

HR INSIGHTS

HR 2021

Quarter 4

Recap

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REFRESHING LAW

Down to Earth

November 2021

Tribunals

A frequent concern for all in HR: the tribunal. However, recent interesting statistics might embolden employers to be less fearful of tribunal cases.

7% of cases that get started end up in a final hearing at the tribunal. This is according to the ACAS statistics that look at how many issues are resolved during the early conciliation phase.

There is a large dropout rate from the threatening of claims through to what happens in the end.

Naturally, some of the people who started early conciliation don't take it further forward and don't issue a case at all. Some issue, but then **20% of those cases then fall away due to the person withdrawing.**

12% of cases get struck out because they are weak, and they've been badly put together in some shape or form. There are then about a third of cases that settle at a later stage, some of which might be through judicial mediation.

Judicial mediation is something recommended to anyone that thinks they've got a case where a claimant has wild expectations but you know you are going to settle, you can use the judicial mediation route to manage those expectations.

The number of cases that go forward to a hearing then is low, and even when those cases do go to a final hearing, they have low success rates. Approximately it's about 10% for unfair dismissal. Less than that for discrimination cases.

Ultimately, as HR we need to have more confidence in our convictions when we know we've treated somebody well and we've done our best to resolve the issue. Don't fear the tribunal.

Mental Health

A recurring theme that is even more pronounced due to Covid is mental health and well-being.

It's now been nearly two years of uncertainty and Covid fears, and we've said previously in these sessions never assume people are okay. We've all had a tough time, it's fair to say those who say they haven't are potentially lying...



The elephant in the room on the mental health topic that we aren't addressing is job design & workload following restructures and redundancies/furloughs.

It is a big issue now for employers where employees are being asked to do perhaps two- or three-people's jobs, which was a similar issue we found back in 2008 following the credit crunch.

We already had people doing big jobs historically, and that now seems to be getting worse as the way we're working is changing. People are resigning and moving jobs a lot currently.

It's not enough now for organizations to be focusing their well-being offerings on 'free fruit baskets' and other similar rather empty incentives. A well-being strategy that includes proper resourcing, job design and responsibilities is important.

European countries are now implementing policies and even legislation regarding "the right to switch off". It's important to start looking at having a **meaningful policy** in the workplace around **expectations** of staff, **work/ life balances**, **working hours**, and the issue of **emails and phone calls outside of work hours**.

Question: Is there anything we can do as employers to prevent mental health problems from happening before they start?

This goes back to the same point; **let's give people jobs that are a sensible size and design**. Jobs that are manageable before they start impacting employee's mental health.

Not enough employers use stress related risk assessments before they employ someone and they aren't analysing where the risks are at the beginning of the hiring process. We need to look at roles from a mental health perspective and from a stress at work perspective.

We recommend looking at the [HSE toolkits around that](#).

On a practical level, look at what the job used to be 5 years ago, 10 years ago etc. What has changed and grown within this job role? What are the things that are now potentially going to make it harder to do the job now? If needed, can the job be stripped back to what's really important in the role?

A big issue now is that people are so bombarded with a myriad of things that they're supposed to be doing all the time that we lose sight of the core purpose and the priority order of the things that we need to be doing.

Recent HR Conflicts

✔ Hybrid working



The first big tension involves employee's expectations vs managers in relation to the return to the office and hybrid work set ups. This could be people being asked to come back to the office but now no longer wanting to commute, employees being exhausted, maybe they've not had enough holidays due to lockdown, or simply not wanting to work in the same way as they had before and wanting to leave the 'long hour cultures' of certain industries. We are seeing flexible working requests and an increase in resignations from employees who are not getting what they want.

✔ Furlough History



Furlough history has started to rear its head during appraisals and redundancies where somebody might feel that they were disadvantaged in some way because they were furloughed. For example, if redundancies are made now but somebody was furloughed historically, a challenge could now be raised as to why/how they were originally put on furlough when they perceive that it is impacting on their selection.

✔ Increase in grievances



There has been an increased volume of grievances recently. This could partly be down to managers not talking to people to iron issues out early doors. This is potentially a result of the pandemic with meetings and communication being conducted via Zoom and Teams. People are getting out of the habit of face-to-face discussion and the ability to iron grievances out earlier on.

Everyone has 'retreated to their trenches' and is using emails and other communication platforms for conflict management rather than the traditional face to face discussion. We need to try and get people back into treating each other like human beings where we'll then avoid these issues.

Redundancies

We are seeing a lot of cases around unfair selection for redundancy which feeds into the earlier points on furlough.

We need to make sure managers and HR are fairly comparing people, some examples such as comparing people who've been working and others on furlough, and employers having to try to even this out by discounting furlough periods (as you might with maternity leave.)

Question: What should we include in redundancy pools and selection criteria when selecting those who unfortunately will be made redundant?

The Employment Tribunal isn't going to say "you should have done it this way." They will look at it from the point of view of "is the way that you have done it within the range of reasonable responses," which allows for quite a generous margin to operate within.

- ▶ Start by thinking that if we drew a structure chart for this organization, who would report into who, and the roles and what that pool looks on a piece of paper. That offers a starting point as to the levels that people operate at.
- ▶ Then you would tend to think about what happens in real life, so if this person goes on holiday, or sick, maternity leave etc, how would we cover the role? If the answer to that is that you know the duties tend to get shared between different people, then we start to see where the overlaps are and where the pool might need to be slightly different to the immediate reaction.
- ▶ If we're talking different levels, so maybe we've got a supervisor or a manager and a lower tier person, are there actually differences between what those people do in real life? You might have situations in certain sectors where a supervisor position might be quite minimal in terms of what the supervisor is actually doing compared to other staff members, meaning that there might not be a big enough difference to say that the supervisors should be outside of the pool.
- ▶ Look at job descriptions compared to what people are really doing and if it's clear that there is a differential that might lead us to look at the pool in a different way.

Most common selection criteria used are:

- ✔ Disciplinary record
- ✔ Qualifications
- ✔ Leadership skills
- ✔ Productivity
- ✔ Cost to the business
- ✔ Experience
- ✔ Absence
- ✔ Attitude, flexibility and potential

Avoid length of service 'last in, first out' type criteria as there are age discrimination implications (unless for a tie-breaker).

When setting up your selection criteria and skills matrix:

You could try and tailor the selection criteria being used to the particular pools, so within a redundancy exercise quite often you have mini redundancy exercises according to the departments that are being affected. It's about looking pool by pool at what is needed by the business going forward.

Often employees will have their own view as to what should be used as selection criteria but they might be proposing something that is not meaningful to the employer.

We suggest having 5 or 6 things (not 15-20) on the matrix otherwise it will become very complex.

Discount disability and time on maternity leave. With absence we suggest looking at a 2 year period, and using a multiplier then for people who have less than two years' service.

In terms of **trying to agree these with trade union reps**, you may struggle and often they don't want to be seen to favour anyone, so they tend to object to whatever you propose, however, be seen to try and agree.

Try to **use more than one manager when scoring** so that you can counter any accusations of bias, which is protective for the manager as well if somebody else has been involved.

When setting up your skills matrix, think about **what it would look like to score a 5 or a 3 etc.** If you articulate an answer to that, that's good guidance that can then go with your matrix and it can be illustrated to the tribunal if needed. Often it is about **unpicking what a line manager is talking about**, like attitude or flexibility or potential.

They can then start giving you phrases and examples that enable you to break that down into something that is more meaningful.

It is recommended to road test and check it works. For example, you know it doesn't work if you end up with 33 people all scoring within one or two marks of each other, that is not going to have a healthy outcome. Reverse engineer it and tweak it until it works better.

There should be clear gaps between people and the tribunal isn't likely to criticise the criteria that you choose. You know your business best, you know what things are important to you going forward.

What they're more likely to do is criticise how they were applied. i.e. if you used productivity as the score, they're more likely to criticise a manager who hasn't looked at all the right information before coming up with their productivity score, and so that's where you need to focus your attention including training on how to score for managers, and making sure that they're doing it in a fair way that they can then explain to a tribunal.

Covid Related Tribunal Cases

We're also starting to see the first batch of COVID related tribunal cases coming through. Where employers have done their best to follow the guidance, putting in place all of the measures that have been advised, have been juggling all of the issues that we've all been dealing with for the last two years, then you can broadly categorise the judges as being quite fair and employer friendly.

Those cases where employers have clearly tried to cut corners and have not done all the actions that they've been suggested to do, and as a result have treated people appallingly, i.e. one case where people who were furloughed by text message, unsurprisingly they are not faring so well in the tribunal cases.

That also comes through with the cases around things like Section 100 of the Employment Rights Act where the employee is trying to argue they've been automatically unfairly dismissed because they've raised a health and safety concern or have refused to work because there's been some danger. The judges are finding a pathway through for the employers who have done the right thing and are being more critical of the employers who haven't.

Employers who have followed the right processes, had consultations, and discussed concerns with staff (before rushing off and doing something) are faring better than employers who imposed changes on staff as they've gone along.

Question: Our Head Office in Europe have requested that we send them details of how many UK staff have been vaccinated and how many have had covid.

As this is a potential privacy issue, is this something we can ask of the UK staff and whether we can insist on answers?

Is the parent company just trying to understand what's going on in the different countries? Do you need to be giving any personal data? They may be happy with Office for National Statistics data.

You could do an anonymous survey. People might be more likely to give you an answer as to whether they've chosen to be vaccinated and whether they've had COVID if it is anonymous and they have it explained to them that this is a global data gathering exercise, done anonymously, and the data isn't even going to be kept in the UK for other purposes. Bear in mind that any data that you have gathered could potentially be inaccurate. Whenever you do any of those surveys, you don't get 100% take-up.

If we did decide to go further and ask specific individuals about their own positions and reasoning, then we are into the GDPR implications of obtaining and storing health data, in which case we're into the extra layers of protection that go with what used to be 'sensitive

personal data'. There are always pathways through and the ICO is being supportive of employers having health data around the COVID situation but you'd need to give a privacy notice explaining exactly what that data is going to be used for and have the right policies in place.

You'd need to make sure the data wasn't used for other purposes and put in place security measures around the data.

Cancer and Return-to-Work Policies

We've seen examples of employees who have been diagnosed, had treatment, and then been treated negatively by their employer as a result.

As regards to work and making reasonable adjustments, Macmillan have got an informative pack that you can apply for [on their website](#). It includes case studies as well as advice on reasonable adjustments and training materials for managers.

There have been cases where the employee has perhaps come back to work a bit too soon (not necessarily just cancer cases) which might be for financial reasons according to sick pay, but it may also be because somebody is pushing themselves and they want to get back to work.

Employers may experience that the employee is still suffering from the after effects of the treatment that they've received i.e. chemo brain is an issue described on the NHS website. It can impact somebody's performance and attendance for a period after they've returned so employers need to be mindful of that and weave that into return-to-work plans and make allowances.

As with any return-to-work plan, any condition and/or aim that is set out at the beginning of the plan, it is important to remember that it's a journey and those steps can go forward and backwards. There should be reviews built in and you might plan for something to happen over a particular time scale, but those timescales might need to shift.

Often there is quite a rigid structure with return-to-work plans regardless of the issue the employee has been absent with. For example, you might have a six week return to work plan but that's not necessarily the right way to go forward with the employee and condition. Remember to be flexible.

With cancer in particular, one of the things that employers could do which might be beneficial to the employee, certainly from a confidence perspective, is to put in place a buddy system. If there are employees in the workforce who have been through this life experience, they could be mentoring and supporting other colleagues who are going through it as well.

Also, sometimes our standard form letters will need to be tweaked to make it appropriate to the particular circumstances. In worse case scenarios, if you don't tweak and the letter is insensitive, employees can claim harassment and victimisation.

Ask Anna

Question: With more documents being sent electronically and not seeing people in person to give and receive paper copies, is it OK to sign documents electronically if this is not done through specialised software such as docu-sign?

For example, employment contracts being signed by people typing their name into the document in normal font. Is this Ok or should we be asking for paper copies to be signed and returned to us?

Electronic signatures is a topic that's been raised more often now due to the pandemic. In the last couple of years there has been a law commission review of this and the upshot of that is everybody has agreed that it is just as legally binding to have a signature done in this manner as a traditional old-fashioned wet signature on a document so we don't need to worry about the principle of having a document signed electronically but we might want to give a bit of thought as to how we're doing it.

There is always a risk involved, and this can happen with wet signatures as well, of a document coming back to you where the original document that has been sent to the employee is saved as one file and the signature page is printed off, signed separately, scanned in and saved separately. So you've got two documents in effect. In that scenario, you're taking it on trust that those two go together and that that contract is the contract that the employee was signing when they were signing the bits of paper.

The ideal is to have one document with the signature on it, so there's no question about what was being signed up to. We recommend to reunite the signature page with the document when you save it or you use one of those pieces of software that will give you an electronic footprint to say exactly which contract was signed.

Regarding employees typing their name into a document as their signature, this could be an issue for you later down the line. Somebody could say that that wasn't them typing their name and anyone could type it out, or change the document. It is recommended that an actual signature, or using one of the pieces of software that enables you to then create the signature, is the way forward.

Question: What are the GDPR implications of employees using personal email addresses for work?

For example, if trustees currently have their own organisational email addresses for all correspondence relating to the organisation but they request for these to be set up to forward to personal email addresses for convenience.

While emails are on the work system, the employer has control over them and technical measures to secure the data in them. However as soon as you start sending this outside the work systems, you begin to lose protection, so that is a reason to avoid going down that road.

From a GDPR perspective, you'll be aware of the requirement to explain to anybody what you're doing with their data, and you'd usually do that through a privacy notice. Your average privacy notice doesn't deal with anything like personal email addresses, so potentially if you haven't told people that data could be being sent to third parties in this way, there could be an issue there. There could also be potential criticism from the ICO and employees if data is being used in a way they weren't expecting.

In terms of pathways through Data Protection, you're going to have to rely on legitimate interests, but there's a proportionality angle to the legitimate interest pathway where you have to show it's necessary for you to be doing something, and the ICO might not be convinced that it is necessary to be working in this way.

The other issue is subject access, if correspondence is leaving the work system and you receive a subject access request from a data subject, you then have to get the trustees in this particular case to provide you with any data that they've been creating from personal email addresses.

While you might think you've got no control over personal devices of individuals the ICO attitude is that if the email is being used for work purposes then it is within scope and they would expect you to be asking for the data.

Another concern could be that when people are conducting work communication on their personal devices, as we've seen with platforms such as Whatsapp, it's a less formal environment allowing more temptation to 'shoot from the hip' a little bit more. Potentially this could be an issue when using personal email.

One final point is confidentiality of information, your work systems might be secure, but there's more risk of personal email addresses being hacked making you vulnerable to attack, creating issues around your intellectual property or confidential information.

Question: Are there any best practises in company inductions you can implement to help with retainment and happy employees?

I'd focus more on managers than inductions ("people don't leave a job. They leave a manager.") So it's key to tool up your managers. Something many UK businesses are guilty of is not teaching people how to be a manager. We expect them to gain those skills by osmosis.

Secondly, make sure your managers are tied into the culture. If the manager isn't fed into the culture, the employees under them are going to struggle also.

Question: What is an employer entitled to know about employee's health?

For example, we need to set up travel insurance and the premium clearly depends on pre-existing health conditions.

Can I ask the employee to elaborate on the health condition for this purpose?

Yes absolutely, because you have a good reason for asking the question. It's about explaining to the employee why you need it and let them know why you are asking.

Question: On the topic of remote working, can we insist we go into someone's home to install IT equipment so that they can work efficiently from home? For example, an employee who has been given 2 PC screens to make their role easier.

What if the employee can't set it up and says it is affecting their job performance, but still won't accept help from the business to set it up for them at their home?

Having access to someone's home for work equipment is something that you need to put into either the contract or in your homeworking policy with a section that makes it clear that it is a contractual issue.

In regards to entering their home to set up the work equipment, ultimately we need to be reserving the right to enter somebody's home as an employer. You should have the ability to be able to go there to do health and safety risk assessments or to conduct processes like sickness, absence meetings, collecting/maintaining IT kit and other property. That's the base that you want to start from.

If somebody isn't using the equipment that you've asked them to, it becomes a reasonable instruction/disciplinary issue. If the employee refuses to do so, then you are into performance management and maybe even disciplinary territory. Just because it's not in your office that this is happening, we wouldn't suggest shying away from addressing it. If they are working from home and are being paid during those work hours, they should be using the equipment provided to do so.

Extra piece of advice on Homeworking Policies...

On this topic, a general tip for homeworking policies is to make it a privilege to be working from home, so if there are performance issues then it can be withdrawn. You could require somebody to come in then if they need to be supervised, mentored, or if they need to be developed because there are issues over performance.

The key to flexible working requests if you can't offer it is having clear business reasons as to why you can't, and that line managers don't have basic yes/no answers and instead explain the reasoning and why it is a no.

Look at how homeworking was working when employees were forced to do it through lockdown and government restrictions, and identify things that were not working. A lot of employees are saying they're doing okay working from home and that they don't need to be travelling back to the workplace, but it may be that some duties that require a physical presence are being lumped onto somebody else and making their job unmanageable. If you are pro home working, it may be that there are some tasks that you need to find different solutions to that allow for working from home to continue.

Question: If you could pick three essential pieces of training for employees, what would you pick?

1. Particularly these days there is the important need to have employees who are aligned to our **company culture**. An understanding of what the culture really means for the organisation is important as it's very easy to have our poster on the wall with our visions and values, but actually, what does that look like in practice?
2. An area that is key for everyone to start thinking about is '**dignity at work**'. By that we mean thinking about the real lived experiences of people in organisations.

For example, the Employment Lawyers Association put together a training module following the Black Lives Matter movement, that took place over a whole month where every day you would receive a small article, or video, or information to digest. They all related to issues relating to race and work which was very profound with people sharing their experiences which gave an understanding of the racial microaggressions that people were dealing with in the workplace.

Other examples of dignity at work could be about understanding that the disabled person might be worried in the work place about what happens to them when there's a fire and they can't make it down the stairs, or a member of staff going through the menopause whose desk is very far away from the toilet and where there is no window, or maybe it is the introvert who doesn't feel comfortable with speaking in meetings.

It's these pieces of information about real people and their working lives and how we can get people to understand more about the other human beings that we work with that is

very important.

- 3. Conflict management** is another important one. Most people don't know what their own patterns and behaviours are around conflict, so if you don't understand your own habits then you know you might not understand how you differ from others. It's about giving people the tools to reframe what they're saying and doing so it's done in a less confrontational manner.

Question: Do you have any advice on dealing with the menopause in the work place?

Our recommendation on this issue is that we need to be weaving it into everything that we do. If we can train managers to understand it a little bit more and generally you'll find (speaking from experience) that is it a topic that people do want to know more about.

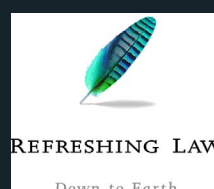
We are on the cusp of it being a more widely addressed with a recent discussion on it in Parliament, where traditionally it has been a taboo topic that wasn't talked about, but actually we're moving into a place where it is being talked about.

When you're managing sickness, performance or potentially disciplining somebody, similar to other health issues, you need to have that antenna working as you would with other conditions. If you get somebody mentioning this as an issue, don't just ignore it or discipline the employee/ give them a warning, but instead think: OK, let's stop, let's pause. Let's get some medical advice about how this particular issue is affecting you, like we should for any health issue that comes up. And let's understand the position before we make any rash decisions/actions.

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