

# Employment Law Issues in the Tourism and Hospitality Sector arising from Covid 19

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# CJRS Scheme

## 20<sup>th</sup> March 2020 – Phase 1

- Government would pay 80% of wages of furloughed employees – Monthly cap £2,500
- No Work permitted
- Employers would consult about impending redundancies with employees on furlough and claims could be made for employees who were serving notice

## 1<sup>st</sup> July 2020 – Phase 2

- Flexible furlough
- Level of grant reduced on a sliding scale

## 1<sup>st</sup> November 2020 – 30<sup>th</sup> April 2021 – Phase 3

- Flexible and full-time furlough permitted

## 17<sup>th</sup> December 2020

- Chancellor announced extension of CJRS scheme until end April 2021

# Handling Redundancy Fairly

## Plan

- Read your redundancy procedure!
- Labour Relations Agency best practice guidance.
- How many jobs are to go?
- What kind of jobs?
- Which employees are affected?
- What will be the selection criteria?
- Are there alternatives?
- Re-deployment?
- Re-skilling?

## Inform

Advise employees and/or their representatives:

- Reasons for the proposed redundancies
- Numbers and descriptions of those affected
- Method of selection and selection criteria
- Proposed timescale

# Consult - General

Initial 'at risk' meeting advising of:

- Likelihood of redundancies
- Reasons for same
- Commencement of consultation process

An Employer must consult with a Trade Union or Employee Representative where it is proposed to dismiss 20 or more employees at one place of work within 90 days or less. The consultation **must** include discussion about:

- Ways of avoiding redundancies
- Reducing the numbers to be dismissed
- Mitigating the consequences of any redundancies

An employer intending to make 20 or more employees redundant must submit a HR1 form giving relevant details to the Department of the Economy:

- At least 30 days in advance where 20-99 redundancies proposed
- At least 90 days in advance where 100 or more redundancies proposed

# Consult - Individual

**Initial 'at risk' meeting** giving notice of the situation

## **First consultation meeting**

- Details of selection pool, criteria (if used)
- Consideration of any suggestions from employee as to how redundancies can be avoided
- Any queries about the selection pool/criteria (if used)

## **Second consultation meeting**

- Provisional selection for redundancy
- Outcome of selection exercise
- Proposed redundancy terms
- Alternative vacancies

## **Termination**

### Statutory Minimum Dismissal Procedures

- Letter of invite to formal meeting advising of reason for proposed termination and right to be accompanied
- One to one meeting
- Letter of outcome advising of right of appeal

**Redundancy Procedures must be fair, objective, unbiased and consistent.**

**They must not discriminate either directly or indirectly on any of the protected grounds, e.g. gender, disability, race, age, religious belief/political opinion**

**They must not treat part-time workers or those on fixed-term contracts less favourably.**

**Care must be exercised in relying on, for example, attendance or absence records particularly in relation to pregnant employees or those on maternity leave or disabled employees.**

**Similarly length of service may be age discriminatory.**

## CASE STUDY – REDUNDANCY

Food Co – a local restaurant chain with 4 branches in Northern Ireland

Client consulted us as they have been speaking with their accountants and it is clear that they will have to make redundancies in one of their branches. Business was slow before the Covid-19 outbreak and they will be unable to re-open on the same basis as before due to funding issues. They believe their waiting staff will be affected and as they no longer have a need for the amount of waiting staff employed at that location.

Our advice is to firstly check if they have a redundancy policy. If not, then they should follow the Labour Relations Agency guidance.

They have already identified the pool of employees who will be affected (waiting staff) so they now need to consider how many roles will be made redundant. They should consider if there are any alternatives to redundancy such as redeployment to another role or another location. They consider that 4 employees will be made redundant from a pool of 10.

The next step is to create fair and objective selection criteria ensuring that they are not directly or indirectly discriminating against particular employees, e.g. disabled workers or those on maternity.

The next steps are to invite (in writing) and consult with the pool of employees at risk. Consider any representations put forward in a bid to avoid redundancy and provide information on the selection criteria.

A second consultation meeting should then be arranged with each employee to confirm the outcome of the selection exercise and provide those selected for redundancy with details of their redundancy entitlements.

The employer must then write to the employees who have been selected for redundancy confirming their termination by way of redundancy and providing them with the right to appeal.

# Changing Contractual Terms of Employment

It is important to note that contractual terms do NOT need to be in writing. They can be:

- Written
- Oral
- Implied
- Or a mixture of all

Once an employee accepts a job on the terms set out by the employer and begins work, a contract of employment is implied.

# The Law

An employee's core terms and conditions of employment (e.g. hours of work, remuneration) cannot be unilaterally varied by the employer. They may only lawfully be varied with the consent of the employee.

In addition to contractual rights and entitlements employees enjoy a broad range of statutory rights, e.g. the right not to suffer unlawful deductions from wages, the right not to suffer unlawful discrimination. These statutory rights cannot be varied by an employer in any circumstances.

An employer who seeks to impose a change to an employee's terms and conditions of employment without the employee's agreement will be in breach of contract. Even where a contract contains a unilateral variation clause imposition of same without consent will be vulnerable to challenge as unlawful.

The employee then has the following options:

- Accept the unilaterally imposed change to the terms and conditions of employment and overtime, by implication s/he will be deemed to have accepted same so that they are incorporated into the contract of employment
- Resign and claim constructive dismissal on the basis that there has been a fundamental breach of contract sufficient to bring it to an end
- Remain in employment and continue to work 'under protest' whilst pursuing a claim in breach of contract
- Pursue a claim for unlawful deduction from wages

# Best Practice Guidance

An employer who seeks to change an employee's terms and conditions of employment, must consult with the employee with a view to reaching agreement about the proposed change. Consulting means listening and taking into account the views of employees when deciding on certain actions.

Changes to a core term of a contract of employment by an employer should be capable of justification. For example, the changes may be necessary for economic, technical or organisational reasons. It is recommended that an employer explains this to their employee to help them understand the reasoning behind the proposed change.

Where agreement is reached between the parties, it is recommended that the employer provides the employee with written notification of the change as soon as possible after agreement is reached, but no later than one month after the change is made.

If an employer is unable to reach agreement with employees on a proposed change, they have two options available:

- Abandon the changes and try and find an alternative solution to meeting the business needs
- Dismiss and re-engage the employee(s) on the new contract of employment

The decision to dismiss and re-engage, should not be taken lightly. Employers should ALWAYS try to agree the changes with their employees in the first instance.

Employees will also need to consider if the statutory dismissal procedure is applicable to the situation and ensure the contract is terminated with the appropriate level of notice.

Note that the need to adhere to the statutory dismissal procedure does not apply where the employer is dismissing and offering to re-employ all the employees in the business or in a particular category/role but does apply where the employer seeks to change the terms of contract of one or more individuals rather than the whole section or category to which the employee belongs.

# Case Study

XYZ Ltd – a family run independent hotel with circa 90 staff members.

Client consulted us as they are considering what their workforce will look like upon reopening of the hospitality industry. They believe that there will be restrictions in place in terms of opening hours etc.

They expect to be in a position where they will need to reduce their employees working hours.

Our advice is to effectively consult with their employees and provide them with an open and honest explanation as to why they need to amend their working hours.

Care must be taken to ensure that adverse changes are not proposed in circumstances which could constitute unlawful discrimination.

For example, it would be unlawful to seek to impose reduced working hours disproportionately on, e.g. disabled or part-time workers.

Equally, employers must be careful to ensure that employees are treated consistently and that any selection decision to determine whose work shall be reduced shall be taken on the basis of objectively fair criteria if the change is not applying to all employees.

# Living and Working With Covid-19

## BRINGING EMPLOYEES BACK TO A SAFE WORK ENVIRONMENT

HSENI and the Public Health Agency has developed a range of guidance documentation for employers specifically concerning COVID-19.

It remains the legal responsibility of the employer to ensure that the workplace is a safe environment.

Employers should regularly communicate to *their employees* the practical measures they are *taking* to help ensure a *safe return* to the *workplace*.

Some employees might be anxious about safety and returning to the workplace. Employers should encourage staff to talk to them about any concerns they have, and try to resolve them together.

Employers should listen to any concerns staff may have and should take steps to protect everyone.

For example, they could:

- offer extra car parking where possible so that people can avoid using public transport
- stagger start and finish times to avoid employees congregating in common areas
- arrange for some employees to work different hours temporarily to avoid peak time travel

# Covid-19 Risk Assessment

All employers should carry out an updated and appropriate COVID-19 risk assessment BEFORE any employees return to work. A useful template is available from HSENI.

<https://www.hseni.gov.uk/publications/example-covid-19-workplace-risk-assessment-template>

Employers should continue to ensure that a detailed assessment of the risk from COVID-19 in their workplace is carried out to safeguard employees' health and minimise the risk of infection and put into place appropriate measures in line with up-to-date government and public health guidance.

These measures should be communicated to all employees and should not reduce the level of protection afforded by existing health and safety measures (for example keeping fire doors open to reduce the risk from contaminated door handles creates increased risk. Appropriate regular cleaning and advice on hand hygiene is appropriate).

The risk assessment should be regularly reviewed and may need to be updated as time passes and as further risks are identified.

# Vaccination

Prohibition on mandatory vaccination Public Health Act

Could also infringe right to private life – ECHR

Persons suffering from certain conditions

Younger employees who will not be vaccinated until after the roll out with priority groups

Requirement might be objectively justified in certain high risk work environments, e.g.  
Nursing Homes

# Useful Guidance

## Labour Relations Agency

[info@lra.org.uk](mailto:info@lra.org.uk)

Tel: 03300 555 300

## Health & Safety Executive for N. Ireland

[mail@hse-ni.gov.uk](mailto:mail@hse-ni.gov.uk)

Tel: 0800 0320 121

## Equality Commission for N. Ireland

[information@equalityni.org](mailto:information@equalityni.org)

Tel: (028) 9050 0600

## NI Direct Government Services

# Thank you

