



Employment Law Legal Update Webinar

30 April 2020

Agenda

- 1. COVID-19** 3
 - Sharing some common themes for hospitality
- 2. Recent Case Law** 19
 - Find out more about cases reported
- 3. New Legislation** 26
 - What is coming your way soon that you need to plan for

Speakers

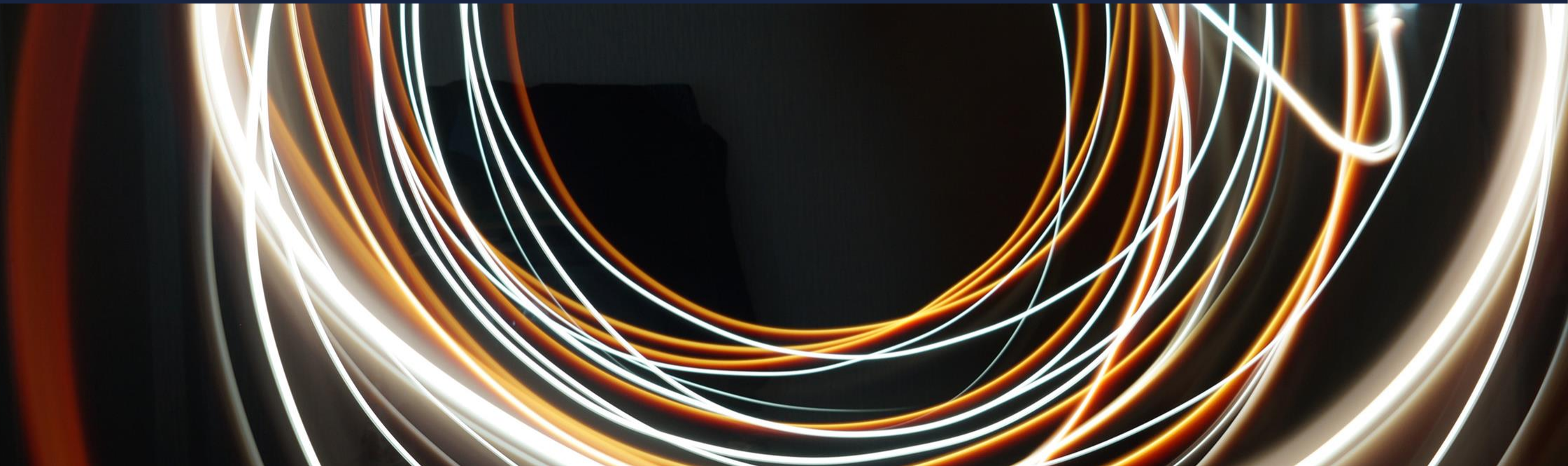


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COVID-19 Hospitality Sector



COVID-19 Impact

- COVID-19 has had the biggest negative impact on the hospitality sector in recent living memory. Immediate impacts include: low occupancy, closed hotels and restaurants, furloughed staff, transactions delayed/failed and construction on hold
- Hospitality is traditionally a people intensive sector and therefore closed premises and switching to delivery services where possible has had a huge impact on the way companies are operating
- The UK government has put in place schemes to support hospitality sector employers, including: Coronavirus Job Retention Scheme, The Retail Hospitality and Leisure Grant Fund, VAT deferral and business rates holiday and COVID-19 Corporate Financing Facility

Common Themes

- **Using Government Schemes:** Taking advantage of the Coronavirus Job Retention Scheme to furlough workers and receive a grant to cover 80% of an employee's regular wage up to £2,500
- **Limited Reopening:** Burger King, KFC and Pret A Manger have reopened a limited number of their restaurants for collection and/or delivery (located close to London hospitals)
- **Remobilising teams:** Sodexo have remobilised teams to support the NHS COVID-19 effort
- **Donating space:** Hilton and American Express are donating 1 million hotel rooms for medical professionals working on the COVID-19 response

Treasury Direction - Coronavirus Job Retention Scheme

- The legal framework for the CJRS is provided by the Treasury Direction issued on 15 April under sections 71 and 76 of the Coronavirus Act 2020
- The Direction is opaque and sometimes inconsistent with the HMRC guidance issued before and after the Direction
- The Direction is only legally binding on HMRC
- Existing fraud legislation will be used to police abuse of CJRS

Coronavirus Job Retention Scheme

Key Provisions (1)

- Applies to all UK employers who have created and started a PAYE payroll scheme registered on HMRC's real time information system for PAYE on or before 19 March 2020 and have a UK bank account
- Does not apply to employees hired after 19 March 2020 or hired before 19 March but not paid before 19 March except ex-employees whose employment terminated after 19 March 2020 and they are re-hired and placed on furlough
- Minimum period of furlough is 3 weeks
- Administrators are not prohibited from accessing the CJRS
- The scheme has been extended to run until the end of June

Coronavirus Job Retention Scheme

Key Provisions (2)

- The guidance does not indicate a need for a genuine risk of redundancy
- Employees cannot do any work for their employer or any connected person
- Employers must confirm in writing to their employee that they have been furloughed
- Permanent contract employees whose employment has already been terminated can be rehired and furloughed
- Fixed-term contract employees can be re-employed and furloughed if either (1) the contract expired after 28 February and an RTI submission was notified on or before 28 February or (2) the contract expired after 19 March and an RTI submission was notified on or before 19 March

Job Retention Scheme

Key Provisions (3)

- Claims under the scheme can be backdated to 1 March 2020
- The grant will cover 80% of an employee's regular wage or £2,500 PLUS the associated employer National Insurance Contributions and minimum automatic enrolment pension contributions on that subsidised wage
- Employers can choose to top up an employee's salary
- HMRC is hoping to make payments by the end of April 2020

Job Retention Scheme - Reimbursement

Key Provisions (4)

- The online portal opened on 20 April: <https://www.gov.uk/guidance/claim-for-wages-through-the-coronavirus-job-retention-scheme>
- An online calculator is available to assist employers in calculating how much they can claim: <https://www.gov.uk/guidance/work-out-80-of-your-employees-wages-to-claim-through-the-coronavirus-job-retention-scheme>
- The Treasury Direction states that in calculating the employee's reference salary **no account is to be taken of anything which is not regular salary or wages**
- The employee must be paid all the money which is received (less deductions for tax and NICs). No fees can be charged to the employee

Job Retention Scheme - What elements of pay are included?

Key Provisions (5)

At 7.4: 'Regular' means so much of the amount of the salary or wages as:

- (a) cannot vary according to any of the relevant matters described in paragraph 7.5 except where the variation in the amount arises as described in paragraph 7.4(d)
- (b) is not conditional on any matter
- (c) is not a benefit of any other kind, and
- (d) arises from a legal enforceable agreement, understanding, scheme, transaction or series of transactions

Job Retention Scheme - What elements of pay are included?

Key Provisions (6)

At 7.5: The relevant matters are:

- (a) the performance of or any part of any business of the employer or any business of a person connected with the employer,
- (b) the contribution made by the employee to the performance of, or any part of the business,
- (c) the performance of the employee of any duties of the employment, and
- (d) any similar considerations or otherwise payable at the discretion of the employer of any other person (such as a gratuity)

Job Retention Scheme - Guidance on 80% Calculation

Key Provisions (7)

The amount you should use when calculating 80% of your employees' wages is regular payments you are obliged to make, including:

- regular wages you pay to employees
- non-discretionary overtime
- non-discretionary fees
- non-discretionary commission payments
- piece rate payments

Job Retention Scheme - Guidance on 80% Calculation

Key Provisions (8)

You **cannot** include the following when calculating wages:

- payments made at the discretion of the employer or a client – where the employer or client was under no contractual obligation to pay including:
 - tips including those distributed through troncs
 - discretionary bonuses
 - discretionary commission payments
 - non-cash payments
- non-monetary benefits like benefits in kind (such as a company car) and salary sacrifice schemes (including pension contributions) that reduce an employees' taxable pay

Job Retention Scheme - Sick leave, self-isolation and shielding

Key Provisions (9)

- The Treasury Direction states that where SSP (Statutory Sick Pay) is payable or liable in respect of an employee (whether or not a claim is made) at the time instruction to cease work is given, the furlough period doesn't begin until that SSP period comes to an end. Any subsequent entitlement to SSP must be disregarded.
- On 16 April 2020, the Statutory Sick Pay (General) (Coronavirus Amendment) (No. 3) Regulations 2020 came into force. The effect of this appears to be that if an employer has not yet furloughed a shielding employee they cannot now do so.
- However, the latest version of the guidance still states: Employers are also entitled to furlough employees who are being shielded or off on long-term sick leave. It is up to employers to decide whether to furlough these employees. You can claim back from both the Coronavirus Job Retention Scheme and the SSP rebate scheme for the same employee but not for the same period of time.

Job Retention Scheme - Annual Leave

Key Provisions (10)

- The guidance now states that while furloughed, employees continue to accrue annual leave as per the employment contract
- Employees can agree to vary holiday pay entitlement as part of the furlough agreement but not below the statutory minimum
- Employees can take holiday during furlough at the usual rate of pay
- Employers can restrict when holiday is taken
- Employees who have been furloughed have the same rights to maternity and other paternity rights as they did previously

Job Retention Scheme - Pensions

Key Provisions (11)

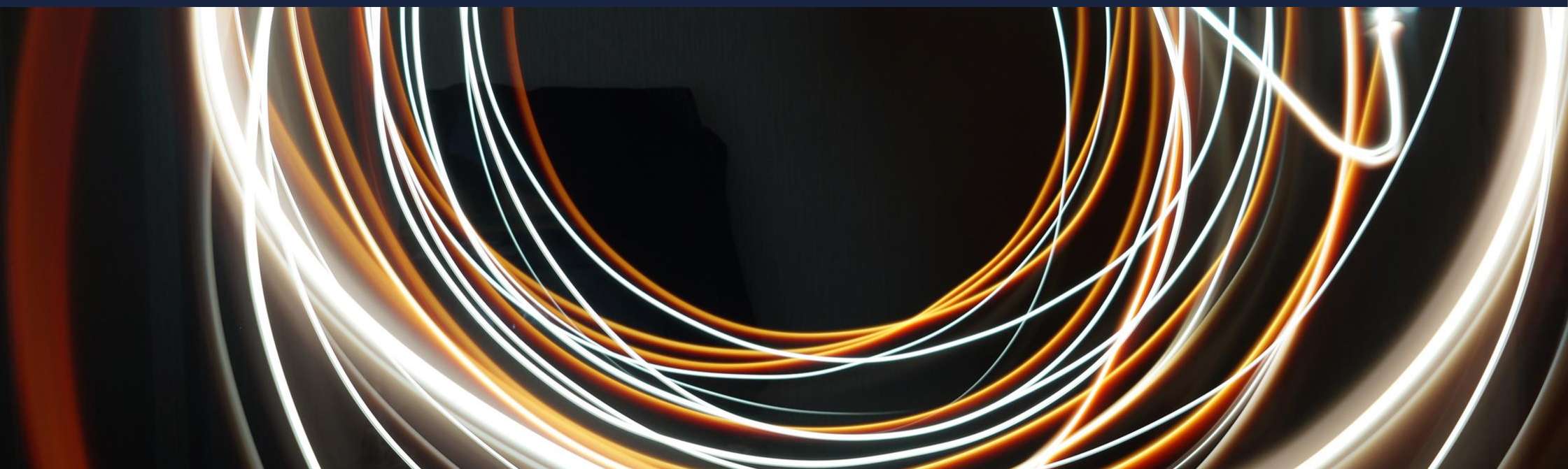
- Pensions Regulator's guidance makes it clear that employers' automatic enrolment obligations continue to apply as normal whether employees are working or are furloughed, and that employers must not encourage or induce employees to reduce their contribution level, opt out or cease active membership.
- The Regulator acknowledges that this is a challenging time and states that it will take a proportionate and risk-based approach towards enforcement decisions with the aim of supporting both employers and savers.

Recent cases

Note: both cases considered the application of the JRS in the administration context

- ***Carluccio's Ltd, Re Insolvency Act 1986 [2020] EWHC 886 (Ch) (13 April 2020)***
 - Consent to the variation of contracts of employment and furlough sought after administrators were appointed
 - Variation Letter sought agreement to furlough and reduced pay (80% of the salary up to a maximum of £2500 per month)
 - First glimpse into the relationship between the JRS and existing insolvency law
- ***Debenhams Retail Ltd, Re [2020] EWHC 921 (Ch) (17 April 2020)***
 - Contracts of employment were not varied and employees were furloughed before the appointment of administrators
 - The meaning of adoption was interpreted consistently with Carluccio's BUT the uncertainty surrounding the meaning of wages/salary and lack of limitation of wages/salary to 80% of the salary up to a maximum of £2500 a month may present issues for the administrators
 - The Court took a pragmatic approach, referring to the willingness of many employees to have their wages limited to the JRS capped level
- ***FOOD FOR THOUGHT***
 - Carefully drafted furlough agreements – limit your liability under contracts of employment
 - A dynamic area – watch this space!

Recent Case Law



Case Law – Vicarious Liability

- *In Wm Morrison Supermarket plc v Various Claimants [2010] UKSC 12*, an employee copied payroll data onto a USB stick and sent it to three national newspapers, purporting to be a concerned member of the public.
- The Supreme Court overturned judgments of the High Court and Court of Appeal and decided that the supermarket was not vicariously liable for unauthorised breaches of Data Protection Act 1998 committed by the employee.
- The mere fact that the employee's employment had given him the opportunity to commit the wrongful act was not sufficient to warrant the imposition of vicarious liability. The employee was pursuing a personal vendetta. His wrongful conduct was not so closely connected with acts which he was authorised to do that it could fairly and properly be regarded as done by him while acting in the ordinary course of his employment.
- Although this was decided under the previous data protection regime, the DPA 1998 and the GDPR are based on broadly similar principles and the GDPR and Data Protection Act 2018 (DPA 2018) will not be a barrier to vicarious liability actions in data privacy proceedings commenced under the current regime.

Case Law – Vicarious Liability

- In *Barclays Bank plc v Various Claimants* [2020] UKSC 13, the Supreme Court held that a self-employed medical practitioner was not in a relationship “akin to employment” with a bank that had engaged him to perform medical examinations on potential bank employees. The bank would therefore not be liable for sexual assaults allegedly committed by him when he was undertaking medical examination on candidates.
- Lady Hale noted that whether a person could be made vicariously liable for the torts committed by another involved a two-stage test. The first stage is whether there was a relationship between the two persons which made it proper for the law to make one pay for the fault of the other.
- This has been expanded past employer and employee, where the relationship is “sufficiently akin” to employment to make it fair, just and reasonable to impose vicarious liability.
- The question was whether the wrongdoer was carrying on business on his own account or whether he was in a relationship “akin to employment” with the defendant.
- In this case, the doctor had been in business on his own account with a portfolio of patients and clients. The bank was not vicariously liable for his wrongdoing.

Case Law – Confidentiality

- In *Scott v LGBT Foundation Ltd [2020] EWHC 483 (QB)*, LGBT disclosed information with the claimant's GP in a telephone conversation, regarding the claimant's drug use and LGBT's assessment that he was at significant risk of suicide or other substantial self-harm.
- The claimant had completed self-referral forms to access the counselling services available, the form stated "if there is a reason to be seriously concerned about your welfare, we may need to break confidentiality without your consent to help you stay safe".
- The High Court rejected the claimant's claim that the LGBT Foundation had breached his confidentiality, privacy and data protection rights by disclosing information about him to his GP due to concerns about his welfare.
- There was no DPA breach because the disclosure was verbal and therefore not processing personal data, but even if it was, it would have been justified to protect the data subject's vital interest.
- There was no breach of confidence as there was a carve out of limited disclosure to a GP in the self-referral form completed by the claimant.

Case Law – Trade Secrets

- In *Trailfinders Ltd v Travel Counsellors Ltd & others* [2020] EWHC 591 (IPEC), Trailfinders took action against former employees and a rival company the former employees had moved to, claiming they took preparatory steps before resigning to use the agency's trade secrets to set up in competition with the rival.
- Trailfinders alleged that the former employees took names, contact details and other confidential customer information. They then exploited this information for their benefit and the benefit of the rival company.
- The High Court held the former employees were in breach of the duty of confidence they owed to Trailfinders. It was also held that they had committed unlawful acts within the meaning of Directive (EU) 2016/943 on the protection of undisclosed know-how and business information against their unlawful acquisition.
- This is the first judicial reference to the Trade Secrets Directive, providing a definition of trade secret (article 2(1)) which is now the best guide to what is confidential under the Trade Secrets (Enforcement, etc) Regulations 2018 (SI 2018/597).

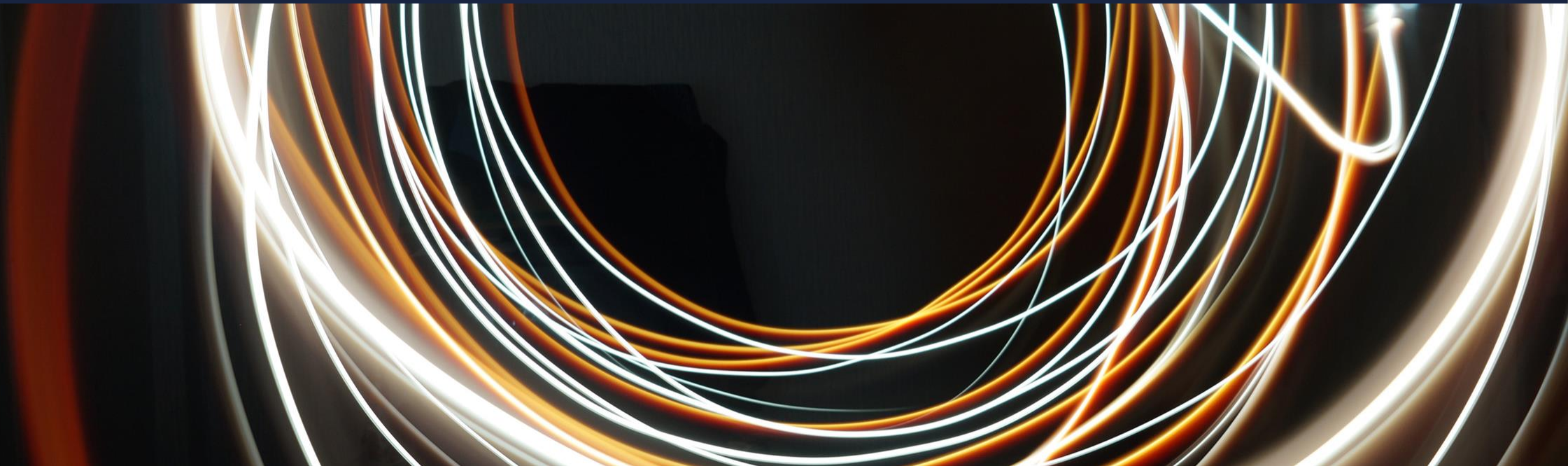
Case Law – Wrongful Dismissal

- In *Human Kind Charity v Gittens UKEAT/0086/18*, Ms Gittens was employed by Human Kind Charity. She was asked to investigate extra data charges related to her work iPad. She concluded she could not “narrow down” the person responsible. The charity undertook a separate investigation, during which she admitted she was in possession of the iPad when the charges were incurred. She was put through a fair disciplinary process based on incurring charges without permission and intentionally submitting a false investigation report, she was summarily dismissed.
- The EAT held that an employment tribunal had misdirected itself by conflating an employee’s right not to disclose their own wrongdoing where they owed no fiduciary duty, with the right to say something that is not true, when it found that Ms Gittens had been wrongfully dismissed for submitting a false investigation report.
- The wrongful dismissal test is an objective test; a tribunal must decide whether an employee is responsible for a repudiatory breach of their employment contract. In this case, Ms Gittens was responsible and had submitted a false investigation report when she was aware of her own wrongdoing. The right to remain silent is not the same as a right to say something that is not true.

Case Law – Whistleblowing

- In *Jesudason v Alder Hey Children's NHS Foundation Trust* [2020] EWCA Civ 73, the claimant was a part of an informal confidential group mediation process with colleagues in 2008. He subsequently made disclosures to the Trust's HR department using confidential information from the mediation. He also contacted the media, resulting in an article critical of the Trust appearing in a national newspaper.
- The claimant brought an employment tribunal claim for whistleblowing detriment and race discrimination. The detriments the claimant alleged to have suffered included letters sent from the Trust's chairman to third parties, setting out the Trust's position.
- The tribunal held that the sending of the letters did not amount to a detriment, as the trust was defending its position and could not reasonably be viewed as causing a detriment.
- The EAT and Court of Appeal upheld that the employer was not liable to a whistleblower for damage to his reputation caused by trying to set the record straight. Where a whistleblower takes a case outside an organisation, by going to the media or regulatory bodies, the employer will not necessarily be liable under the whistleblowing legislation if it responds in kind, and tries to set the record straight, even if this is in robust terms and harms the employee in the process.

New Legislation

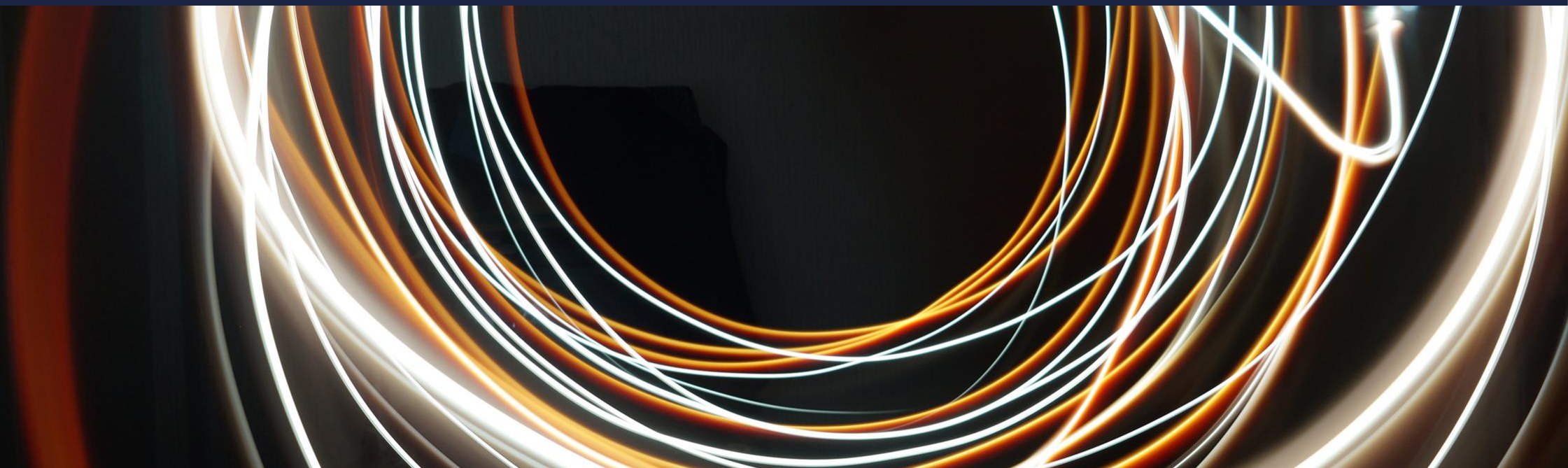


New Legislation

- **Employment Rights (Increase of Limits) Order 2020 (SI 2020/205)** increased the limit applying to certain awards of employment tribunals and other statutory payments on 6 April 2020.
- **The Social Security Benefits Up-rating Order 2020 (SI 2020/234)** increased the rates of statutory sick pay, maternity pay, paternity pay, adoption pay and shared parental pay on 6 April 2020.
- **BEIS consultation** opened on its proposal to give employees who are also unpaid carers one week's unpaid leave per year for the purposes of caring.
- **National Living Wage and National Minimum Wage** increased in April 2020.
- **Neonatal Leave and Pay** plans were announced by the Chancellor. The Government will bring forward legislation to create additional entitlements to statutory neonatal leave and pay.
- **Government updates on calculating holiday pay** for workers without fixed hours or pay to reflect new 52-week referenced period introduced by the Good Work Plan.
- **IR35** Off-payroll working rules reforms have been delayed by 12 months and will now come into force on 6 April 2021 as part of the response to COVID-19.

Q&A

DLA Piper Resources



DLA Piper resources

GENIE:

www.dlapipergenie.com

DLA Piper coronavirus COVID-19:

<https://www.dlapiper.com/en/uk/services/coronavirus-covid-19/>

The screenshot shows the GENIE website header with a background image of a lake and trees. The header includes the GENIE logo and the text "Global Employment News, Insights & Events". Below the header, there is a navigation menu with options: "Explore employment laws around the world", "View country reports", and "Compare countries". The "Latest" section shows a list of articles with thumbnails and titles, including "Spain: New month...", "Poland: Deadline of holiday allowance...", and "US: NLRB reverses...".

The screenshot shows the DLA Piper coronavirus COVID-19 website. The header features the DLA Piper logo and navigation links: "About Us", "Locations", "News", "Careers", "People", "Sectors", "Services", "Insights", and a search icon. The main content area is titled "Coronavirus COVID-19" and includes a sub-navigation menu with options: "Blogs", "Events", "Publication Series", "Publications", "Resources", and "Topics". The main content area displays a list of articles with thumbnails and titles, including "Coronavirus COVID-19: Webinar on the global employment law issues", "Global: Roundup of developments for February 2020", "Singapore: An update on the impact of the coronavirus on business", and "China: Special rules due to Coronavirus on work permits, social security and suspension of business".

Thank you

Any questions? Speak to your normal DLA Piper contact or email us at Employment@dlapiper.com