# EMPLOYMENT NEWS HEADLINES SEPT-OCT 2020 ISSUE 29

## LATEST COVID-19 CHANGES AND NEW GOVERNMENT JOB SUPPORT SCHEME

As the UK begins its second national lockdown below are key highlights of a continually changing situation since we last reported in Maxlaw Global employment news.

- Regular readers will be aware that the original Coronavirus Job Retention Scheme (CJRS) which was introduced by the UK Government in consequence of the first nationwide lockdown in Spring was due to end on 31 October 2020 following a few extensions and adjustments over the Summer. This has now been extended until the end of March 2021.
- A new Job Support Scheme (JSSO)[1] and an expanded Job Support Scheme (JSSC)[2] was to be introduced by the Government with effect from 1 November 2020 but will now commence following the end of the extended furlough scheme. Small and medium sized enterprises legally required to close for business (JSSC) will be automatically eligible with larger enterprises being eligible subject to an assessment. Under these schemes' employees are:
    - Required to work 20% (previously 33%) of their normal working hours on normal pay (subject to review after 3 months) if under the JSSO;
    - For each hour *not* worked 5% (previously one-third) of their normal pay will be paid by the employer;
    - The Government will pay 61.67% (previously one-third) for each hour *not* worked (capped at £1541.75 (previously £697.92) per month);
    - Employees would forfeit pay for the remaining hours *not* worked;
    - For JSSC the Government will pay 67% of pay (capped at £2100 per month);
    - National insurance and pension contributions remain payable by the employer;
    - Employers will not be able to serve notice for redundancy or make employees redundant who are on the schemes;
    - Application for the schemes must be agreed in writing between employer and impacted employees.

Previously in Maxlaw Global employment news (Issue 27) we reported on the Job Retention Bonus (JRB) scheme, this also will no longer apply due to the extension of the furlough scheme until March next year. The JRB was designed to prevent employers from making employees redundant before the end of January 2021 which is no longer applicable but that is not to say it may be revived in this or

[1] JSSO is Job Support Scheme Open – business open but with downturn in work.
[2] JSSC is Job Support Scheme Closed – business legally required to close due to coronavirus restrictions.

another form in the future depending on how things develop. We will provide further updates in our next edition.

## TERMINATION DUE TO PARANOID DELUSIONS NOT DISABILITY DISCRIMINATION – SULLIVAN V BURY STREET CAPITAL LIMITED (EAT)

The EAT has provided some insight into how the legal definition of 'disability' is interpreted in the case of *Sullivan v Bury Street Capital Limited* specifically on what it means to satisfy the requirement for the disability to be considered long term.

Mr Sullivan was a sales executive at Bury Street Capital and developed paranoid delusions in 2013 following the breakdown of his relationship with his Eastern European girlfriend. This was significant in that primarily he had a delusional belief that he was being pursued by a Russian gang. This affected his sleep, time keeping, attendance and his ability to function at work. This was recognised by his manager and addressed. By late 2013, the condition appeared to have improved to the extent that Mr Sullivan took a business trip to New York with his manager which was productive and successful. Although the delusions did not disappear entirely, Mr Sullivan was able to function in his daily life and work.

By 2017 Mr Sullivan's time keeping, attendance and general attitude and work became problematic again but this was not raised by him as related to his earlier situation in 2013. Mr Sullivan was dismissed and he brought a claim for disability discrimination.

At first instance the Employment Tribunal found that although the initial paranoid delusions had resulted in a "substantial and adverse effect on his normal day-to-day activities" i.e., attendance, time keeping and performance, these has improved after a few months. As a result, this condition did not have a long-term effect (i.e., likely to last for at least 12 months or more) and it was reasonable to assume that it would not recur although it had. It ruled that Mr Sullivan was not, therefore, disabled within the meaning of the Equality Act 2010.

Mr Sullivan appealed and the EAT upheld the ET's initial findings clarifying that it was reasonable for the ET to make the assessment that it did based on the situation at the time. Moreover, Mr Sullivan had not told his employer that the paranoid delusions was the reason for his drop in performance again and that his employer did not know nor could be reasonably expected to know of his disability. It was noted by the EAT that he was, at the time in 2017, also having discussions relating to his pay which had caused him stress.

This case highlights the importance for employers to carefully assess each element of the disability definition and seek the necessary medical and professional guidance as to whether its duty to make reasonable adjustments is triggered or not.

## ROLE MAPPING DID AMOUNT TO CONSTRUCTIVE DISMISSAL– ARGOS LIMITED V KULDO (EAT)

At a time when many employers are having to take the difficult decision to make roles redundant, this case is an important reminder that even when trying to avoid a compulsory redundancy situation it is critical for employers to apply its internal policies and processes fairly and reasonably.

In the case of *Argos Limited v Kuldo*. Mrs Kuldo was placed in an "at risk" pool of two for a role that was to be made redundant. Argos was looking to prevent a redundancy by mapping one of the roles to an alternative position. Before the redundancy consultation commenced, one of the "at risk" employees resigned and Argos "mapped" Mrs Kuldo into the available role. Mrs Kuldo raised a grievance claiming that this was not a suitable alternative role and that she should have been made redundant. Argos heard the grievance and an appeal but stood by its decision. Mrs Kuldo resigned and claimed constructive dismissal. The Employment Tribunal found in her favour ruling that:

- The role mapping criteria had been incorrectly applied by Argos to Mrs Kuldo's specific role, where she had argued the new role was a more junior, lower status role with a different job content;
- Argos had failed to carry out an individual redundancy consultation with Mrs Kuldo once the other "at risk" employee had resigned, considering this unnecessary;
- Argos had failed to properly assess the points of Mrs Kuldo's internal grievance appeal.

All of this amounted to a sufficient breach of the implied duty of trust and confidence entitling Mrs Kuldo to constructively dismiss herself. The EAT supported this finding on appeal. This case highlights that even when wishing to save jobs, it is important that employers do consider redundancy as the most reasonable route in some instances.

## CHANGES TO ACAS CONCILIATION PROCESS WITH LARGE CASE BACKLOG

Many employers involved in litigation in the Employment Tribunals (ET) will be aware of the early conciliation requirements which became mandatory in 2014. This early conciliation requirement means any applicant wishing to bring a claim in the ET must first submit a form to the Arbitration Conciliation and Advisory Service (ACAS) to try and conciliate with the other party before litigation. This period under the current arrangement can last for 4 weeks with an option to extend by a further 14 days with the agreement of the parties and ACAS. If the conciliation is unsuccessful the ACAS officer is required to issue an Early Conciliation Certificate with a reference number to indicate the conciliation period has been completed but was unsuccessful. Only then can an applicant go on to bring a claim in the ET using this reference number.

The *Employment Tribunals (Constitution and Rules of Procedure) (Early Conciliation: Exemptions and Rules of Procedure) (Amendment) Regulations 2020 (SI 2020/1003)* will be changed with effect from ***1 December 2020*** so that the conciliation period will be a standard six-week conciliation period with no option to extend by ACAS or the parties. ACAS officers will also be given the powers to make minor corrections to claim forms. What this means for employers is that they will need to carefully monitor the close of the conciliation period which will then reactivate the limitation period in which the applicant can submit a claim. They will also need to be mindful that minor errors will no longer mean a claim can be struck out.

## IR35 CHANGES FOR THE PRIVATE SECTOR NOW LAW FOR APRIL 2021

And finally, following the delay in April 2020 of the introduction of the IR35 rules for private sector companies due to the Covid pandemic, this has now been passed into law and received Royal Assent in July this year. It is enshrined in the new Finance Act 2020. In general, the assessment and process of applying the off-payroll rules remains the same with one key revision.

Previously, a contractor may be captured by the IR35 rules where the service was provided by an "intermediary" which was a Personal Service Company (PSC) where the individual held more than 5% of the ordinary share capital of that PSC. The Finance Act 2020 has widened this to prevent individuals circumventing the rules by holding less than 5% of the share capital which means an "intermediary" will now cover any company from which the contractor has received, or has the right to receive, a payment which can reasonably be taken to be a reward for the contractor's services to the end user.

This will mean that any end-user company using contractors will need to be thorough in its due diligence to ensure tax and NI is accounted for regardless of shareholding. A contractor providing services via an employment business such as an umbrella company or employment agency will be an exception provided the employment business is accounting for PAYE and NIC deductions before paying the PSC.

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