



Paper

The shape of things to come: A look at the future landscape for employers

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Introduction

2020 is a year that will be studied for many years. Few (if any) in 2019 would have dreamt of the profound impact that a virus (probably) originating on the other side of the world would have on the economic and social fabric of the UK the following year. Few would have foreseen the ability of employers and employees to adapt at speed, and in ways that are likely to leave an indelible mark on the future of work and the workplace.

And even without Covid-19, 2020 is still likely to have been a year that would have profoundly impacted the future employment landscape in the UK. It was a year in which the UK struck an exit deal with the EU, (thereby severing ties with a significant generator of employment law rights in recent years) and the Black Lives Matter movement shined a light on diversity issues.

This paper looks at these issues from an employment lawyer's perspective to draw out what these recent developments are likely to mean for employers.

Legislative changes on the horizon

Usually, the easy starting point for any lawyer considering future changes is to look at what legislative changes lie ahead. However, for much of 2020 the government was either concerned with tackling the pandemic or trying to negotiate a deal on Brexit. Many government employment consultations or plans were delayed, and it is unclear what changes the government will implement in the remainder of its current term.

There are a few recent legislative changes where we can predict with some certainty the impact. For example, on 6 April 2021:

- The national minimum wage increased, and the national living wage was extended to 23–24-year-olds for the first time.¹ This will increase costs for business at a time where there will be solvency risks, but it will help low paid workers.
- The 'IR35' off-payroll working rules for the private sector became effective. These rules ensure that individuals who work like employees through a personal service company pay broadly the same income tax and national insurance as employees.² This change, together with recent high profile cases on worker status³ and increasing awareness of the importance of good corporate citizenship in the light of unprecedented (at least in peace time) levels of government debt, is likely to mean that some of the more exotic,

¹ <https://www.gov.uk/government/news/national-living-wage-increase-to-protect-workers-living-standards>

² <https://www.gov.uk/government/publications/off-payroll-working-rules-communication-resources/know-the-facts-for-contractors-off-payroll-working-rules-ir35>

³ [Uber BV and others v Aslam and others \[2021\] UKSC 5](#)

and overt, means of employers seeking to avoid individuals becoming employees will disappear.

What about changes beyond these?

The 'B' Word

The EU has been a significant generator of employment law rights in recent years. This has been not just through legislative changes such as the Working Time Regulations and rights conferred on part-time, fixed term, and agency workers, but through the jurisprudence of the Court of Justice of the European Union (CJEU) whose cases have been binding on UK courts when they interpret domestic law (whether that was EU derived).

In the short term, Brexit is unlikely to impact on UK employment rules as the UK and EU have committed to maintaining (indeed striving to increase) the level of protections already in place, and either party can take action if any changes have a material impact on trade and investment.⁴ Employment rights stemming from EU law will be retained and followed by the courts, save for where appellate courts wish to depart from EU law (which is likely to be rare in practice particularly when that law has been embedded through years of UK case law). UK courts are no longer bound by future decisions of the CJEU (they remain bound by European case law in place as at 31 December 2020) but these cases are likely to guide UK courts (or in legal terms be of 'persuasive authority').⁵

The end of free movement will not affect the 4.88 million people who may be successful in their applications for the UK's Settlement scheme, but employers now have the added task of checking EU employees have the right to work in the UK.⁶

The government has already 'scrapped' its post-Brexit review of UK employment law and denied that it was looking at making changes to the 48 hour working week and the calculation of holiday pay.⁷ Given most adults of working age in the UK are employees, it's unlikely that reducing employment rights is going to be seen as a vote winner unless it fits into a wider programme arguably boosting economic development and therefore

⁴ [Article 6 of the Trade and Cooperation Agreement](#)

⁵ [c.16, s.6 of the European Union \(Withdrawal\) Act 2018](#)

⁶ <https://www.gov.uk/government/collections/eu-settlement-scheme-statistics>

⁷ <https://www.ft.com/content/ab8d876c-bc65-441e-8b04-051d3be124c9> and <https://www.bbc.co.uk/news/business-55842992>

benefiting all.⁸ Therefore my view is that we are unlikely to see wholesale changes that substantially weakens workers' rights in the short, medium and probably long term.

That does not mean that there won't be changes that are seen to enhance workers' rights. Future employment law changes were indicated in December 2019.⁹ However no Employment bill has been published, presumably because of the pandemic. That delay has attracted criticism and the promised Employment Bill may reappear at some point in 2021 or 2022.¹⁰ This Bill promises to bring in a variety of changes such as:

- the introduction of a single labour market enforcement body;
- a right to request a more predictable contract after 26 weeks;
- extended leave for neonatal care; and
- making flexible working the default position (unless employers have a good reason not to).

One potentially significant area of change in the future concerns post-termination non-compete clauses which restrict an employee's ability to work for competitors ('Post-Termination Restrictions' or 'PTRs'). The government is considering making employers pay their ex-employee for the duration of the non-compete, limiting the length of PTRs or making them entirely unenforceable and has recently finished consulting on the issue.¹¹ Any changes would be concerning for employers as PTRs are key to ensuring that competitors do not obtain an unfair advantage by poaching key staff who are then immediately able to use their connections to lure away other key employees or customers/clients of the business.

If changes to PTRs are made, it may force employers to encourage employee loyalty by making pay and bonuses dependant on the employee remaining with the employer for a certain period of time. Clawback clauses might see increasing prevalence as employers look to recover bonus payments, not just where 'malus' has been found after the award of a bonus, but simply for the employee leaving within a certain time. The net result may be that recruiting senior staff becomes prohibitively expensive as they will expect a 'buy-out' of any bonus that they are required to repay.

So with Brexit, at least in employment terms, likely to have limited impact, perhaps the most significant changes to employment law and the workplace in 2021 and beyond are going to be cultural ones.

⁸ See for example

<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/bulletin/s/employmentintheuk/august2020#:~:text=there%20were%2028.02%20million%20employees,fewer%20than%20the%20previous%20quarter>

⁹ <https://www.gov.uk/government/speeches/queens-speech-december-2019>

¹⁰ <https://www.theguardian.com/business/2021/feb/18/deafening-silence-uk-government-delays-covid-employment-reforms-legislation>

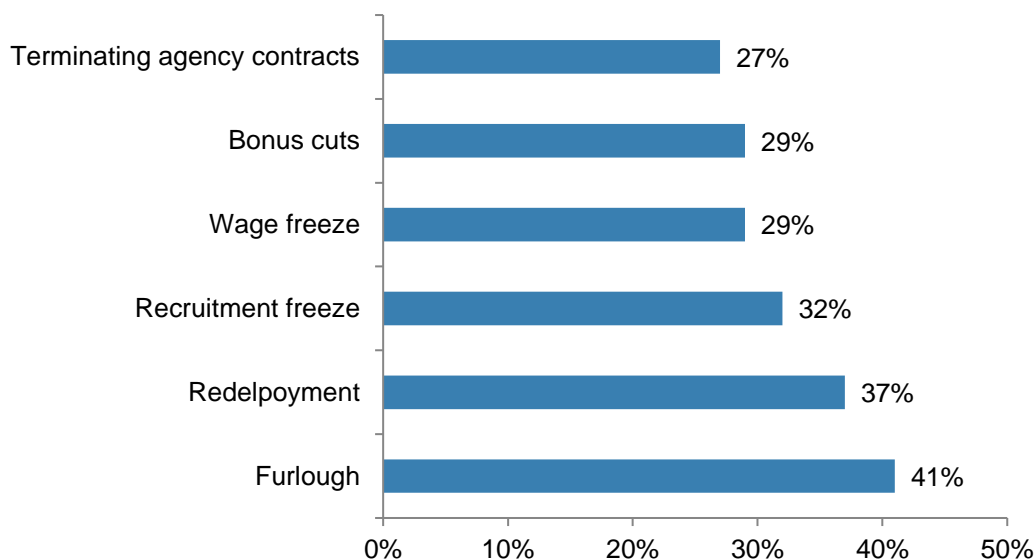
¹¹ <https://www.gov.uk/government/consultations/measures-to-reform-post-termination-non-compete-clauses-in-contracts-of-employment>

Redundancy and reorganisation

The pandemic has been challenging for many businesses trying to adapt to restrictions, with retail and hospitality sectors being under most pressure.¹² In an extraordinary (but not surprising) measure, the government has been paying 80 per cent of participating employees' wages via its Coronavirus Job Retention Scheme (more commonly referred to as 'the furlough scheme').

The furlough scheme undoubtedly helped to reduce mass scale redundancies that would otherwise have occurred due to the economic collapse in the UK following the arrival of Covid-19 and lockdown. However, it was not enough to prevent a record rise in the number of redundancies (370,000) reported by ONS between August–November 2020.¹³ This was double the highest three-monthly peak of 180,000 seen during the 2008 financial crash.¹⁴ The extension of the furlough scheme until 30 September 2021 has brought some stability and the number of planned redundancies fell rapidly in November 2020, and as of January 2021 the number has been at its lowest level since the pandemic began.¹⁵

Employers have a range of tools at their disposal to reduce the need for redundancies. The CIPD Labour Outlook report recorded the percentage of employers using the methods in the graph below as countermeasures to avoid redundancies.¹⁶



¹² <https://www.bbc.co.uk/news/business-55313752>

¹³ <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/bulletins/employmentintheuk/december2020>

¹⁴ <https://www.bbc.co.uk/news/business-54125690>

¹⁵ <https://www.bbc.co.uk/news/business-55412640> and <https://www.bbc.co.uk/news/business-56130167>

¹⁶ https://www.cipd.co.uk/Images/labour-market-outlook-autumn-2020_tcm18-86411.pdf

At the time of writing, the furlough scheme will be reduced from 1 July 2021 as employers will be asked to contribute more to employee wages.¹⁷ ONS has confirmed that the UK narrowly avoided a double dip recession when the UK locked down from November 2020.¹⁸ However, the real test will be how businesses will fare without government support.

Structural changes in the UK economy (such as the move from the high street to online, and office to home working) have been accelerated by the pandemic and it is likely that by mid-August at the latest, a number of businesses will start to consult employees on redundancies. If the economy fails to recover in the way that is currently expected, then this will only increase the rise in planned redundancies in the near future.¹⁹ The mid-August date is the latest point at which employers who wish to take full advantage of the furlough scheme can initiate staff consultation on mass redundancies. Employers may therefore find the summer of 2021 challenging in many ways.

Localism and globalism

In the long term, the WHO predicts that the virus will become endemic.²⁰ As I will discuss below that is likely to have significant impacts on how employees are managed in the workplace. The consequence of the virus being a permanent (but manageable) aspect of our lives is likely to have a significant effect on workforce models, impacting on localism and globalism.

Employers may choose to undergo further workforce restructuring to strengthen the reliability of operations, reversing a reliance on outsourcing, or diversify suppliers to counter the effects of global disruption. For example, those who rely on call centres in India and were disrupted in the initial stages of the pandemic, may consider partially nearshoring or reshoring aspects of their business to allow them to withstand further disruption to different parts of the world.²¹ Supply chains may become shorter, with more employees employed to carry out critical tasks that were previously outsourced or employers may employ increasing numbers of staff or create teams simply to ensure the robustness of supply chains and to secure alternative supplies in the event of disruption. If the title of 'Chief Crisis Management Officer' doesn't exist already we may see that come to pass.

¹⁷ <https://www.gov.uk/government/publications/changes-to-the-coronavirus-job-retention-scheme>

¹⁸ <https://www.theguardian.com/business/2021/feb/12/uk-avoided-double-dip-recession-despite-covid-slump-in-2020-ons-gdp> and <https://www.theguardian.com/business/2021/feb/12/uk-avoided-double-dip-recession-despite-covid-slump-in-2020-ons-gdp>

¹⁹ <https://www.bankofengland.co.uk/monetary-policy-report/2020/january-2020/the-economic-outlook>

²⁰ <https://www.theguardian.com/world/2020/dec/29/who-warns-covid-19-pandemic-is-not-necessarily-the-big-one>

²¹ <https://www.ft.com/content/00611a21-9e43-430b-b46e-de0a50c0383a>

In contrast, the rise of remote working may give the chance for businesses to offshore parts of their work to freelance staff across many countries where the costs of labour are cheaper.²² What rights will apply to these workers? On the basis of existing UK case law, while it will be a fact-specific question, there will be an argument that UK employment rights will apply to these overseas workers. The rise of the global worker may lead to an increase in UK employment litigation – something I come back to below.

The workplace redefined

The traditional employment model (based on concepts of master and servant from a bygone era) sees both time (ie working hours) and place (ie where work is undertaken) fixed for employees. 2020 was the year that brought forward a flexible working revolution that showed for many employees that neither time nor place had to be fixed. For many businesses, flexible remote working has been proved successful and on a large scale with the help of technology. Some employees will have welcomed the breaking of the fundamental chains between time, place, and employment while others will still wish for the structure imposed by the traditional employment model (and for some roles there may be no choice).

What's becoming increasingly clear is that employees will wish to have some choice in the time/place decision which is a far cry from the traditional master/servant relationship. The Working Families charity has shown that 90 per cent of employees want flexible working to continue after the pandemic.²³ According to Adzuna, an online job search engine, remote working jobs being advertised has risen by 147 per cent and the number of searches allowing remote working has risen by 660 per cent.²⁴ To the extent that employers do not engage in co-creating time and place with their employees, they may see recruitment and retention issues as employees choose to work for employers that do.

In the short term, remote working will continue so long as the government advises employers to take every possible step to facilitate their employees working from home into the summer of 2021.²⁵

Employers will continue to have challenges in dealing with the flexible working revolution:

- There may be continued sickness absences due to Coronavirus outbreaks and other reasons, but how are employees' sickness absence and their 'return to work' managed when an employer may rarely see them in any event?

²² <https://www.ft.com/content/192eb45a-f7c9-4897-ac56-57cb743ac2f2>

²³ <https://www.personneltoday.com/hr/maintain-flexible-working-momentum-after-pandemic-urges-charity/>

²⁴ <https://www.personneltoday.com/hr/head-of-remote-set-to-be-trending-job-title-in-coming-months/>

²⁵ <https://www.gov.uk/guidance/national-lockdown-stay-at-home?priority-taxon=774cee22-d896-44c1-a611-e3109cce8eae#going-to-work>

- How will employers manage the risk of stress or burnout due to home and work situations?
- How will employers ensure employees forge relationships with new staff or clients and customers?
- How will employers maintain team cohesion and the organisational culture?
- How will employers ensure that employees have suitable workstations and are working safe hours that are not detrimental to health?

All of these challenges will require even closer communication with employees and clear workplace policies and procedures that have been adapted to the 'new normal'.

To the extent that employers do not proactively deal with the issue of flexible working, it is likely that they will see an influx of flexible working requests. There already exists a legal right to request flexible working where an employee has 26 weeks' service (which, as noted above, is likely to be extended in the future). In reality, this legislation is seen as having little teeth, due to employers being able to refuse these requests on a variety of broad reasonable grounds (that do not have to be explained to an employee). However, where an employee has been working flexibly and productively through the pandemic, it will be harder (both legally and from a relationship perspective) to refuse to agree the employee may continue to work in that way going forward. Many employers are already developing their long term flexible working strategy and all employers should consider clearly communicating their policies before requests come in. Otherwise, it is possible to see that refused applications for flexible working will become the new frontier for constructive unfair dismissal and discrimination claims.

The rise of flexible working will raise questions about the meaning of the workplace, but I do not anticipate that employers will be able to do away entirely with places where their employees work together physically, meet clients, customers or suppliers, and do the myriad other things that have been sub-optimal when done remotely. The 'workplace' will become a more complex construct that may not be delineated by time and place in a way that way that was previously thought intrinsic.

One final word of warning on this subject: some employers may rush to embrace flexible working and remove some or all workplaces entirely. Although it may not be intended to reduce staff numbers, such a process may technically create a 'redundancy situation'. While consultation in these scenarios with employees is likely to happen in any event, it will be important for employers to tick the legal boxes and ensure this consultation meets minimum legal requirements (including in relation to duration).

Claims culture and Covid-19

I have noted above the WHO's expectation of Covid-19 becoming endemic in the long term. This will mean businesses planning for seasonal disruption and strengthening

business continuity plans in the event of future outbreaks or pandemics with the aim of becoming more efficient and resilient.²⁶

Debates about mandatory testing and vaccinations (or vaccination boosters in the future) are likely to continue. There will be sector specific considerations, but my view is that the more significant the impact of future virus outbreaks, the more likely it is that employers will consider moving to a mandatory testing and vaccination regime. With safeguards, it is legally possible. At the least I would anticipate that benefits and salary may be reduced for those who refuse to vaccinate and are off sick as a result and that employers may have a rule against employing new employees who do not expressly agree to testing and vaccinations (we are already seeing some employers introduce such policies²⁷). Rules around wearing masks/PPE (even in non-clinical settings) are likely to continue and we are already seeing some employees challenge such rules.

I would anticipate seeing cases where disciplinary action is taken against workers who refuse to wear PPE/test and inadvertently spread the virus to other colleagues. Employers are likely to become increasingly intolerant of employees who cause significant disruption to their business even if that is based on genuinely held ethical or religious beliefs. Inability to comply with such rules due to a disability will need to be carefully balanced against protecting wider business interests.

Due to the pandemic, employees have become aware of health and safety risks in an unprecedented way. Rightly they will feel encouraged to raise any concerns they may have in the workplace. Such discussions are in legal terms likely to be protected by whistleblowing and health and safety laws meaning if an employee receives detrimental treatment as a result of raising such issues that would be actionable. The whistleblowing charity Protect studied the whistleblowing cases it received and found that 41 per cent of whistleblowers of Covid-19 concerns were ignored and 20 per cent of whistleblowers were dismissed.²⁸

The employment relationship is a delicate legal construct that tries to reflect the complexity of the human relationship it underpins. Where friction occurs in the human relationship, this is likely to turn into a dispute with legal connotations. In other words, friction caused by redundancy and reorganisation, the moves to localism/globalism, the reimagining of the workplace, a heightened awareness of health and safety and the creation of new disciplinary rules due to Covid are likely to see an increase in internal grievance and disciplinary processes and external Employment Tribunal proceedings.

Unfortunately, the increase in litigation is unlikely to be limited to employment cases. Covid-19 is likely to see personal injury claims increase – this could be directly because of Covid-19 or because of challenges associated with it (such as permitting safe home

²⁶ <https://www.who.int/westernpacific/news/commentaries/detail-hq/from-the-new-normal-to-a-new-future-a-sustainable-response-to-covid-19>

²⁷ <https://www.bbc.co.uk/news/business-56113366>

²⁸ <https://protect-advice.org.uk/41-whistleblowers-covid-concerns-including-public-safety-disclosures-ignored-by-employers/> and <https://protect-advice.org.uk/the-best-warning-system-whistleblowing-during-covid-19/>

working). The stresses of the pandemic have led to over half of NHS critical care staff reporting PTSD, depression, or anxiety.²⁹ The pandemic may cause key workers who have been working in particularly stressful environments to make claims against their employers when the pandemic is over. Employers should be checking their insurance policies now.

An unequal pandemic

Although the pandemic has affected everyone in some form or another there has been unequal burden placed on certain disadvantaged groups in society. In the short term, this will inevitably mean a setback in the workplace for those people.

There are fears that the gender pay gap could widen as a result of the pandemic as women are more likely to lose work or be burdened with childcare.³⁰ Higher levels of anxiety in women have been reported, and ONS has reported that since July 2020 more women were furloughed than men.³¹ The 2021 gender pay gap enforcement deadline has been postponed until 5 October 2021, but it will be interesting to see what the data will show.³²

In August 2020 the government produced a report on disparities in the risk and outcomes of Covid-19 and found that the risk of dying was higher in deprived areas and Black, Asian and Minority Ethnic groups had up to 50 per cent higher risk of death³³. The impact of Black Lives Matter (in many ways building on the momentum of the 'Me Too' movement) has helped keep diversity issues at the forefront of employers' minds³⁴ and they are now firmly entrenched as Board level issues.

Employers being seen to be proactive in dealing with diversity issues and going above and beyond the legal minimum is an important part of protecting the reputation of an organisation. As a result, I would expect employers in the short term to refocus their efforts on promoting diversity and inclusion in the workplace. This might come in the form of setting diversity targets, training, and grants to individuals from unrepresented groups, mentoring, creating networks which target those with protected characteristics, as well as rooting out inappropriate behaviour and bias.

²⁹ <https://www.theguardian.com/society/2021/jan/13/nhs-icu-staff-ptsd-severe-depression-anxiety>

³⁰ <https://www.bbc.co.uk/news/business-55002687>

³¹ <https://www.gov.uk/government/statistics/coronavirus-job-retention-scheme-statistics-january-2021/coronavirus-job-retention-scheme-statistics-january-2021#employments-furloughed-over-time-by-gender> and <https://www.theguardian.com/world/2021/mar/10/womens-wellbeing-hit-harder-than-mens-during-pandemic-says-ons>

³² <https://www.gov.uk/government/collections/gender-pay-gap-reporting>

³³

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/908434/Disparities_in_the_risk_and_outcomes_of_COVID_August_2020_update.pdf

³⁴ <https://www.personneltoday.com/hr/black-lives-matter-employers-urged-to-take-a-stand-against-racism/>

In the longer term we expect that diversity and inclusion will continue to be a marker of how an employer treats its employees, along with focusing on wellbeing and flexible working offerings. Increased voluntary reporting around a variety of metrics relating to diversity and inclusion is likely to be a marker of good corporate citizenship and be seen as a means of enhancing employer brand. It is likely that ethnicity pay gap reporting will become more commonplace in the future, particularly as the government launched its consultation on the issue in 2018³⁵. The result of the report has been delayed but the BBC has reported that employers overwhelmingly support the introduction of mandatory reporting³⁶.

Conclusion

Employers in the UK are at watershed moment. The cultural and societal changes caused by the events of 2020 and 2021 are likely to leave a lasting legacy on employment and the workplace. There will be new challenges to face that will have legal, economic, and human consequences. Increased legal rights, expectations of flexibility, and the refinement of what it is to be a good corporate citizen will mean that on many issues there will be no stepping back but only consideration of how to step forward.

However, many businesses in the post-pandemic era will feel that they are more resilient than they have ever been. They may also feel that tackling challenges head on and embracing likely change quickly will pay dividends in terms of enhancing their employer and corporate brands, increasing staff morale, discretionary effort and ultimately boosting the bottom line. And of course, it is likely to help reduce exposure to the legal risks identified in this paper. As Jeff Bezos put it: 'What we need to do is always lean into the future; when the world changes around you and when it changes against you - what used to be a tail wind is now a head wind - you have to lean into that and figure out what to do because complaining isn't a strategy.'

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³⁵ <https://www.gov.uk/government/publications/cma-diversity-and-inclusion-strategy-2020-to-2024/action-plan-2020-to-2022>

³⁶ <https://www.bbc.co.uk/news/uk-politics-55364466>

member's, rather than employment lawyer's perspective. Further information can be found here: <https://www.dacbeachcroft.com/en/gb/people/udara-ranasinghe/>

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