WORKMATTERS
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NEWSMATTERS

July 2021

WELCOME TO OUR NEWSLETTER FOR JULY 2021

Our newsletter is issued to you quarterly to ensure that you can be kept up to date with employment issues. We will offer helpful hints on how to handle situations within the workplace, but never be afraid to give us a call for both guidance and support. All newsletters are on our website ensuring easy access to current information just click on the newsletter you wish to view.

This Quarter the focus is on the changes in law which may affect your business.

- Job Quality in the UK – CIPD report
- How to manage employees with Long COVID
- COVID 19 recent tribunal cases

Our October newsletter will hopefully bring you more positive news as the UK economy will hopefully have re-started and may well be slowly bouncing back. Please stay safe.

We think you'll find the articles very interesting. Please call us on 01442 870742 to discuss any of these articles and see how we can help you and your business more effectively in the field of Human Resources. Alternatively have a look at our website **www.workmattershr.co.uk** and email us from there or on **carolinebrode@gmail.com**.

As part of the GDPR we are mindful of the fact that you can choose to receive our e-newsletter. If you are happy continuing to do so no further action is required or if you no longer wish to receive our e-newsletter please reply to this email with 'unsubscribe' in the title and we will remove you from our list or go to our website.

In This Issue

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JOB QUALITY IN THE UK – CIPD REPORT

Jobs in the UK continue to fall short based on several key measurements and inequalities persist, despite the pandemic not much changed with good jobs remaining good and bad jobs remaining bad. The CIPD Good Work Index has been reviewing things since 2018 and using this experience is encouraging employers to inform their policies and practice.

So, whilst the furlough scheme saved millions of jobs, too many of these fell short of the UK's ambition for 'good work'.

Key Findings of the Survey

- **One in four workers say work is bad for their physical or mental wellbeing (23% and 25% respectively – representing little change from 2020, where 26% and 27% of workers said this).**
- **Just 52% say work offers good opportunities for development (and only 40% of furloughed workers say the same) – showing little improvement from 2020 when 48% of workers said this.**
- **30% of workers report unmanageable workloads, similar to the 32% that said this in 2020. This year the figure rose to 36% among key workers and 32% among those working from home all the time (regardless of occupation).**
- **One in four workers report poor work–life balance, finding it difficult to relax in their personal time because of work (the same figure as 2020), and flexible working options remain out of reach for many.**

Inequalities continue to exist. Access to good work continues to vary by occupation, higher and managerial professional roles tend to have more positive perceptions.

Disparities in opportunity for skills development is another area for concern, and one which was exacerbated for those who were furloughed. Pre pandemic, those in routine, semi-routine and lower supervisory and technical roles were less likely to say their job offers opportunities for development.

63% of those in higher managerial and professional roles say they have the opportunity to develop their skills, compared with just 27% of those in routine occupations.

It should also be noted that those in 'lower class' occupations saw the most redundancies in 2020.

'As we rebuild our economy post-pandemic, employers must invest in job quality across their workforce, to minimise trade-offs and avoid exacerbating existing inequalities. A strong recovery is not just about more jobs, but better jobs too. It may not be realistic to make all jobs great in all ways, but with a better understanding of the different aspects of job quality, employers can and should help ensure that work benefits people and societies as much as it benefits business and the economy.' – Melanie Green, Research Adviser at the CIPD.

Employers Should Act Now to Improve Job Quality

The CIPD is urging employers to review the various dimensions of job quality explored in the Good Work Index and consider what they can do to ensure that good work is a reality throughout their organisation.

For example, it recommends that employers:

- Examine potential trade-offs in job quality and consider whether these are necessary. Challenge the assumption that lower paid occupations inevitably have fewer opportunities for skills development, or managerial roles will always struggle with workload.
- Keep wellbeing high on the agenda, even when the pandemic subsides. Take an individual approach that recognises wellbeing challenges look different for each of us – and will partly be influenced by other aspects of job quality.
- Prioritise better skills development and alignment. Think about how to make skills development more readily available and address any mismatches between skills and job roles – especially for those in routine and semi-routine roles and those who've been furloughed.

JOB QUALITY IN THE UK – CIPD REPORT continued...

- Monitor workloads. Put enough resource in place to avoid overwork and negative implications for wellbeing – especially for remote workers and key workers.
- Review flexible working options to address the work–life balance challenges your workforce faces. If some types of flexible working are out of the question for certain roles, identify other flexible working arrangements that would benefit both parties.

While COVID-19 has driven an increase in remote working, 46% of UK employees still do not have flexible working – whether that be remote working, flexi-time, job shares, compressed hours, part-time working in their current role. And those without access to flexible working are around twice as likely to be dissatisfied in their job, compared to those who do.

The Pandemic has clearly identified the benefits of flexible working arrangements for employers and employees: from improved wellbeing and work– life balance to greater productivity.

There is a campaign to encourage employers to support flexible working for all and the right to request flexible working from day-one of employment. The campaign is for a change to UK law to make flexible working requests a day-one right for all employees. At present, UK law states that employees can only request to work flexibly after 26 weeks of employment, with a limit of one request per 12-months.

A View on Good Work

Work can and should be a force for good, benefitting people and societies as much as it benefits business and the economy. Measures of GDP and employment rates are important, but we also need to understand whether the jobs we have are good or poor and how they can be improved.

But what does a quality job look like?

- is fairly rewarded and gives people the means to securely make a living
- allows for work–life balance
- gives opportunities to develop and ideally a sense of fulfilment
- provides a supportive environment with constructive relationships
- gives employees the voice and choice they need to shape their working lives
- is physically and mentally healthy.

All jobs have the potential to be better and we should aspire to making good work a reality for all, regardless of personal characteristics or occupation. It may not be realistic to make all jobs great in all ways, but there are several dimensions to job quality, and by being more creative with job design and HR practices, employers can and should make work better for everyone.

Job quality is affected by a range of factors, including employment legislation, labour market conditions, HR practices, the quality of people management and by workers themselves. Policy-makers, employers and people professionals all have a role to play in ensuring that work is both productive for the organisation and good for employees. The CIPD Good Work Index gives insights that help individuals, employers and policy makers improve and protect job quality at every level.

HOW TO MANAGE EMPLOYEES WITH LONG COVID

Employees who caught Covid in the last few months may still be suffering from the effects of the virus months after contracting it may end up qualifying as disabled. It is estimated that over one million people have reported experiencing Long Covid.

What Is Long COVID

The long term effects of Covid were initially unknown when the first advice was given. Initially, the general advice given from the Government was that people who contract Covid-19 would only suffer from mild flu-like symptoms and would usually fully recover after a few days' rest. However, sadly, some people have severe reactions to the disease and/or suffer from debilitating long-term problems, such as chronic fatigue.

People who had mild symptoms at first can also still have long-term problems. Fatigue, pain, headaches, breathing difficulties, muscle weakness, lasting fever, problems with memory and concentration, difficulty sleeping, heart palpitations, dizziness, pins and needles, joint pain, anxiety, depression and stress, additionally people have reported tinnitus and earaches, feeling sick, diarrhoea, stomach aches, loss of appetite and rashes are some reported long-term adverse effects, which are becoming known as Long Covid.

There are growing comparisons with myalgic encephalomyelitis (ME). Employers are used to dealing with long-term absences, but find it much more difficult to deal with individuals who can be fit for work one day and debilitated the next.

Is Long COVID a Disability under the Equality Act?

Many of the symptoms of Long Covid are likely to meet the definition of a disability, which is any physical or mental impairment that has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities.

An impairment will be regarded as long term if it has already lasted (or is likely to last) at least 12 months. Ultimately, an employment tribunal would have to decide on specific facts if Long Covid qualifies. If tribunals take a similar approach to ME, employers should assume that anyone who is still suffering from the effects of coronavirus months after they were infected is likely to be able to demonstrate that it is long term and a disability.

If Long Covid qualifies as a disability, employers have a positive duty to consider what, if any, reasonable adjustments can be made to assist, such as adjusting working hours or allowing individuals to continue working from home after lockdown.

Practical points for businesses to consider:

- Be sure to engage with employees and consider making reasonable adjustments such as phased returns to work, adjusting working hours, amending the type of work done, allowing continued home working and providing access to occupational health and employee assistance programmes.
- Ensure you proactively manage absence and refer employees to occupational health to gain a better understanding of the situation.
- Even if adjustments are made, the level of absence may reach the point where you can reasonably dismiss on the grounds of capability. However, you would need to obtain up-to-date medical evidence first, discuss this with the employee and warn them that they may be dismissed.

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HOW TO MANAGE EMPLOYEES WITH LONG COVID continued...

- Employers may be able to make permanent health insurance (PHI) claims on behalf of such employees. Most PHI schemes stipulate a 'deferment period', with benefits not payable until the employee has been unable to work for a specified period – typically from six months to a year. Insurers are beginning to accept Long Covid claims, but employers need to check with their insurers.
- Ensure line managers appreciate the importance of applying policies and procedures in a non-discriminatory way.
- Employees who are off sick with Long Covid may possibly be furloughed, but this should be managed carefully. The furlough scheme is not intended to be used for short-term sickness absence, although businesses are nonetheless able to furlough employees for business reasons when they are off sick if they wish to do so. This is unlikely to be available for intermittent absence.

Consider Introducing a Long COVID Policy

In circumstances where an individual has been particularly ill from Covid-19, the introduction of policy will help to set out how your business will manage this, Long Covid has been seen in a multitude of people, from varied backgrounds, experiences with Covid-19 and ages.

Responsibilities of the Company

The Company is committed to encouraging and facilitating equal opportunities for all employees. We also recognise that the needs of individual employees who are suffering from Long Covid may vary and will carefully assess each case.

Therefore, the following steps to support staff suffering from Long Covid may be taken as and where necessary:

- establishing strong communication channels with employees in order to encourage them to discuss their circumstances
- providing training on Long Covid and its impact to both management and staff, raising awareness of the issue
- providing equipment and facilities to support and assist employees suffering from Long Covid in carrying out their duties
- ensuring that the needs of employees, arising directly or indirectly because of their work, are met
- ensuring physical premises and the working environment is safe.

Specific reasonable adjustments to the working day may also be considered. This could include the following:

- temporary home working
- temporary flexible working
- temporary change or reduction of duties.

Reviews of working arrangements and employee duties will be regularly undertaken to determine if any developments have occurred that require attention. This attention may consist of retraining, adjustments to the premises or revisions to the reasonable adjustments, or other changes the Company needs to make for the provision of assistance as necessary.

It may be necessary to consider training/ retraining or redeployment for an employee if they are unable to continue to carry out their duties. It may also be that suitable alternative employment is available should reasonable adjustments not be appropriate. The Company will make every effort to avoid termination, by providing necessary training and support and considering redeployment. The employee will be involved in the consultation process throughout.

Responsibilities of the Employee

Employees need to be responsible for making themselves aware of the actions they need to take to comply with any policies introduced by the Company.

If employees are suffering from Long Covid or who have been diagnosed with it are encouraged to raise this with their manager. This will enable the Company to give the appropriate support. Employees who has Long Covid may all have different symptoms so it is important to keep the Company informed of how their recovery is progressing and raise any issues. As there is no time scale on how long an employee may suffer with any of the symptoms regular communication is essential.

If employees feel they are no longer suffering from the symptoms of Long Covid, they are encouraged to inform their manager. The Company may, at this stage, remove temporary adjustments to their working day put in place as a result of Long Covid if appropriate. Again, full consultation will be held with employees before any decisions are made.

Sickness Absence Due to Long COVID

It is important to follow any Company sickness policy that is in place along with return to work interviews and if need be fit notes from Drs to support any absence.

Upon returning the need for a phased return may be needed as well as continued use of flexible working. Any changes to an employee's contractual terms must be done under consultation.

The Company needs to take into consideration the implications of Long Covid and its changing or recurring nature.

SHOULD EMPLOYERS BE ALLOWED TO FIRE AND REHIRE?

Should employers be allowed to fire and rehire? In economically hard times such as the pandemic, or when a business is restructuring, the ability to change employment terms can be an essential tool. The law does not allow an employer to change employment terms unilaterally, so giving lawful notice and offering a new contract in return is a safer option. It does create a dismissal though, which may be unfair. Unfair dismissals are often defended on the basis of SOSR – some other substantial reason – but the business need only have a 'sound business reason' for the contract change, as well as behaving reasonably overall. Is banning a perfectly legitimate process – lawfully ending one contract and offering another – really the answer?

Fire and rehire has been brought into the spotlight recently by the widely reported British Gas case, where employees were given notice to end their existing contracts and asked to agree new terms for lower pay and longer hours. Hundreds refused and so their employment terminated. An Observer poll found that 9/13 companies firing and rehiring this year maintained healthy profit margins. That headline might be misleading, it seems to disregard the fiscal responsibilities businesses have to shareholders and underplays the impact of declining profits. British Gas's profits have halved over ten years and this year reported its weakest earnings on record. Shouldn't they be allowed to address that downward trend?

The government asked Acas to investigate fire and rehire and received the report in February this year, but its content has not been published. MPs have debated the issue recently too. Government representatives indicated that they need to tread carefully when considering government intervention in commercial contractual matters between employers and employees. Whilst denouncing 'bully-boy tactics', representatives said the government needed to look at the Acas evidence on the flexibility that fire and rehire tactics offer, where the ultimate aim is to save jobs. The government has said they will look at the issue, and the Employment Bill more generally, 'when parliamentary time allows', so the can has been kicked down the road for now.

Fire and rehire should always be a last resort. The pandemic has shown that employees faced with the threat of redundancy are often willing to accept new, less favourable terms, in order to protect their long-term employment. Communication is the key here, as is considering what cost-free sweeteners can be offered alongside pay or benefit cuts. The last year has shown us that benefits such as flexible and home working are considered priceless by some employees. Fire and rehire shouldn't be banned, but it should be used sparingly, when all other methods have been exhausted and there really is no other option.

Changing Terms and Conditions – COVID 19 Recent Case Study

Khatun v Winn Solicitors

Many employers have changed terms and conditions during the pandemic, whether to access the furlough scheme or to enable the survival of the business through economically unprecedented times. Some employees have been willing to agree to those changes, keen to avoid a redundancy situation. If an employee refuses to change their contractual terms, an employer cannot unilaterally make the change without breaching the contract. The safer method is to dismiss the employee lawfully from the old contract – by giving contractual notice – and offer to immediately reengage them on new terms. Provided the employer has a sound business reason for making the change, the dismissal may be fair based on 'some other substantial reason' (SOSR), one of the five potentially fair reasons to dismiss. The dismissal must be reasonable overall, which includes following a fair procedure.

In Khatun v Winn Solicitors, the employer experienced a downturn in work due to the pandemic. It decided to furlough half its staff, with the other half retained to service the remaining work. All employees were required to sign new contracts or face dismissal. The new terms gave the firm the right to furlough staff or to unilaterally reduce their hours and pay on short notice. The employee refused to sign the new contract, saying she would consider furlough or a reduction in hours in future if the situation arose. The employee was urged to reconsider but she refused. She was dismissed without notice or accrued holiday pay because the COO was 'fuming'. Her remote computer access was removed before she was even told about her dismissal. The employer later accepted they owed her notice and holiday pay and paid it. The employee brought an unfair dismissal claim.

The employment tribunal agreed that she had been unfairly dismissed. They acknowledged that the business had sound, good business reasons for the contract change. Given the effect of the pandemic, it was reasonable to request these changes and it was not premature. Theoretically, the dismissal had met the SOSR test. However, the employer had not behaved reasonably

SHOULD EMPLOYERS BE ALLOWED TO FIRE AND REHIRE? continued...

overall. The tribunal conceded that only one employee out of 300 had refused to sign, which indicated that the business had acted reasonably. However, there had been no meaningful consultation at all, just a one-sided conversation. Although a subsequent phone call had looked more like consultation, the tribunal did not believe meaningful consultation had taken place. The employer did not explore alternatives and instead just reiterated the firm's position. The firm said they did not have time to negotiate with 300 staff, but the facts showed that it was only this employee with whom consultation was required. The tribunal was surprised that a firm of solicitors had so little regard for a binding contract and an employee's desire to protect her contractual terms. The employer's own evidence was that they did not explore alternative options and the employee would be dismissed if she refused. They had offered no appeals process. The tribunal said a reasonable employer would have taken more time to engage meaningfully with the employee and explore alternatives to dismissal. The dismissal was unfair.

Fire and rehire is itself coming under fire but this case also shows the importance of following a fair procedure in any dismissal case, whatever the circumstances. The key issues in this case were the lack of consultation and any reasonable consideration of alternatives to dismissal (including her offer to stay on existing terms and consider changes in future if required). With a sound business reason for the change, and SOSR engaged, all the employer then needed to do was follow a fair process. For one employee, this would not have taken much longer than the 48 hours in which the employee was given to sign her new contract. The employer here let their panic at Covid, and 'fury' with the employee, override the importance of a fair process. A remedy hearing will decide just how much that mistake will cost.

Unfair Dismissal – COVID 19

Rodgers v Leeds Laser Cutting

Sections 100(1)(d) and (e) of the Employment Rights Act 1996 provide employees with protection from dismissal if they exercise their rights to leave the workplace or take other steps to protect themselves if they reasonably believe there is serious and imminent danger. There have been murmurings about employees using these provisions to justify refusing to work during the Covid-19 pandemic. Employers are nervous – if the mere existence of the virus creates a serious and imminent danger, regardless of safety measures taken, what is to stop all and any employees refusing to work? An employment tribunal has now handed down a judgment on this topic in Rodgers v Leeds Laser Cutting, giving insight into how these claims will be dealt with.

The employee had less than two years' service as a laser operator. He was one of around five employees who worked at any one time in a large warehouse-type building. A colleague developed Covid-19 symptoms and went off work. The employee developed a cough and decided to self-isolate. At this point, the employer had already put some measures in place including social distancing, extra cleaning and staggered breaks. They reiterated government advice to staff. On 29 March 2020, the employee sent a text message to his manager that he would not be coming to work until lockdown eased because he was worried about bringing the virus home to his vulnerable child who had sickle cell anaemia. He was dismissed a month later. The employee didn't have enough service to bring an ordinary unfair dismissal claim so he brought claims for automatic unfair dismissal under s100(d) and (e) Employment Rights Act which don't require two years' service.

The employment tribunal said that a reasonable belief in serious and imminent danger should be judged on what was known at the time the actions were taken. On the facts, the tribunal found that the employee didn't believe there was serious and imminent danger in the workplace – he believed there was serious and imminent danger everywhere. That said, his evidence about his fear was undermined by his decision to drive a friend to hospital the day after he left work. The message to his manager referred to coming back when the pandemic eased, not when the workplace had been made safe. The size of the workplace and real ability to socially distance also meant that objectively such a belief was not reasonable. He could have averted danger by following the safety measures and refusing to do the occasional task that overstepped them. It wasn't reasonable for him to absent himself from work when it was possible to socially distance. Nor had he taken appropriate steps to communicate his fears of imminent danger to his employer. Most interestingly, the tribunal rejected the employee's assertion that Covid-19 presents serious and imminent danger regardless of what steps an employer takes to mitigate the risk. To do otherwise would mean that any employee could rely on these provisions to 'down tools' (as the judge put it) during the pandemic. However, the judge did say that these provisions can apply to situations arising from the pandemic and every case will have to be decided on its facts.

This case isn't binding on other tribunals but gives welcome insight into how employment tribunals may construe these provisions in relation to the pandemic. The employee in this case gave contradictory and confusing evidence which undermined his evidence about workplace danger. The workplace was large, social distancing was possible and safety measures were already in place even in March 2020. This case shows that implementing safety measures is vitally important – it will significantly reduce the risk of 'danger' posed to staff by the virus in the workplace and therefore the risk of tribunal claims.

Thank you for taking the time to read our Newsletter which I hope you found informative. An e-newsletter will be sent on a quarterly basis to help keep you up to date with current legislation changes, as well as giving you some helpful hints and tips to help your business run smoothly.

In the mean time please contact us if we can be of service to you or your company.

Have an enjoyable quarter and we look forward to issuing you with our next newsletter in the early part of October 2021.

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