosure is protected will obviously also depend on whether there was a disclosure of information, which in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one of the 6 relevant failures has occurred or is likely to occur.

82. As to whether such a disclosure would be in the public interest, it seems that a large number COVID-19 related health and safety issues may meet that requirement (but not necessarily all). In ***Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening) 2018 ICR 731, CA***, it was held that even where the disclosure relates to a breach of the worker's own contract of employment there may be features of the case that make it reasonable to regard disclosure as being in the public interest such as;

    (a) The numbers in the group whose interests the disclosure served.

    (b) The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed.

    (c) The identity of the alleged wrongdoer.

83. In ***Morgan v Royal Mencap Society 2016 IRLR 428, EAT***, the EAT held that it was reasonably arguable that an employee could consider a health and safety complaint, even one in which the employee is the principal person affected, to be made in the wider interests of employees generally. ***Morgan*** complained about having to work in a cramped working area when she was recovering from a knee injury. Her claim was struck out on the basis that she had no reasonable prospect of arguing that her complaint was in the public interest. In the EAT's view, it could not be said that no reasonable person could have believed that the matters that ***Morgan*** was raising engaged the public interest. That question had to be decided after the employment tribunal made findings on the facts.

84. Further in ***Osowski v Travelodge Hotels Ltd ET Case No. 2202520/16***, the EAT accepted that even where an employee was mainly concerned with his and his colleagues own safety (using corded power tools at full mains voltage which was asserted to not be safe), it was reasonable for him to believe that an employer requiring employees to work in an unsafe way was a matter of public interest.

Q: If an employer makes a disclosure about a failure by a third party (opposed to their employer) are they covered under the whistleblowing regime?

85. A disclosure does not have to relate to a failure of the employer and may cover wrongdoings about a third party (***Hibbins v Hesters Way Neighbourhood Project 2009 ICR 319, EAT***).

86. For example, a care worker who enters a service-user's home to provide care could attain protected if they make a disclosure about conditions in that premises. In ***Irish v Lambeth Elfida Rathbone Society Ltd. ET Case No.2302607/15*** a disclosure about dirty and unsanitary conditions in a service-user's home fell within s43(1)(d) on the basis that it related to the health and safety of the employee, her colleagues and the service-user.

87. Furthermore, complaints about customers, visitors, students, patients etc. may all also be covered. This could become relevant especially in the context of being able to comply with the government's guidance such as maintaining social distancing.

88. A worker is still obliged to provide sufficient details of the nature of the perceived threat to health and safety in the disclosure (although that has not been interpreted onerously by the tribunal). They are not required to identify a specific risk or person or timescale of the risk (***Palmer and anor v London Borough of Waltham Forest ET Case No.3203582/13***).

89. As ever, the worker's belief must be reasonable i.e. a rational or reasoned reason for it. Unlike s100(1)(e) and 44(1)(e) ERA there is no rest for seriousness or imminence.

Q: Given the above protections. What can an employer do if the employee refuses to work on health and safety grounds?

90. Firstly, considering dismissal, it is possible that such a refusal might fall under s100(1)(d) ERA 1996 (automatically unfair dismissal) and accordingly any absence from work was due to a reasonable belief that attending work would put them in serious and imminent danger (and they could not reasonably have been expected to avert that danger). Please note than an employee's own health might be relevant as might the type of work and its geographical location. The employee does not need to communicate their concerns to their employer to be protected.

91. "Danger" has been interpreted broadly by the courts (***Harvest Press Limited v McCafferty [1999] IRLR 778***). It might include the risk of contracting COVID-19 from a colleague, customer, client etc. It is important to remember that the danger needs to be serious and imminent and therefore it might depend on factors such as the status of the

pandemic at that time. Although an employee would not need to show that such a danger actually existed, they must have a reasonable belief.

92. Employers may be able to show that a belief was not reasonable by taking the following steps to minimise the risk (non-exhaustive):

    (a) Conducting risk assessments and publishing details to all staff.

    (b) Implementing and adhering to government guidance.

    (c) Consulting and communicating clearly with employees about steps taken to minimise the risk of contracting COVID-19 in work.

    (d) Publishing policies and strategies for COVID-19.

    (e) Enforcing policies and including taking disciplinary action if appropriate.

93. In ***Edwards and others v SS for Justice UKEAT/0123/14*** the EAT considered that the information received by the claimant was relevant to their reasonable belief.

94. The circumstances of danger are not confined to the physical features or arrangements of the workplace and may arise out of the acts of another employee. In ***Harvest Press Ltd v McCafferty [1999] IRLR 778***, McCafferty left his nightshift in response to abusive behaviour from a colleague and refused to return until that colleague was removed or dismissed. The EAT rejected the employer's argument that walking out constituted a resignation, found that McCafferty was seeking to protect himself and that his dismissal was automatically unfair under s100(1)(d) ERA. This plainly is going to have relevance during the COVID-19 pandemic.

95. Refusal to attend work in such circumstances will also likely attain protection against detriment under s44(1)(d) ERA, so sanction including refusal to pay might be unlawful.

96. It is also possible that the refusal could be a qualifying disclosure under s43B ERA 1996 and thus the worker would be protected against dismissal or detriment. Accordingly, any step to dismiss or discipline might be highly litigious. Employers are going to need to tread very carefully. In contrast to s100(d) the qualifying disclosure would obviously have to be communicated.

Q: What can an employer do if an employee refuses to work due to health and safety concerns about their commute?

97. There is a clear actual and perceived risk in respect of public transport. Millions of individuals rely on this to get to work.

98. The law is less clear on whether s100(1)(d) "serious and imminent danger in the workplace" and 44(1)(d) ERA 1996 is likely to encapsulate the commute. On one view the EAT's decision in ***Edwards and others v The SS for Justice UKEAT/0123/14*** suggests that it is possible. However, it is also arguably distinguishable because in ***Edwards*** the employer had provided the transport (opposed to it being public transport).

99. The danger would need to be something that the employee could not avert. The ability to get to work though alternative means or perhaps staggered work hours to allow travel off peak then the danger might be reduced. In addition, the Secure guidelines should also be followed and tailored as appropriate (see in particular the coming to work and leaving work guidance as set out above).

Q: What are the limits on an employee's protection if they take action to prevent danger?

100. Section 100(1)(e) ERA protects employees who, in circumstances of danger that they reasonably believed to be serious and imminent, took or proposed to take appropriate steps to protect themselves or other persons from danger.

101. It is important to note that the EAT held in ***Balfour Kilpatrick v Acheson [2003] IRLR 683*** that the wording of s100(1)(e) does not comply with the requirements of the European Framework Health and Safety Directive (89/391/EEC) and that the words "or to communicate these circumstances by any appropriate means to the employer" should be read into the section. Accordingly, employees who take steps to communicate appropriate steps to their employer by appropriate means will be protected.

102. The applicability of the section is limited by the concepts of "danger", "reasonable belief" and "serious and imminent". Those terms have been considered above under s100(1)(d) and apply to s100(1)(e) also.

103. The provision refers to "other persons" therefore it is possible that the actual or proposed steps taken for the health and safety of third parties such as customers, clients, hospital patients, children etc might be covered. In ***Von Goetz v St. George's Healthcare***

NHS Trust EAT 1395/97 the EAT did not limit s100 to employees and it was enough to encapsulate third parties.

104. Whether the employee's actual or proposed steps under s100(1)(e) were appropriate is to be judged by reference to "all the circumstances" including in particular, their knowledge and the facilities and advice available to him at the time (s100(2)).

105. A dismissal for under s100(1)(e) will not be unfair if the employer is able to show that it was (or would have been) so negligent for the employee to take the steps which they took (or proposed to take) that a reasonable employer might have dismissed him/her for taking (or proposing to take) them (s100(3)). In such cases the fairness of the dismissal will be determined under s98(4) ERA.

106. In the context of s100(1)(e) the belief of the employee must be reasonable and honest. The employer's belief as to the facts or danger etc. is not strictly relevant to this (***Oudahar v Esporta Group Ltd. UKEAT/0566/10***). It might in some cases be relevant in undermining whether the employee's belief was reasonable contextually.

2nd June 2020

The law and guidance relating to the contents of this document are constantly evolving. All reasonable endeavours have been used to ensure that this document is correct as of the date it was written. This document should not be taken as legal advice and should not be relied on as such by anyone. Neither 3PB Barristers or the individuals accredited with writing the documents are providing any legal advice to ARAG or their policy holders by providing them with this information. Anyone considering this document should take legal advice before taking any action. ARAG policy holders should not rely on this document as a substitute for contacting the legal advice line.

Sarah Bowen

Barrister
3PB

0330 332 2633
sarah.bowen@3pb.co.uk

3pb.co.uk