

MID-YEAR UK EMPLOYMENT REVIEW 2020 - MANAGING TRICKY ER CASES IN A COVID- 19 CONTEXT, WHISTLEBLOWING AND HEALTH AND SAFETY ISSUES

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Simon Stephen discusses managing tricky ER cases in a COVID-19 context, including best practice on handling investigations and hearings including ill health/disability, whistleblowing and health and safety issues.

Transcript

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Jane Fielding: Hello, I am Jane Fielding, head of the Employment, Labour and Equalities Team here at Gowling in the UK, and I am delighted to welcome you to the third in our series of four webinars that have replaced our usual in-person mid-year review.

So, the topic for today is "Managing tricky ER cases in a COVID-19 context". And just to run through the agenda with you of what we are going to cover, we picked this because it is always a useful thing to remind us of how to approach these sorts of tricky employee relations issues and a review of the basics. So that is the first part of the session.

The next two topics are practical issues essentially that arise because of the nature of the Coronavirus Pandemic. So how do you deal with an ER issue when the people involved, the people you need to speak to, are furloughed. And that leads on to issues around, if you cannot meet safely in a COVID-compliant way in person, you are going to have to have virtual hearings and how do you deal with those and approach them.

And then the last two topics in the session are focussing on the sorts of issues that we are seeing coming up in this current pandemic environment. So we have got health and safety issues around people's return to work concerns for example. Those give rise to whistleblowing issues potentially, and there may be other issues around whistleblowing that we need to look at. And then finally there are naturally issues around ill-health but also potentially issues around managing people with longer term ill-health issues or disability issues in this current environment.

So the aim is to refresh on basic ER, but also to look at these issues very much in the Coronavirus context. Our speaker today is Simon Stephen who is one of the legal directors in our team and he is extremely well placed, possibly uniquely well placed, to talk about this topic because, as well as having worked with us as a lawyer for nearly 15 years, he has also spent four years in an employee relations role in a major investment bank. So he has seen things from both sides if you like.

Simon is going to speak for about 30 minutes and then we will have time for some questions. So a couple of housekeeping points before I hand over to Simon. If you would like to ask a question, then we are using the Q&A function which you will find in the bottom of your screen. So just click on that and type in your question. We will do our best to deal with as many as possible at the end before we close but I cannot guarantee that we will get to all of them based on past numbers of questions that we have had. And secondly, at the end of the webinar, you will get a questionnaire which asks for feedback on the session. Please do take a couple of minutes if you can to fill that in and send it back to us. We do read your feedback and use it to shape future sessions so we would be really grateful if you could do that for us and I will remind you again at the end. So I will now hand over to Simon.

Simon Stephen: Thank you Jane. Good morning everyone, welcome from my kitchen. So

as Jane said, I am pretty well experienced in ER so I will be running through the agenda that she put forward.

The first point on the agenda (if I can make my IT work) is 012 of the general principles. I appreciate that for a significant number of the people on the call ER is your bread and butter and you are very experienced so this is in no means an attempt to teach you to suck eggs. I think it is always important in an ER case to remind ourselves of the general principles in any case, but in terms of COVID and the COVID context, as I will be calling it today, I think it is even more important. Life is generally different of course and in many ways more difficult so, ensuring that we think back and fall back on the general principles, are going to hold us in good stead for running an ER process and mitigating any risks or fall out at the end.

So we have the general principles as I see them on this slide, there are five of them there. The first point I want to make though is that, any ER case, it is in fact the employer's process. It is always your process whether that is a disciplinary, an investigation, a grievance or performance management appeal, whatever it might be, it is your process to be done in lines with how you want to do it. It is always important to keep that in mind particularly now as, there are going to be more tricky issues. That said, you must always remember that all steps are to be reasonable. Reasonable is a wonderful word which lawyers spend ages arguing about in all types of context. I think what it means really in ER cases is that, when somebody looking from the outside will say "OK that's fair enough, I can see why they are doing that, that is kind of fair to go with". So I think we always look at it from that point of view. And it is also important that all the steps are reasonable. So that is everything from who we choose to hear a case, who we choose to do an investigation through to how we do each step, how we communicate it and we come to a decision.

The second point is that processes must be timely. I think this is something we are all alive to and indeed lawyers love to remind clients that things must be done quicker, or maybe put a bit of pressure on. From sitting on the other side of the fence from running ER cases, I completely understand why that can be really difficult to do. You are reliant on so many different moving parts within a business of which an ER process is just one. But that said, we must always make sure that the processes are timely. And I think in a COVID context, this is one of the issues that is going to be more difficult because there is just simply so much else going on within a business, within personal lives. Again this runs through the whole lifecycle of an ER case right from the outset and I think in a COVID context, probably the most important thing about the timely point, is to make sure that when something comes up it is dealt with there and then, or at least the initial steps are

taken there and then kind of putting a flag in the ground so it does not drift.

The next step is the process must be fair. Again, another wonderful word which lawyers can argue about. But it is really meaning that it is balanced in the interest of everyone to the extent it can. No one likes an ER process apart from maybe a number of you on the call and myself, I think they are brilliant, I love doing them. But no one likes being disciplined. No one likes being investigated. People do not really like raising grievances because by the time you have got to that, you have dug your trench. So having a process that is fair is balancing that with everyone.

And then consistency. I think consistency along with timely is going to be one of the difficult things in a COVID context because things are different nowadays. But it is really important to bear in mind that whatever we do in any ER case, there are going to be other examples before COVID and after COVID and to the extent we can, processes, the decisions made, the outcomes, how we do things, are to be consistent throughout. And a good example was in the news last week about a postman who was dismissed. He was videoed urinating in public because he was not able to get to the nearest public toilet at the supermarket, I think it was. And he was dismissed and you might think, well that is fair enough, that is pretty gross really. But he was successful in his unfair dismissal claim because he brought a lot of evidence to show that a lot of other postmen and women had been caught urinating in public and they had not been dismissed. So the tribunal said, well that just shows that there is an inconsistent approach and the dismissal is unfair. So it is very important to bear that in mind.

Well as usual, there is a catch all to all the circumstances. This is all the circumstances, it is the individual and that will include the COVID context, it is all the business who is doing it, so everything else.

So if you bear those five points in mind together with the fact that it is your process that is going to give you a good sort of back stop through conducting any ER process.

So in terms of back to basics. Again, not teaching you to suck eggs, but a reminder of where these basics come from. First you have the ACAS code of practices and the guidance and I will link them on the slides, I will make the slides available afterwards so you will be able to access that. It is a very short document. You may not have read it for a while, always good to go back and read it to make sure you remind yourself what it says. But also it is important to make sure you are up to date with what your internal policies say and of how they are applied to the ER case you are dealing with. And then I think a new back to basic that comes up in a COVID context is the importance of risk assessments. Risk assessments are something that have always been advised on from a

health and safety perspective and frankly is probably something we have never really been too involved in. Now risk assessments are at the forefront. Risk assessments are such a key thing in managing where we are now. But it is very important that you take into account the outcome and input of any risk assessments included in any ER case. They will feed in and it is quite an easy win or an easy argument for someone who is challenging an ER process to say this is not in accordance with a risk assessment. So I think bearing that in mind and feeding that in is very important.

Before I go any further, a big red stop sign (and that is not just to add some colour in for my otherwise slightly dull slides) but it is really important, when faced with an ER issue, as I said you acting timely, it comes up, you have picked it up, you have put the flag in the ground. It is very important to take that step back and just stop and think, do we need to do this, is this something that needs a formal process or are there other better ways of doing it? Now this is always something that should be in consideration and I think in the COVID context, given all the other complexities we have in running a business, in people's personal lives, but it is important to take this step. As an example, I had a talk to a client a couple of weeks back where there was a pretty flagrant data breach and it would look pretty straightforward in terms of, well that is an issue that needs to go through to disciplinary. We just counselled a bit of caution knowing a bit of the background about the people involved and before launching into the formal process which is what the client wanted to do, they had a quick conversation and it turns out the individual just made a mistake because they were struggling with childcare, struggling with mental health, struggling with a number of different issues. So the risk was able to be mitigated and that process was able to be done through a different means. Had they gone through the formal process, things could have escalated very quickly into something that it did not need to be. So just a word of caution just always stop, think, before any formal action is taken.

So flicking back to the ACAS code of practices, the key importance from a legal point view that the code of practice still applies to ER during COVID and any failure to comply risks an uplift in compensation of about up to 25%. It is also a very easy win or a very easy argument for someone who wants to challenge what you are doing to raise it and say, what you are doing is not in accordance with the code of practice. It gives you something else to think about and it detracts from moving on with the process. Because ultimately what we want to do with an ER case is start it and finishing it as quickly as possible. And the things that delay, obviously ill-health and things like that will come up but it is arguments and challenges from employees. As I said before, nobody likes being in a process, but to the extent you can engender some form of trust to enable the process to go from start to finish the better and making sure that there are no easy wins in terms of

the code of practice or not comply with the guide (which the link is there as well on the slide) and indeed the updated COVID-19 advice from ACAS are all going to be key points.

Drawing on the specifics that I think you may not have seen but are of importance that are out right now about COVID and the context, these are the ACAS key points that they have got in their specific COVID advice. So over and above the code of practice and the guidance. But again, you look at them and you think, OK that seemed kind of self-explanatory, it is quite obvious, but they are very easy things to kind of loose track of during an ER case so they do link up with those key principles we were talking about in the beginning.

So first of all, following the public health guidelines, making sure that your interpretation of them, doing a risk assessments and how you do that, you are kind of still complying with them through an ER case. But of course, considering the health and wellbeing of employees, which are going to be potentially more of an issue now during COVID, and then we come to the consider and discuss options. That is the stop sign. What are the options? Do you need to do it? Are there other means of doing it? And also another key point about communicating and explaining decisions.

This goes onto the trust point to the extent you can get trust in an ER case. Telling people what you are doing and why is going to be really key to preventing the challenges and enabling you to carry on with the process, even if they are decisions that people do not like, you can communicate and explain how you have done that, why you are doing it, coming back to those key points - why it is reasonable, why it is fair. That is going to go a long way to helping you complete the process, get it done and it is also fast forwarding into the future if there are any tribunal claims or litigation and it is going to give you good stead in defending those.

The next back to basics point is quickly on internal policies and processes. They are obviously very important in how you govern ER processes and there are so many different types. You may have quite a high-level process or you might have an all-singing all-dancing process. It is very important before you start doing any ER processes, indeed I would recommend you do it as a matter of course, even if you do not have any ER cases right now, it is be sure they fit the current scenario.

Do they allow you to do what you need to do to manage a case during COVID? For example, virtual hearings which we will come onto shortly. If you do need to flex or adapt any policies then plan what you are going to do. Plan how they feed into all ER cases and communicate those changes, make sure they are clear in any processes so people understand why things are being slightly different and again, that not only removes you

away from the potential risk of having a lawyer or a representative, or someone coming in and saying "ooh you did not do this and your policy says you should have done". You are building into that plan and communicating them.

Also then just making sure that any changes, any flexes to policies are consistent throughout. If for one case you make a flex or you adapt your policy to accommodate a situation, be prepared to be consistent with that going forward because these are the kind of pitfalls that are very easy to fall into.

That was a quick run through from the back to basics again. I appreciate there are a number of experienced people on the call but they are very important to bear in mind and keep bearing in mind all the way through.

Moving onto some more of the sticky issues with ER cases which we will no doubt encounter.

First of all is the COVID job retention scheme and furlough. Furlough is something that I think the government has found that people are using a lot more than they were expecting and there are significant numbers of people on furlough.

The difficulty in ER context is that rule that I am sure we are all familiar of - is that someone on furlough leave cannot do any work. They cannot do anything which adds value for an employer. That raises an immediate question; which is if I have an ER case, if I discover a disciplinary issue, or indeed somebody while on furlough is doing something they should not do or somebody raises a grievance, what can I do? Can I actually do that process?

The quick answer is, yes you can. The long answer is, but that depends on a number of different points. The first - and this is why it is important to fall back onto the basics - ACAS agreed advice on this. Now, ACAS advice is not a statement of law, it is not like a code of practice which can be taken into account and it can affect compensation.

It is advice, it is advice to be taken into consideration in how you run your processes, your business, as part of everything else, but it is a very important backdrop. The ACAS advice is clear that an individual who is on furlough can take part in the ER process. They can take part as a subject, as an interviewee, the chair, a witness or indeed, as a companion. But - there is always a big but, they can only do so if they are doing so voluntarily and in line with government guidance.

So pausing there in line with government guidance that will fall back into risk assessments, how are we interpreting government guidance and all our requirements, but also then it is

doing it voluntarily. So it is that engagement, that communication with people. There has been a recent case which was held that given evidence in court, so in being a witness in a court case is not work for CJRS purposes. Same for furlough.

I think that is a useful analogy but it is not quite the same as somebody who is actually involved potentially as part of their day job. I think the reality is, it is a balancing act. It comes back to what is fair and what is reasonable and how do you do something timely. If somebody is on furlough and you take the view that you cannot deal with that, then you are not going to be able to do a timely investigation.

Are you going to be explain and justify that delay to that individual concerned, to any rep that may have, or indeed to a tribunal. So you have always got to balance that against what is the risk. And there is the risk of course that an individual who is on furlough and take part, they object, they complain that you are making them work or HMRC might get more interested. There is always that balance and it comes back to that stop sign. Do we need to do this now? In most of the cases given the fact we need to do things timely, the answer will be, yes we do need to do something now and I think the approach to take from this is taking into account all the individual circumstances. You can proceed with ER cases with people on furlough as long as you engage with them and are not doing it against their will.

Moving on then to the next bit, virtual processes - so you have an issue, you have run through your basics, you have checked people are on furlough, you have taken a decision that actually people on furlough you are going to approach them. We are going to move this on timely. How are we going to do it?

Some offices/workplaces obviously have people back in the office now - we will come onto those meetings in person but a significant number of people are still working from home or indeed, on furlough they are not working at all.

How are you going to manage a process with that? Virtual processes are something that are pretty common and are going to be looked at. Indeed, the tribunals themselves are using virtual hearings. If tribunals are moving into the virtual world, then there will be an expectation that everyone else will do as well.

The first thing about virtual processes I think I would say is that they are not really a new thing, from my experience working in a global company, is that global processes were done quite often because you cannot, realistically, fly people from New York to be a witness in an investigation or you cannot fly people from Spain for a disciplinary.

They do work. Before you do anything, of course though, then you fall back into the risk assessment. If an individual is working from home, does the risk assessment and they have mental health concerns etc. does the risk assessment throw up anything else that needs to be taken into account.

Again, you come back to, do your policies allow them? I think it is very unlikely that there are policies which will not allow them. It is always important to check that you have not got something in your policy which prevents you from doing it. Particularly maybe in larger organisations or regulating organisation or bodies where the processes are a bit more set in stone and actually set out more verbatim about what will happen.

You have to make sure you can do them. Before you embark on any virtual process, it is really important to make sure you have done that planning. Planning how it is going to work and communicating how it is working. Many people will be unsure about it. It is, frankly, quite odd doing things by video all the time (he says, doing a webinar by video and having done tribunal claims).

It is different and it can be quite unsettling, so making sure it is all communicated, having a clear process, what is going to happen, what to do if technology fails, how do we deal with confidentiality, how do we make sure no-one else is sat in the room with them. All these things need to be built out in a plan to start with.

Just a few practical points on it. You need to ensure that people have access to secure technology, you need to be able to accommodate a companion and a representative, something that is often forgotten and given the context of COVID, can you accommodate, can you flex using a companion representative. What is the right to have a colleague or a trade union rep. In some situations that might be quite difficult for people, they might not want to have a companion on another screen on a video call. They might be working at home with a wife, parent, partner, husband, whoever it might be and it might be easier for them to have them sitting in with them. Because frankly they are going to be in the room anyway.

Normally you would say no to these processes, but can you flex to accommodate these? Of course, then you document that decision and document why you flex that so you do not get into trouble when you do not allow someone in a non-COVID context in a year's time. That consistency piece.

I would just say there, it is only going to be a very rare circumstance where it is right to flex to allow lawyers in. To be frank, lawyers in an ER case just tend to get in the way and turn things into processes that are not.

Then just running through these other key points. How are you going to approach documentation? Obviously sending E-bundles, through PDFs etc. is much preferable. Can people access them? Are they password protected? Are you using the same software to transfer? All these things need to be planned and built in from the outset so they do not become something for people to get upset about at the time, the day before the hearing.

Again, communicate with the individuals and accommodate their circumstances. Do they have access to private area? They might be in a small area with lots of people who also work there or do they have health issues that need to be taken into account? That is where the risk assessment comes in. Mental health is and will continue to be a big issue for people working from home. Does anything like that need to be taken into account in how the virtual processes work?

Not least because they are much more tiring. If you are going to have a four day disciplinary or a three, four, five hour investigation meeting, think about how you are going to structure a virtual hearing because it is going to be much more tiring for all those involved, not just the individual but the chair and any companion as well.

Touching on meetings in person, do you really need to do them in person? It obviously adds more risk and you will link back into the risk assessment. But there are a number of practicalities to meet, even if you are an organisation where people are back in the office.

You are going to have to think very carefully about where to meet, how can you keep socially distanced in an investigation room? How can you accommodate breakout rooms and companions if they want to go and have a discussion? Do you have enough rooms that are sufficiently secure and safe? And again the approach to documentation, how are you going to get people documents? How are they going to be safe and ensure that those documents are clean? Indeed when you are in a meeting often documents will pass between people. Are you going to allow that? How are you going to communicate? All these little things which will come up as issues in a hearing should be planned out in advance.

Moving onto the next sticky issue about ill health and disability. This is always a tricky issue in ER cases. I think it is more tricky in the COVID context. As a recap, as in all processes, you are going to have to build in reasonable adjustments and also claims under Section 50 of The Equality Act which is the claim where something happens to someone and it is a rising consequence of a disability. The prime example for that is you discipline someone for absence and their absence is because they are disabled.

You are not directly discriminating against them but you are doing something to them that

is basically a consequence to a disability. These are things that are going to be built up even more. They are going to come more to the fore I think during COVID. Not least because health concerns are going to be at the forefront of everyone's minds.

As I said, it is going to build in with new risk assessments but as with virtual hearings, you are going to have to consider the impact of logistics on people. How is this going to impact on someone who is unwell or who has a disability.

I think the reality is, as I said before, it is going to be more stressful, so do we need to think about whether that will exacerbate the conditions and make further adjustments to that. I think a wider point which can easily get forgotten, is that if people are working from home or indeed if, when people are coming into the office and having these meetings, they may well be accommodating dependents or associates back home, who have medical conditions which could be something that has an impact on that individual particular, for example commuting on public transport.

All of those things will need to be borne in mind and again communicated and documented. So it is that communication with the employee, making sure you understand what that employee's needs are and communicating with the employee about why you are doing various things. More importantly than ever, is making use of all the medical support available and that is any employee assistance programmes or occupational health.

As a matter of course, if somebody is off sick or somebody is unwell, the advice is always to get occupational health advice. Do you need to do that in advance, at an earlier stage than you might otherwise do. And you are going to have to prepare to be more flexible. Because there will be more ill health issues. People will be more stressed - mental health considerations are going to be much more likely I think so you are going to face these and you may well end up with that situation where people are in fact, off sick with stress.

If you can build things up right at the outset to try and make it as easy as possible, bearing in mind all the things you have talked about. That should mitigate the risk of that happening. Particularly if we are more compassionate, and this might sound a bit weird for you to hear a lawyer saying we need to be more compassionate, but certainly from my experience of working in-house is that compassionate understanding, acknowledging people's problems or working round them with communications and plans, help to engender that trust and helps you get that process going through.

Again, there is no magic wand with ill health and disability in the COVID context, other than it is just something that is going to need more consideration than before and at an earlier stage than as before.

Health and safety issues are also going to be a potentially sticky issue. Again, sounding like a broken drum, the importance of the risk assessment. Always come back to that risk assessment, your internal policies and those principles that we covered at the beginning. People will have concerns about returning to work, they might have concerns about their own health and safety and they might have concerns about the health and safety of dependents and colleagues.

You will get complaints about that but also when you are asking people to come into the office for meetings in person, these are the kind of issues that you will have. People will also have concerns about participating in processes. You will have two situations, people will say I am raising a concern about what is happening to me and that is my grievance or that is my whistle-blowing complaint. I want you to investigate. But also there is also going to be issue about somebody who is in an ER process, who raises concerns during that process about what is happening is in fact, a breach of their health and safety. Particularly working from home, mental health and all these kind of things.

All of this needs to be taken into account and planned at the outset, falling back on the risk assessment. It is really important to remember that key thing about health and safety issues is that employees are protected when they reasonably believe there is a serious and imminent risk to their health and safety. If somebody does believe that and they do not come into work, or they say they will not participate in an act, then they are protected from detriment and dismissal.

I will just pause on the detail of that because that does link a little bit in with the next thing which is whistle-blowing. I think the expectation is that there will be a high number of whistle-blowing cases coming through.

Charities such as Protect report a significant increase in calls to their helplines. I had a call with the chief executive of Protect a couple of weeks back and I think the number she quoted was about a 50% increase and this is people complaining about furlough fraud or misuse. "I am on furlough and I am being asked to work" or indeed we have had ones where people say, "I am not on furlough and I should be".

People are also raising the health and safety concerns through the whistle-blowing format. People also, similar to the health and safety in the fact that people raising health and safety concerns about being asked or how they participate in ER process, there is possible retaliation for having raised concerns in the first place or there could be concerns raised through a disciplinary process. Them saying "I think that being asked to do this investigation impacts on my health and safety, or indeed of others. I have raised this

concern, but you are not dealing with it. Why have not you dealt with it properly?" You can then potentially face retaliation claims for having raised those concerns in the first place.

The reality is any whistle blowing around furlough fraud and misuse, or health and safety concerns are likely to qualify as protective disclosures, which gives people further protection from being subjected to a detriment or dismissal as in the health and safety claims.

A different stop sign as to hopefully keep you awake, but then when dealing with whistle-blowing cases, and any health and safety. So if you have done any tricky ER issue then I think the same is for ill health and disability when you have these issues, stop and take a pause. I do not mean stop the process. I mean, just stop and think about the impact. Do not let the knee jerk. That is one of the biggest pitfalls in tricky ER cases involving ill health, disability, health and safety and whistle blowing is that people's immediate reaction.

Somebody says they are feeling stressed and the reaction is, well we are all stressed. I do not believe you, let us just crack on. That knee jerk reaction, you are bound by and it will come back and bite you later on.

Tribunal claims have been listed for years in advance now, ones where it is 18-24 months. The individual is not going to forget what that initial reaction was and you are still going to face those issues in explaining it to a tribunal.

When you do this pause, just make sure you pause and understand what is being said. Something may not be being phrased as a health and safety or whistle-blowing claim but that could well be how it is phrased later on down the line when the individual has not got what they want.

Always stop. Take a measured approach. Think about what is actually being said or what could be being said and then pause and think of any further investigation is needed. Again with ill health and disability this applies as well. And you mentioned the ill health and you mentioned a potential disability. Have a pause. What else do we need to do to understand. To make sure this process is fair and reasonable in all the circumstances.

And then it is important to engage the correct procedure and the right team. I put that because many organisations, many of you will have your own whistle-blowing teams or whistle-blowing processes, health and safety teams etc. Just making sure that they are engaged in the right way. Likewise engaging those who you need to in relation to medical ill health, occupational health for example.

Before I close, just wanted to recap on the practical tips that hopefully have come through this. I think to be frank I could have spoken for hours about this, there is so much here. It is a bit of a trot through and recap.

Any ER case needs planning carefully but in the COVID context, that planning is just so key. Planning what you are dealing with, why you are dealing with it and then planning what you are going to do as things come up, having that done at the outset.

That will give you the structure to complete a case. And then communicate. This is something that is often forgotten but making sure that people understand. If there is a delay, even if it is only a few days or a week, because your hearing manager is unwell or something and you need to find another one.

Let people know. Keep people in the loop so they can feel engaged and it all goes back to that trust point. The best you can, try and get people to come with you on the, clichéd phrase, but come with you on the journey because once we are in there, it is going to happen.

I think as well, be confident. Do not be tempted to use the long grass that COVID may create for you. It is possible because people are on furlough or actually as virtual hearings or the risk assessment says that I need to take into account someone's mental health, it is tempting - we are all human - to park it or to kick it into the long grass.

Do not do that. Or at least do not let the knee jerk and let that be your first reaction. Plan and make sure that any decisions around it are done properly, documented, communicated so the process can be done as timely as possible to avoid that risk further down the line.

And then the final point, because of all these things that are going to be thrown up during COVID, just ensure that you have got the right people for the job. Horses for courses. Ensure the investigation and hearing managers are trained - not only in your own ER processes but any flex that needs to be done. Any adaptations and make sure they are people who can be compassionate and can do the right thing for the individual.

I think I am coming close to my allotted time and Jane has popped up so I will refer back to Jane.

Jane: Thanks Simon very much. So we have had some questions through on the Q&A function and in fact the first one follows very much from that final point. You talked about carrying out these processes when people are on furlough.

The question is, can a manager hold a disciplinary - so, you be a chair of a disciplinary if they themselves are on furlough?

Simon: Yes, thank you. The answer is, yes they can. The ACAS code is clear on that. They are included in that. So somebody can be a chair. Again, it comes back to, are they the right person, is the circumstances of them being right if they are on furlough and I did mention it, but think about if somebody who is on furlough is, what are their domestic situations.

Are they on furlough, are they the primary child-carer etc. Have they changed things? All those other circumstances to think about. But from a legal point of view and a practical point of view, yes someone can be a chair. It is important to approach them voluntarily to get them on-side which I am sure you do anyway because, to be frank, you do not want a reluctant chair. That is not going to end well. But yes, you can but build in all the circumstances in making that decision.

Jane: Okay. And then there is another question around people returning to work and it is an issue that we have discussed a lot in the team. Basically, if a business has carried out its health and safety COVID compliant risk assessment and possibly has gone above and beyond the necessary measures and they are very confident that they have created a safe working environment. But somebody is refusing to come back because they have a partner who is shielding. Where does the business stand from the point of view of disciplining that employee for not fulfilling their contractual obligations?

Simon: Again, ultimately if somebody is refusing to come to work then it is potentially a disciplinary situation and that is the end game. I think with most of these things, you then roll back and ask; why is this person not coming to work? And where they are not coming to work, is it concerns of shielding, so from the commuting point maybe they talked about before. Bringing risk home. I go to work and when I come home I bring risk.

Risk assessment should cover all of these and I think it comes back to that communication point with an individual. Communicate as best you can or as much as you can to get them to try to understand. Understand their own individual concerns. Why is it different than the risk assessments been carried out? Almost like a personal risk assessment for them.

In many ways it is a bit like reasonable adjustments. Given the context and given that compassion and given the fairness and reasonableness, think about what else can be done. We have already gone over and beyond so is there anything else we can do? If there really is not, you are then stuck with the choices are, can you furlough the person? Can you put them on unpaid leave until the situation is that they can come back? Do they

have leave they can use up? Explore all these options and if none of those work out then I think you almost - although I do not like tick box processes - but you have ticked the process to say, okay well we do not have any other - there are no alternatives now. We have requested you come back to work, it is safe. Our risk assessment says so. We have explored everything with you. We are in the situation or actually it is disciplinary.

Jane: Okay. We have got a couple of minutes. Just time to slip in a quick one about whistle-blowing which somebody has asked. The question is, what if an employee has raised issues with the Health and Safety Executive or HMRC around the furlough scheme. Is it okay for the employer to still carry on with their own internal process?

Simon: Again, the short answer is yes, you can. You just have to tread very carefully and carefully in terms of making sure that whatever the substance of a whistle-blowing to HSE or HMRC is, at first of all people retaliate against that so you need to put your whistle-blowing policy and processes into action to make sure that there is nothing done as a result of that.

If there is an underlying ER case which you need to do which involves this individual who has taken concerns to a regulator, it is then a process of working out what exactly this ER issue is - if it is a disciplinary or whatever it might be and hiving that off from the concerns that they have raised with HMRC and HSE. If you have got a disciplinary and halfway through somebody says, oh actually I think what you are doing is wrong. In terms of furlough, pause and stop. Hive off that concern, allocate it to the right body and when that is done you can then come back and say, yes but we are still going to look at your end wrong-doing. Very much it is that kind of pause and stop.

You can indeed carry on. If what you are actually investigating is that whistle-blowing issue, then of course it is slightly different. You would liaise with HSE, you would liaise with HMRC to make sure that they understood what you were doing in terms of your process. Sometimes it may be agreeing that process with them. You can still run your own process and they would expect you to, in any event. I think it is where there are situations where the police were involved or other things that may be right to pause but ultimately you have still got an internal issue that you need to look at and you need to do that as timely as possible.

Jane: Okay, thanks Simon. It is 11:40 and we said we would finish after 40 minutes so I am going to draw it to a close now and so thank you to Simon for the session and for fielding those questions. Before I close, if you do have time to fill in the feedback questionnaire which you will receive shortly, please do that.

Thank you very much for listening and watching and enjoy the rest of your day.

Simon: Thank you.

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