

Coronavirus

10 employment mistakes to avoid



COVID-19

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If you're a business owner currently faced with a substantial drop in income whilst your outgoings remain the same, you'll be thinking about your bottom line and how to reduce costs. Making these important decisions about your business without thinking through the employment law implications could create costs for you to bear at a later date.

Caroline Dutot from Ardent Chambers shares the top 10 employment law mistakes that are easy to make in response to the Coronavirus crisis and what to do to avoid them.

Mistake 1: Assuming employment and discrimination laws don't apply

Employment rights and the need for fair employment processes exist as they did before Coronavirus disrupted our world. Coronavirus doesn't mean that the rules around unfair dismissal, paying notice periods or redundancy no longer exist. Make sure you do your research, work out the cost implications if you do need to make employees redundant and take advice where necessary.

Mistake 2: Taking decisions about pay or working hours without speaking to your employees

I've heard of employees being invited to a meeting, or receiving a communication, telling them they're going to receive a reduced wage. Pay is a fundamental term in an employment contract and can only be changed by agreement from both parties. If your business is struggling financially then you should be prepared to have open conversations with your employees to try and agree what action is needed to help the business survive, whilst at the same time attempting to retain employees. Businesses should inform employees of the financial issues being faced, outline options to them, consult with them and reach agreement.

Mistake 3 : Going straight to redundancy without considering other options

Business owners need to look at alternative options to redundancy and consult with their employees about them.

Options include:

- Early retirement
- Sabbaticals
- Secondments
- Taking of annual leave or a pro rata of it
- Unpaid leave
- Reduced hours or working patterns by agreement
- Freezing or restricting recruitment
- Reducing or removing overtime
- Reduction of contractors, consultants or freelancers
- Reallocating staff to other areas of the business, or redeploying to another business
- Agreeing to defer salary payments to a later date (in whole or part)
- Freezing discretionary bonuses or agreeing a deferred payment of them
- Voluntary redundancy

If employees agree to reduce their working hours for a defined, temporary period, the employer should confirm to them in writing:

- The exact working hours
- The start date of the varied arrangement
- When the employee will return to their previous working hours
- Details of how their pay will be impacted

Reaching agreement is not as hard as it may seem, especially when employees understand the risk to the business if changes are not made. The consultation process might also allow your employees to suggest ideas or solutions that you haven't thought of.

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Mistake 4: Being inconsistent

If you are looking at taking measures to reduce the cost in your business and this is affecting your employees, then you need to be fair and consistent (unless there's a demonstrable business need for differential treatment.) Otherwise you risk discrimination claims and reduced employee morale and goodwill.

If you're looking at an agreed temporary reduction in pay to save your business, don't tell your employees that's what is needed of them if you, your Board and managers aren't prepared to take the same (or a greater) reduction.

Mistake 5: Temporarily laying off employees without the contractual ability to do so

You can only temporarily lay off employees if their existing employment contracts include a clause allowing you to do so. These clauses are rare and tend to be used in manufacturing settings where demand and supply may justify the need for a fluctuating work force. Without this clause (and most sectors do not have them) laying someone off temporarily will be a breach of contract and amount to constructive dismissal (unless you agree with the employee who is to be laid off or a relevant union). If you can't reach agreement with your employees by working through the options outlined in Mistake 3, and Government support doesn't assist with temporary cash flow, then the next stage is to look at redundancies.

Mistake 6: Failing to adopt and follow (or trying to follow) an appropriate redundancy process

Redundancy is a type of dismissal that happens when a business has less need for employees to carry out particular work or intends to cease business entirely.

The normal legal provisions around redundancies still apply, which mean that you're required to take steps to avoid compulsory redundancies if you can.

Redundancy processes vary and whilst a truncated redundancy process might be considered reasonable by an employment tribunal in certain circumstances during the Coronavirus crisis, giving no thought to

process at all is unlikely to be acceptable.

If you're thinking about redundancy you need to consider the following key stages of the redundancy process:

- Consultation and considering alternatives
- Identifying the pool of employees for selection
- Seeking volunteers for redundancy
- Selection and process of selection
- Looking for alternative positions for those selected
- Redundancy payments to those selected

Mistake 7: Assuming you only have to pay 80% of pay under the co-funding payroll scheme in Jersey

Information about the scheme is still crystallising but some employers think the scheme means they only have to pay 80% of their employee's wages. This is incorrect. The scheme operates so that eligible businesses can receive up to £1,600 a month towards the wage of each individual employee, or 80% of that employee's salary if it's less than £1,600 a month. Unless the employer reaches a different agreement with their employees, this is a contribution towards the salary cost borne by the employer. The employer still has to pay the rest of the salary.

For more information go to:

<https://www.gov.je/SiteCollectionDocuments/Industry%20and%20finance/ID%20Co-funding%20payroll%20scheme%20phase%202%20-%20Informal%20FAQs.pdf>

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Mistake 8: Failing to treat sick pay in the usual way

If an employee contracts Coronavirus, then as a business you should apply your usual sickness absence and pay entitlements, unless you've formally amended your employment handbook in response to Coronavirus.

Statutory sick benefit in Jersey is available if you are unwell with Coronavirus or self-isolating in certain circumstances.

For more information on the amounts payable go to:

<https://www.gov.je/Health/Coronavirus/Pages/CoronavirusSicknessBenefit.aspx>

Mistake 9: Assuming how employees with children want to work

Juggling childcare and working from home can be challenging. However, don't assume how parents among your work force want to work or that they can't continue working because they have children at home. Be prepared to offer more flexible working hours or a relaxation of the number of hours usually worked, if you can.

Some parents may prefer a period of unpaid leave or reduced hours but don't assume. Have open conversations about how they want to manage their work at home and lay out the options – flexible working hours, reduced working hours and unpaid leave (or a combination of those options) for them to consider.

Mistake 10: Assuming how employment tribunals will respond to the crisis

Defending employment claims, whatever the backdrop, takes up precious time and energy. It also presents uncertainty for a business and those involved, both financially and psychologically. This isn't how you want to spend your time and money as a business owner when you could be focused on rebuilding after Coronavirus.

We don't really know how employment tribunals will respond to cases arising out of employment scenarios that took place during the Coronavirus outbreak. We won't know until the first cases start to be heard.

Tribunals are there to uphold the law and if the law has not changed, it's hard to know to what degree an employment tribunal will be able to use their discretion to take into account the unprecedented circumstances. Perhaps our tribunals will offer some leeway over the extent to which a redundancy consultation is carried out, or how it's undertaken where an employer has tried to act reasonably but it's hard to imagine a tribunal saying there should be no process at all.

If you do find yourself before the tribunal in respect of a Coronavirus related employment claim, being able to demonstrate you acted reasonably and explored all the options open to you will be important. So, take stock of your options, consult your employees and record your decision making carefully.

Together we'll keep business working.

Information kindly provided by Caroline Dutot



Ardent Chambers

Please contact us at
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for help and support.

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