

apportionment was void. That meant that the lease, when read without that clause, fixed the apportionment. The FtT therefore lacked jurisdiction to determine the apportionment itself.

Housing allocation

• R v Brimer²

Isleworth Crown Court,
20 March 2020

The defendant applied to Kensington and Chelsea RLBC for emergency accommodation. He claimed to have been renting a flat as a sub-tenant in Grenfell Tower at the time of the fire. He was provided with free accommodation for 125 nights with a food allowance. The council spent nearly £32,000.

Suspensions were raised when the number of the flat that he claimed to live in did not match the floor number he claimed to live on. Residents and family members of deceased residents had not heard of him before. In fact, he had been in prison at the time of the fire and had no residential links to the tower at all.

Following a jury trial, he was convicted of one count of fraud and sentenced to five years' imprisonment.

Homelessness

There has recently been a spate of important cases on homelessness. For reasons of space, summaries of them will appear in the next issue.

- 1 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/876466/Letter_from_Minister_Hall_to_Local_Authorities.pdf.
- 2 'Grenfell fraudster who wrote "Glenfell" as address jailed for five years over £32,000 con', Crown Prosecution Service news release, 20 March 2020.

Sam Mudge-Wyld is a barrister at Tanfield Chambers. Jan Luba QC is a senior circuit judge and a designated civil judge. They would like to hear of relevant cases in the higher or lower courts.

Employment: update

Philip Tsamados rounds up legislation and guidance arising from the COVID-19 pandemic.



Philip Tsamados

This update is intended to highlight the major legislative and other changes to employment law matters arising from the coronavirus or COVID-19 pandemic as it is variously referred to, and also the impact on the operation of the employment tribunals. A future update will deal with practical effects on the terms and conditions and employment rights of employees and workers as and when the impact of the government's measures takes effect and becomes apparent.

Overview

The Coronavirus Act 2020

The Coronavirus Act 2020 received royal assent on 25 March 2020. Essentially, it is an enabling Act allowing the government to bring in measures in response to the situation arising from the COVID-19 pandemic. The Act (s1) defines 'coronavirus' as the 'severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2)' and 'coronavirus disease' as 'COVID-19 (the official designation of the disease which can be caused by coronavirus)'. For the purposes of this article, I will refer to the COVID-19 pandemic unless otherwise referred to as coronavirus within regulations or guidance.

The Act was brought into force by the government in anticipation that the COVID-19 pandemic would lead to a reduced workforce, increased pressure on health services and on death management processes. Of course, it clearly has. The Act contains temporary measures designed to either amend existing legislative provisions or introduce new statutory powers to mitigate the impacts on the UK. These are broadly stated in the guidance notes to the Act to be by increasing the available health and social care workforce, easing the burden on front-line staff, containing and slowing the virus, managing the deceased with respect and dignity, and supporting people. Resultant measures are, to varying degrees, set out in the Act, or have been brought into effect by regulations or governmental guidance.

Regulations regarding movement restrictions and social distancing

The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 SI No 350 took effect from 26 March 2020 and set out measures designed to enforce restrictions on movement and social distancing during the COVID-19 pandemic. The regulations require certain types of shops and businesses to close and place restrictions on certain others. The regulations also prohibit anyone from leaving the place where they live without reasonable excuse, examples given including the need to provide care or assistance, to travel for the purposes of work and to access critical public services. The regulations also ban public gatherings of more than two people. Resultant offences and penalties for contravention are also set out.

There are separate regulations for Wales, set out in the Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020 SI No 353 (W 80), and for Scotland in the Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020 SI No 103 and the Health Protection (Coronavirus) (Restrictions) (Scotland) Amendment Regulations 2020 SI No 106.

Matters specific to employment

The Coronavirus Job Retention Scheme

This is also referred to as 'furlough' or 'furlough leave' (a military term referring to a leave of absence, probably not heard of generally since the days of Sergeant Bilko on *The Phil Silvers Show*).

The Coronavirus Job Retention Scheme¹ is a temporary scheme open to all UK employers for at least three months that was officially launched on 20 April 2020 with the first payments being made by the end of April. It is designed to support employers whose operations have been severely affected by coronavirus (COVID-19) by allowing them to keep employees in employment during this crisis by putting employees who cannot work on furlough (ie, on a leave of absence) and to claim payment from the government to cover the ongoing cost of their salaries.

Essentially, employers can claim for 80 per cent of furloughed employees' monthly wage costs, up to £2,500 a month, plus the associated employer national insurance contributions and minimum automatic enrolment employer

pension contributions on that wage. Employers can use this scheme at any time during this period. Details can be found at: www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme. See also *Coronavirus Job Retention Scheme: step by step guide for employers* (HMRC, 17 April 2020).

The details provided are simply guidance and, beyond an enabling power within the Coronavirus Act 2020, there does not appear to be any further statutory basis for the scheme. The guidance has already been revised on at least three occasions and there are ambiguities as to exactly who is covered and as to how it will work in practice. It is likely that these issues will come to light as the scheme starts to operate and I will be reporting them in the next full update.

Carrying over annual leave

The Working Time (Coronavirus) (Amendment) Regulations 2020 SI No 365 came into effect on 26 March 2020 and amend the Working Time Regulations 1998 SI No 1833 (WTR) in the light of practical difficulties faced by workers in taking annual leave because of the COVID-19 pandemic.

There is government guidance, which can be found at 'Rules on carrying over annual leave to be relaxed to support key industries during COVID-19', Department for Environment, Food and Rural Affairs/Department for Business, Energy and Industrial Strategy press release, 27 March 2020. See also: www.gov.uk/holiday-entitlement-rights/calculate-leave-entitlement.

WTR reg 13 entitles workers to four weeks of paid annual leave in each leave year. Where any of this leave remains untaken at the end of a leave year, reg 13(9)(a) prevents that leave being carried forward into the next year. This is amended by reg 3 of the 2020 amendment regs, which inserts an exception to this bar on carrying forward untaken leave. The exception applies where, at the end of a leave year, it was not reasonably practicable for a worker to take some or all of the leave to which they were entitled as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society). In this case, the untaken leave may be carried forward and taken in the following two leave years.

WTR reg 14 provides for a payment in lieu of any untaken annual leave where a worker's employment terminates. This regulation is amended by reg 4 of the 2020 amendment regs so that the payment in lieu includes any leave carried forward under reg 3

that remains untaken on the date of termination.

The 2020 amendment regs do not apply to the additional 1.6 weeks' leave to which workers are entitled under WTR reg 13A, but the government's guidance suggests that this can be carried forward one year by agreement between workers and employers.

Statutory sick pay and isolation notes

The Statutory Sick Pay (Coronavirus) (Suspension of Waiting Days and General Amendment) Regulations 2020 SI No 374 apply retrospectively from 13 March 2020. Whereas statutory sick pay (SSP) is not payable for the first three qualifying days of a period of entitlement, these days being called 'waiting days' (see Social Security Contributions and Benefits Act 1992 s155(1)), reg 2 of these new regulations disapplies the waiting days where an employee is incapable of doing the work they can reasonably be expected to do under their contract of service, or where they are deemed to be incapable, because of coronavirus.

Reg 3 of the 2020 amendment regs amends the existing Statutory Sick Pay (General) Regulations 1982 SI No 894 and inserts a Schedule into those regulations that specifies when a person is deemed to be incapable of work because they are staying at home. This includes persons with symptoms of coronavirus staying at home for seven days and those living in the household of a person with symptoms of coronavirus staying at home for 14 days.

The Statutory Sick Pay (General) (Coronavirus Amendment) (No 3) Regulations 2020 SI No 427, in force since 16 April 2020, amend that Schedule, inserting a para 5A to cover people classed as extremely vulnerable and at very high risk of severe illness from coronavirus (COVID-19), who are advised to remain at home for at least 12 weeks (known as shielding). The effect of the amendment is that SSP is extended to those people who are deemed to be incapable of work because of this advice.

In summary, as of 13 March 2020, employees and workers must receive any SSP due to them from their first day of self-isolation if it is because they have coronavirus or symptoms of it, or someone in their household has coronavirus symptoms, or they have been told to self-isolate by a doctor or the NHS telephone service 111.

Most employers will accept a self-certificate from an employee for the first seven days of absence. Those unable to work for more than seven

days because of COVID-19 can obtain an isolation note through a new online service at: <https://111.nhs.uk/isolation-note/>. Government guidance can be found at 'Online isolation notes launched - providing proof of coronavirus absence from work', Department of Health and Social Care press release, 20 March 2020. Acas guidance is available at: www.acas.org.uk/coronavirus/self-isolation-and-sick-pay.

Stay at home guidance

The government has issued stay at home guidance: *COVID-19: guidance for households with possible coronavirus infection* (Public Health England, 12 March 2020; last updated 21 April 2020).

Self-employment

For the sake of completeness, although strictly speaking not part of the ambit of these employment law updates, the government has introduced measures designed to provide financial assistance to the self-employed. Details of the proposed scheme can be found at: 'Claim a grant through the coronavirus (COVID-19) Self-employment Income Support Scheme' (HMRC, 26 March 2020; last updated 21 April 2020). My understanding is that there are also initiatives available to the self-employed from local authorities and other bodies.

Continued operation of employment tribunals and the Employment Appeal Tribunal

Employment tribunals

The Employment Tribunals England and Wales, and Scotland, have issued a document entitled *Help for users* (15 April 2020), which sets out the current position regarding the continued functioning of employment tribunal (ET) offices during the COVID-19 pandemic.

In summary, the document states that most, but not all, ETs in England and Wales remain open to the public; the rest (including those in Scotland) are partially staffed but closed to the public. Most salaried employment judges are continuing to work from home with support provided by staff in their ET offices or working remotely. All full hearings up to 26 June 2020 have been postponed and have been converted to telephone case management hearings in accordance with the guidance referred to below. Preliminary hearings and some final hearings are being conducted remotely. Longer final hearings are

usually being rescheduled. There is a move towards the use of video conferencing to conduct hearings and several software systems are currently being trialled and tested.

To find the status of ET individual offices, see: *Courts and tribunals tracker list during coronavirus outbreak* (HM Courts and Tribunals Service, first published 2 April 2020; updated periodically).

On 19 March 2020, the presidents of the ETs in England and Wales, and in Scotland, issued a practice direction as to the conduct of future hearings,² with an amendment issued on 23 March 2020.³ Essentially, all in-person hearings scheduled for 23 March 2020 onwards are converted to telephone case management hearings at which an employment judge will determine their future conduct.

The presidents of the ETs in England and Wales, and in Scotland, have also issued *Presidential guidance in connection with the conduct of employment tribunal proceedings during the COVID-19 pandemic*. Additionally, they have issued *FAQs arising from the COVID-19 pandemic* (3 April 2020), to help parties and representatives during this time.

Telephone and video hearings

While it is a matter for individual judges as to how to conduct hearings during the current crisis, HMCTS has issued guidance, *HMCTS telephone and video hearings during coronavirus outbreak* (18 March 2020; last updated 22 April 2020).

Employment Appeal Tribunal

Provisional arrangements during COVID-19 pandemic (25 March 2020) notes that hearings listed to take place up to and including 15 April 2020 have been postponed. The current position on arrangements for hearings is set out in *Hearing arrangements from 16 April 2020* (9 April 2020).

- 1 See the Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme) Direction, HM Treasury, 15 April 2020.
- 2 www.judiciary.uk/wp-content/uploads/2020/03/2020_03_19_ET-Covid-19-Direction.pdf.
- 3 www.judiciary.uk/wp-content/uploads/2020/03/2020_03_19_ET-Covid-19-Direction-Amendment-23.3.20.doc.

Philip Tsamados has been a specialist in employment law for over 29 years. He was a solicitor in private practice and for many years worked at Central London Law Centre's employment unit and latterly for Whitechapel Legal Advice Clinic based at Tower Hamlets Citizens Advice.