

Coronavirus – Managing Existing Proceedings

Introduction

The coronavirus is giving rise to a variety challenging, and sometimes interesting, individual employee relations issues, which will draw the attention of employers. However, many employers would no doubt have had ongoing cases on their hands, which arose before the coronavirus challenges, but in respect of which consideration may have to be given as to whether the circumstances surrounding the coronavirus have any impact on those case. In this note we give you some factors that you may wish to consider, notwithstanding that each case will need to be dealt with on its own merits, but there are some general common approaches that employers may wish to consider.

What if proceedings were already underway when the effect of the virus struck?

In cases where notice has been given to the staff member to commence the relevant procedure then you will have to decide:

- Whether and how to continue with the process. That means that you will have to determine whether to take the next step in the process (i.e. whether it is further investigation, convening a hearing or issuing your decision).
- Whether to postpone the proceedings.
- Whether to abandon the proceedings altogether.

In order to make this decision you should act reasonably and within the principles of fairness that employers are required to apply in such cases as the one that you are dealing with. Whilst the coronavirus has had a dramatic impact on business and society, it has not changed the fundamental principles of fairness that employers should follow in these cases. The legal framework provides that decisions should be made based on what is reasonable in the particular circumstances of the case. Therefore, there are no absolute set of factors that you are required to apply and you should focus on the specific issues arising from the case before you. However, here are some examples of factors which can be said to be generally relevant:

- The stage that you have reached in the process: if the next step in the process can be taken without needing to have any further contact with the parties or witnesses then there should be no reason to postpone or abandon the proceedings. You have control of that step and there are few reasons not to take it when you are able to do so (e.g. if you have heard all of the evidence then you can decide the final outcome and notify the staff member).
- The nature and seriousness of the issues in the case: consideration of this would mainly apply in cases where you have not as yet reached the stage where a decision can be made. Therefore, the options are as to whether to postpone or abandon the proceedings. By way of example, if you were dealing with a case of poor performance, but the staff member in question has answered a call to support the business through the challenges posed by the effects of the coronavirus, and is doing so to your satisfaction, then you may wish to review whether the proceedings should reasonably continue. Alternatively, you may decide to postpone the proceedings because the

helpful service that the staff member is providing has a bearing on your view of his/her capabilities.

- The impact of delay on the ability to make progress in the case: this would mainly apply in cases where you have not as yet reached the stage where a decision can be made. The decision as to whether to postpone would then be affected by whether the delay would compromise the ability to make a decision that is fair in the circumstances. For instance, consideration would have to be given as to whether delay would affect the recollection of witnesses; or the financial impact on the business (e.g. full pay continuing during a prolonged suspension in a disciplinary case; or full sick pay continuing in a long term sickness absence review where the medical evidence does not suggest an imminent return to work).

These are factors which employers may reasonably take into account in order to determine whether and when to proceed. The parties should be informed of the decision as to whether and when to proceed. In the event of any challenge, having considered all relevant factors, you would then be able to explain your decision and progress the case accordingly.

In a case where you have not notified a staff member of proceedings (i.e. you had made your mind up to proceed but had not as yet informed the parties), then you will have to decide whether you instigate the proceedings in the current circumstances. The broad principle in relation to bringing proceedings is that you should do so quickly and to avoid unnecessary delay. Therefore, subject to the practicalities of managing your time and the changes that may have to be made from a procedural point of view (see below) it would be advisable to instigate the proceedings. The coronavirus will not make the problem disappear and should you delay then the question would arise in any future proceedings as to why action was not taken earlier if there was genuinely a problem.

Could coronavirus measures impact on existing proceedings?

They are likely to do so. The interview and hearings which take place in proceedings are typically held face to face; your procedures may specifically require face to face meetings. However, given the measures that you may have implemented to comply with the Government advice/orders on social distancing and restricting travel, face to face meetings may no longer be safe and practical. Therefore, notwithstanding any procedural requirement or general practice, it would more than likely be reasonable to hold meetings remotely (e.g. by telephone conference/Skype type systems). All of the usual procedural safeguards can and would apply to such meetings, such as disclosing evidence in advance, right to be accompanied and opportunity for the staff member to state his/her case. It is important that managers prepare for such meetings in the usual way (we remind you of our workshops and tools available to managers to get themselves ready to hold such meetings, such as our [digital workshops](#) and the animated videos from our friends at [10 to 3](#)).

The current circumstances could also impact upon your decision making, depending upon the nature of your business and its current needs. For instance, if any party

is a key worker or if you are an essential service, which needs intensive or additional resource, then in the interests of the public wellbeing, you may reasonably decide to return a member of staff to the frontline of service when you might otherwise not have done so. For example, in the current climate an NHS organisation who has a staff member on suspension may decide to lift that suspension because of the need to deploy as many people as possible. The implications of such a decision would have to be carefully considered and managed with a view to what happens at the end of the crisis measures.

Every case will be different, and we are available to help if you have a case where such issues have arisen.

Vista Employer Services

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