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The End of Furlough… the Start of Redundancy?

The Coronavirus Job Retention Scheme (CJRS) has been paying the wages of over 7.5 million UK employees, but as the most expensive government spending programme in history draws to a close, what are the employment law consequences?

The CJRS has effectively equated to a temporary leave of absence from work, but as employers are beginning to have to pay something towards the scheme – and understand the dramatically different post-lockdown landscape – large scale redundancies are likely. This article intends to look at some distinct tricky issues that employers and employees could face when embarking on the redundancy process.

Selection of the Pool

Aside from the selection criteria, this issue can be one of the most contentious hurdles to overcome. 'Pool' is not mentioned in section 98(4) of the Employment Rights Act and employers are granted a fair degree of discretion over the size and composition of selection pools. Workplaces are often split into distinct departments, but there may be employees undertaking the same, or very similar tasks, elsewhere – even at different sites. Employers may also be entitled to move workers according to their contracts of employment, so having a pool from one department or job role could be unreasonable, resulting in a successful claim for unfair dismissal. It follows that a careful and holistic approach to the selection is essential.

Employees require consultation throughout the process – and objections from employees regarding the pool selection will need to be carefully justified. Workers who have been seconded, or working on separate projects, require careful consideration; it helps to ask whether there is a good reason to keep them out. From a business perspective, a large pool could adversely impact on moral, or unnerve essential employees, but a narrow pool is more likely to result in claims of unfairness. In *Wrexham Golf Co. Ltd v Ingham* [2012] 7 WLUK 249 (EAT), an employee initially won a claim where he was placed in a pool of one, before it was remitted for rehearing. The danger to employers lies not just in the risk of an adverse result, but in the expense it requires to put right. Litigation tends to be very fact specific, so each decision in the process, such as whether to 'bump' employees to other roles, could be subject to close scrutiny.

Holidays and Notice Pay

Employees have still been accruing statutory holiday entitlement during furlough. The guidance has been clear that employers can compel employees to take annual leave when on furlough: https://www.gov.uk/guidance/holiday-entitlement-and-pay-during-coronavirus-covid-19#taking-holiday. However, employers would need to pay employers 100% of pay over this time – and not make a claim under the government scheme. This can make for quite complicated calculations, particularly when done retrospectively, or when people are leaving employment. The guidance also suggests employees should be allowed to carry up to 4-weeks holiday over the next two holiday years, which should avoid employers having to accommodate multiple requests at the end of the year.

The position is more complicated with paying notice pay to staff on furlough. If 80% salary is presently being paid, there is a logic in it continuing over the notice period – as long as the employee is not undertaking any work. The provisions in sections 87 to 91, coupled with sections 220 – 229 of the ERA require close scrutiny of the contract, length of service and the statutory notice period before an answer can be provided. The result is that employers only paying 80% will risk proceedings from disgruntled employees, even if that cannot be recouped from the CJRS. Conversely, for employers making multiple redundancies of furloughed staff, this could result in unpredicted expenses from the redundancy process.

Restricted Covenants

The general rule is that an employer is only entitled to limited protection from a former employee in respect of existing clients, confidential information and trade information. With redundant employees chasing limited opportunities, such covenants will be particularly important. Most restricted covenants are now written into contracts – many of which were drafted some time ago and may not reflect the present legal position. If an employer has a genuine interest to protect, then a Court would uphold a restrictive covenant, but only if the restraints are reasonable and necessary to protect a legitimate interest.

The general rule is that if a covenant was too restrictive, then it would be void and no part of it could be enforced. However, in recent years, the Courts have been willing to relax this interpretation and use the 'blue pencil' rule – deleting an offending part of the covenant, to make is reasonable and necessary. In *Tillman v Egon Zehnder Ltd* [2019] UKSC 32, the Supreme Court provided detailed guidance on when Courts could severe parts of the covenant to make the remainder enforceable:

1. The unenforceable provision should be capable of being removed without the necessity of adding or modifying the remaining wording;
2. The remaining terms are still supported by adequate consideration;
3. Removing the unenforceable provision does not change the character of the contract, so that it results in being different to what the parties initially agreed;
4. The severance must be in line with public policy underlying the avoidance of the offending term.

In advance of making redundancies, employers should consider the covenants in place and whether they would survive Court scrutiny. Employees may also need to consider what restrictions they have before accepting new roles. It will prove extremely difficult to enforce a restricted covenant if an employee was dismissed in breach of contract, such as those only paid 80% of their notice pay. If it does come down to litigation, one Justice in *Tillman* suggested that even if an employer wins in enforcing a restrictive covenant, they could be punished with costs if the contract they wrote needs rewriting by the Courts.

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