COVID: Employment Law Update

There have been two small but important developments in the last week or so that may have gone under the radar for many employers, but which could be important when making decisions on furlough and the dilemma (faced by many employers) when someone claims they can't return to work on the grounds of health and safety.

R (on the application of the Independent Workers Union of Great Britain) v Secretary of State for Work and Pensions and Anor

Under the Employment Rights Act 1996 there is a protection for employees from suffering detriment or dismissal on health and safety grounds.

Section 44 of the Employment Rights Act 1996 provides (among other things) that it is unlawful to subject an employee to detriment for leaving or refusing to return to the work place in circumstances of serious and imminent danger, or for taking appropriate steps to protect him or herself or other persons from danger. In the context of the Covid crisis, this previously little utilised section of the Act has come to the forefront and we expect in future years there to be litigation as to when that threshold was met by an employee and when, to the contrary, an employer can demonstrate that it took steps as were required. Each case is likely to turn on its own facts.

Importantly however, in a case law development, the High Court held in *R (on the application of the Independent Workers Union of Great Britain) v Secretary of State for Work and Pensions and Anor* that the protections offered by the Employment Rights Act do not go far enough because they only apply to 'employees' in law and not the wider category of 'workers'. The Court said that the Working Time Directive requires protection of workers as well as employees, thus widening the scope of the protection from the legislation. In the motor industry, most employment relationships are that of employer and employee, but workers are utilised in different sectors, so it is important for employers to be aware of this development.

Updated Guidance on CJRS

In another development, on 13 November 2020 the Government quietly updated its guidance on the CJRS scheme on Friday night to provide that, in a few weeks, employers will not be able to reclaim furlough monies for periods of notice. The precise wording inserted into the guidance is as follows:

> "*For claim periods starting on or after 1 December 2020, your employer cannot claim for any days or on after 1 December 2020 during which you were serving a contractual or statutory notice period for your employer (this is includes people serving notice of retirement or resignation).*"

This is a significant development and clearly results in greater costs for employers, particularly if they are restructuring or making redundancies as a result of the crisis.

This advice is general in nature and it will need to be tailored to any one particular situation. Should you find yourself in the situation above, contact us at any stage for advice and assistance as appropriate.