Dear Ian,

My apologies for the delay in referring you to our legal compliance challenges which I set out below. These focus on several Acts of Parliament and how these can be complied with while we are in this pandemic and many/most employees are working remotely and/or furloughed. I mentioned also that while Universities are looking to return to work in some capacity following lockdown, we do not know if there will be a second peak, but it is suggested this is most likely. It is also possible that cities experience local lockdowns, such as has happened in Leicester.

Not COVID19 related, we also need to refer to the S188 Notice specifically referring to Dismissal and Re-engagement should we fail to reach agreement.

1. Section 188 of the Trade Union Labour Relations (Consolidation) Act 1992 (“TULRCA”)
3. S10 of the Employment Relations Act 1999 (Right to be Accompanied)

Section 188 of the Trade Union Labour Relations (Consolidation) Act 1992 (“TULRCA”)

Collective Consultation
A collective redundancy situation arises where the employer is proposing to make 20 or more employees redundant at one establishment within a period of 90 days or less. In that event (and in addition to consulting with employees individually) the employer must provide certain information to “appropriate representatives” of the affected employees and consult with them, in accordance with section 188 of the Trade Union Labour Relations (Consolidation) Act 1992 (“TULRCA”). The collective
negotiations with the trade union or employee representative should seek to avoid compulsory redundancies where possible and should seek to mitigate the consequences of any compulsory redundancies that prove inevitable.

The obligation to consult will apply also where the employer is proposing to unilaterally vary terms and conditions of employment by terminating existing contracts and re-engaging employees on new terms. (GMB –v- MAN Truck and Bus Limited [2000] IRLR 636). Consultation must take place about:

- avoiding the dismissals,
- reducing the numbers of employees to be dismissed, and
- mitigating the consequences of the dismissals.

The consultation must be meaningful and genuine on all three of these criteria. The consultation should be undertaken with a view to reaching agreement with the “appropriate representatives”. However, this does not mean that agreement must be reached, but rather that the process should not be a sham and that the employer should consider the views and proposals of the “appropriate representatives”.

It is worth pointing out case law has held that consultation should also cover the reasoning behind the redundancy situation, i.e. the business or commercial decision. (1) (UK Coal Mining Limited –v– (1) National Union of Mineworkers (Northumberland Area) and (2) The British Association of Colliery Management [2008] IRLR4. This read with s.188 (2) (a) which imposes an obligation to consult over ways of avoiding the dismissals, effectively requires there to be consultation over the reasons for those dismissals.

It is not possible for an employer to avoid liability by arguing that consultation would be futile. In particular, those consulted should be given a fair and proper opportunity to understand the matters about which they are being consulted and to express those views and have those views considered properly and genuinely. The question then arises as to whether collective consultation be effective when workers are furloughed or working remotely. We argue that collective consultation is not possible in such circumstances.

A fundamental component of adequate consultation is for the representatives of affected employees to be able to communicate the University’s views to the affected employees, hear their views on the University’s proposals, and, in light of the views expressed, respond to the University. If the majority or even high proportion of the affected employees, are, for example on furlough or working remotely, it may make it very difficult for effective communication with them to take place. It may also prevent the union’s representatives from seeking, and acting upon, the views of the workers they represent. Section 188(5A) TULRCA requires that ‘the employer shall allow the appropriate representatives access to the affected employees and shall afford those representatives such accommodation and other facilities as may be appropriate’. If employees are on furlough or working away from the workplace
questions will arise as to whether the employer is able to give appropriate representatives the access they need.

Whether collective consultation can be effective in circumstances where workers are furloughed or working remotely will therefore very much depend on its facts.

While working under lockdown we have all had to give cognisance to issues such as

- Individual’s IT knowledge
- Family circumstances
- Health issues
- Software - via Skype, Teams, Go to Meetings or Zoom. We do not have access to all these software and members may not also.
- Hardware – may not have work provided kit and how can you use hardware to both attend a Video Conference and look at documents at the same time when the phone is 8 inches from your ear for example.
- Ability to access paperwork in hard copy
- Broadband connection
- Intermittent interruptions with connections / freezing / dropping out etc.
- Confidentiality when family members in the background
- Ability to read body language
- Ability to confer with Trade Union reps and adjourn
- Reasonable Adjustments for Disability?
- General Duty of Care particularly if facing redundancy or dismissal
- Equality Issues to ensure that all have the ability to participate irrespective of gender, race, disability, socio-economic factors etc.

For these and more reasons we do not believe we as trade unions can carry out our role effectively and that can place legal jeopardy on the trade unions. If we for example excluded (or failed to include) groups of lower paid women, for example, we would (following precedence from the Local Government Equal Pay claims) find ourselves co respondents with Employers on Discrimination Claims.

The onus is therefore on you to explain how you as Employer are going to assist representatives in carrying out their responsibilities: Section 188 (5A) places an obligation on employers to provide appropriate facilities to employee representatives. Consultative arrangements must ensure trade unions or other appropriate representatives can access affected employees. In a case where a union is recognised this includes all workers in the bargaining unit not just the trade union members. What amounts to “appropriate facilities” is something that is rarely considered in the context of how s188 operates but in organisations which previously have relied on face-to-face meetings and now cannot, it will need to be considered very carefully.

Whilst there are circumstances where an employer does not have to consult for example if there are “special circumstances which render it not reasonably practicable” for the employer to comply with its duties, it need only take such steps as are reasonably practicable in the circumstances. The onus is on the employer to show that there are special circumstances and that it has taken all reasonably practicable steps. It is highly unlikely the pandemic or the fact workers are furloughed of itself amounts to special circumstances and something else would need to be added into the mix for it to have any
genuine prospect of doing so. The Court of Appeal in Clarks of Hove Ltd v. Baker’s Union considered that the defence should apply in the event of sudden disaster, whether physical or financial, that makes it necessary for the employer to close down its business.

**Dismissal and Re-engagement:**

In relation to the dismissal and re-engagement allegations whether under remote working or ‘lockdown’, or not, it is our view that this has placed unreasonable real threats on the unions. It is arguable that given you have taken this position, that you have no intention of meaningfully consulting with us with a view to reaching agreement and have already therefore breached your S188 obligations. You will know there are several very high-profile matters in which dismissal and reengagement is likely to be tested in the coming months namely in the Airlines Industry and the Energy Sector. It would be very public if we also tested this in the University Sector and we want to avoid this at all costs while we are all dedicated to demonstrating to students why they should feel confident that their student experience is worth enrolling now.

It is most unhelpful and a real departure from the good industrial relations we have always had with the University of Sheffield and we would ask you to retract what is perceived to be a real threat.

In summary in relation to the TULRCA we do not believe you as Employer and ourselves as Trade Union and ‘Appropriate Representatives’ can comply with our legal obligations under S188, may already have breached the S188 obligations - and this could lead to both claims against the University and the Trade Unions.

**S98 of the Employee Rights Act 1996:**

Let’s assume that we fail to reach agreement through these consultation period and you do follow through with Dismissal and Re-engagement.

In the case of Dismissal, you will need to demonstrate that you have a Fair Reason to dismiss either through claiming:

1. Capability or qualifications;
2. Conduct;
3. Redundancy;
4. Where continued employment would contravene the law; and
5. Some other substantial reason.

Assuming you relied on the last reason you will still need to demonstrate that there is Some Other Substantial Reason, not simply that you have failed to reach a collective agreement with the trade unions and this substantial reason will need to be evidenced. We would for example challenge whether another employer of a similar size and financial position, facing similar uncertainties in student numbers, would have acted in the same manner and whether it was reasonable response. Ultimately, this could lead to multiple Unfair Dismissal claims under S98 of the Employment Rights Act 1996.

**S10 of the Employment Relations Act 1999:**

Furthermore, as I mentioned in the case of dismissals this triggers the rights for all employees to be accompanied under S10 of the Employment Relations Act. Would it be your intention to hold 8100plus...
individual dismissal hearings in the Autumn/Winter because there would be an expectation on you to do so? All staff, whether members of the union or not, will have the right to be accompanied at these dismissal meetings and this refers me back to the point about whether under remote working/furloughing we are able to comply with the rights to be accompanied and all those rights entail.

**In conclusion:**

I appreciate that is all very detailed and long however you asked me to set it out in writing. We concluded the meeting to say that we are not aiming to be obstructive and do wish to engage with you in meaningful and constructive dialogue and consultation with a view to reaching agreement. Before we can continue however, we ask you to return with your reasons on how you can comply with S188 of the TULRcA and S98 of the Employment Rights Act 1996 and S 10 of the Employment Relations Act 1999.

It was suggested by the Joint Trade Unions at the end of our trade union meeting following the meeting with yourselves that it would be very constructive and go a long way to restore concerns about industrial relations and demonstrate good faith in the process if you were to revoke the S188 notice completely or at least the threat to dismiss and re-engage.

We look forward to hearing from you as soon as you can.

Yours Sincerely,
Leonie Sharp on behalf of the Joint Trade Unions.

cc. UNISON, UCU, UNITE, GMB representatives