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REDUNDANCY CONSULTATION IN THE TIME OF COVID-19: OLD LAW, NEW CHALLENGES

Multiple large scale redundancies have been announced in the UK this week, hitting the retail and aviation sectors particularly hard. With the prediction of around a 20% contraction in UK GDP in this second quarter of 2020, we expect to see many more redundancies across many sectors in the UK in the coming months.

The legislation underpinning collective consultation about redundancies is now almost 3 decades old. Although it has been honed by case law over the years, it was not built for these times. The process lends itself to face to face consultation with a focus on support and exploring alternatives to redundancy. Many businesses now have largely remote working workforces and we are still in a climate where a face to face process is unfeasible.

For most businesses, the rationale for redundancy is clear cut. Many businesses are still in a state of semi-hibernation or facing their bleakest cash flow forecast in memory. As employment lawyers, we are aware that the true challenge for businesses now focuses more on the implementation of those redundancies, collective consultation timelines and the interplay with new concepts such as furlough.

In this note, Hannah Ford and Frances Rollin highlight some of the challenges facing HR in managing collective consultation processes in the time of COVID-19.

WHAT IS COLLECTIVE REDUNDANCY CONSULTATION – WHEN DO BUSINESSES NEED TO DO IT?

The obligation to collectively consult is triggered when an employer proposes to make 20 or more employees redundant at one establishment within a 90-day period. The collective consultation process involves informing and consulting appropriate representatives of the affected employees.

This duty to consult may be triggered not only by traditional redundancies by also where an employer changes terms and conditions, such as by the introduction of a reduced hours scheme.

Many employers will seek volunteers for redundancy prior to commencing selection for compulsory redundancies. The number of any voluntary redundancies must be taken into account in determining if the threshold for collective consultation has been reached.

Certain minimum time periods for consultation apply depending on the scale of the redundancies proposed. Where 100 or more redundancies are proposed, consultation must begin at least 45 days before the first dismissal takes effect. For fewer than 100 redundancies, the minimum period is 30 days. Employers will need to consider these minimum periods if they wish to effect redundancies prior to the closure of the Coronavirus Job Retention Scheme (CJRS) on 31 October 2020 or the tapering of the CJRS grant in August, September and October 2020.

If an employer is waiting and planning to effect all its redundancies at the end of the CJRS, this may artificially skew the numbers of dismissals within a 90 day period. This may increase the risk of a duty to collectively consult being triggered.

There is a very limited, partial defence to the obligation to collectively consult. Where special circumstances render it not reasonably practicable to consult in good time or provide the statutory information, the employer need not fully comply with the duty, but must still take such steps towards compliance as are reasonably practicable. The term "special circumstances" is interpreted very narrowly and is therefore unlikely to be available in most situations.

Where the collective consultation duty applies, the employer must notify the Secretary of State (for Business, Energy and Industrial Strategy) of the proposed redundancies, right at the start of the process. Failure to do so is a criminal offence.

HOW DOES AN EMPLOYER ARRANGE THE ELECTION OF REPRESENTATIVES DURING COVID-19?

The duty to collectively consult is with appropriate representatives of the affected employees. One of the first steps in the consultation process, after the first announcement, is to identify who the representatives are going to be. Specific statutory rules govern the election of employee representatives for the purposes of collective consultation. This can be followed without much difficultly in large face to face group meetings. It becomes much more of a challenge when you need to get nominations in a virtual setting, vote virtually and ensure fair counting of votes.

A breach of the rules governing the election of representatives can of itself give rise to a claim for a protective award, in the same way as for any other breach of the collective consultation obligations (see below).

There had been a concern that an employee could not carry out his function as an employee representative whilst on furlough leave, due to the prohibition on working for your employer during furlough. However, the current guidance on the CJRS confirms that, whilst on furlough leave, union or non-union representatives can undertake duties and activities for the purpose of individual or collective representation of employees or other workers.

Employers should also consider what happens if one or more employee representatives falls ill with coronavirus during the consultation process. It would be sensible to put in place 2 representatives for each section of the workforce. In the case of illness, the understudy representative can take over.

HOW DO EMPLOYERS CONSULT WHILST EMPLOYEES ARE ON FURLOUGH OR WORKING FROM HOME?

Employers need to ensure that meaningful consultation can take place with the representatives. Practically, face to face meetings with large number of representatives is not easily achieved whilst maintaining health and safety standards. Virtual meetings are also unwieldy for large numbers. It may be easier to facilitate virtual meetings for a small group of representatives, employers should ensure that all of the representatives have access to the relevant technology, and that it allows proper consultation to take place.

Under the collective consultation rules, employers are obliged to give the employee representatives access to the affected employees and provide them with such "accommodation and other facilities as may be appropriate". Obvious practical difficulties arise where some or all of the affected employees are on furlough or working from home. Employers will need to consider virtual meetings (such as via Zoom) and, where the employees concerned do not have the facility to participate in a video call, the possibility of conducting consultation meetings by telephone.

The lack of face to face contact during a redundancy exercise and a cold, impersonal virtual process is likely to make it even more unpleasant for employees. Being on furlough or working from home leads to a significant reduction in the support network of colleagues available during what can be an extremely stressful time. There is no easy answer on how to alleviate this, perhaps encouraging teams to meet virtually (or in small, socially distanced groups in person) during the process.

The current legal underpinning of the CJRS, the third Treasury Direction, includes the following wording: “Integral to the purpose…is that the amounts paid to an employer…are used by the employer to continue the employment of employees.” One interpretation of this new wording is that a redundancy process cannot be started while an employee is furloughed. However, the updated government guidance for employees says that “Your employer can still make you redundant while you’re on furlough or afterwards”. It seems likely that employers can carry out collective consultation with employees whilst on furlough, particularly in light of the fact that during consultation, employers are under a duty to consult about ways of avoiding the redundancies.

IS THE ESTABLISHMENT TEST AFFECTED BY EMPLOYEES REMOTE WORKING?

The trigger for collective redundancy consultation is where an employer proposes to make 20 or more employees redundant at one establishment within a 90-day period. An “establishment” for this purpose is an “entity to which the employee is assigned to carry out their duties”. This test for “establishment” is complicated where all or some of the employees who are at risk of redundancy are working remotely, without a plan in the foreseeable future to return to an office environment. In our view, where remote-working is envisaged as a short term and temporary response to COVID-19, it would be difficult for employees to argue that the “establishment” to which they are assigned has changed to their home.

HOW DOES AN EMPLOYER SELECT THE REDUNDANT EMPLOYEES WHEN SOME ARE ON FURLOUGH?

The normal rules apply to selection, even where some of the “at risk” employees are on furlough. In deciding whether a redundancy selection was fair, a tribunal must decide whether the employer's choice of pool was within the range of reasonable responses. Employers will need to carry out the usual process of identifying the pool of employees to select from, by looking at the type of work which is ceasing/diminishing and which employees perform this work or similar work(whether they are on furlough or not). Selecting only those employees on furlough is unlikely to be fair unless the decision process to select employees for furlough was rigorously carried out to the same standard as redundancy selection.

CAN THE CJRS GRANT BE CLAIMED WHILST AN EMPLOYEE IS ON NOTICE?

It had been assumed until last week that employers could consult about redundancies, put employees on notice, and pay them notice, all whilst the employee was on furlough. This moderately certain position has been thrown into disarray by some drafting added to the third Treasury Direction issued on Friday 26th June. Paragraph 2.2 of the Treasury Direction says “Integral to the purpose…is that the amounts paid to an employer…are used by the employer to continue the employment of employees.”

The Treasury Direction is the legal basis for the CJRS and so employers ignore this at their peril.

On its most strict interpretation, paragraph 2.2 wording means that the CJRS funds cannot be lawfully claimed for an employee who is working out their notice. Their employment has been terminated is not continuing. It appears that the third Treasury Direction is intended to have retrospective effect. If this interpretation is correct, employers who have already given notice to employees whilst on furlough and claimed under the CJRS for this amount will be liable to repay such amounts.

In our view, this interpretation is unlikely to be the correct one for a number of reasons:

1 An employee serving out their notice is still continuing their employment, albeit for a finite period.

2 The government guidance on the CJRS states that "Your employer can still make you redundant while you're on furlough or afterwards."

3 The exact wording of the paragraph refers to "employees" in general. It could, therefore, apply to the other employees of the employer whose employment is able to continue because of the use of the CJRS for notice pay for redundant employees.

4 HMRC web-chat has informally confirmed to us that employers can claim for employees' notice pay whilst on furlough, up to the point of termination of employment.

So, it is not without risk to claim for notice pay for those on furlough, but it seems unlikely that HMRC will be seeking repayment of such amounts or issuing penalties for a failure to self-report or repay.

However, there is another complication in relation to furlough and notice pay. Under the Employment Rights Act 1996, notice pay entitlement varies according to the length of notice period and the type of working hours. Some employees may, therefore, be entitled to furlough pay during their notice period. Some may be entitled to full pay. HMRC has informally confirmed however, that although employers can claim 80% up to the last day of employment, employers must top up the remaining 20% of the notice pay. This suggests that all employees are entitled to 100% of normal pay during their notice period. Failing to pay full pay during a notice period there both risks a claim under employment law for unlawful deductions, but also risks a fine from HMRC for inappropriate use of the CJRS fund.

IS IT FAIR TO MAKE REDUNDANCIES WHEN THE OPTION TO FURLOUGH IS STILL AVAILABLE?

In any redundancy unfair dismissal claim, a tribunal will look at whether, in all the circumstances (including the employer's size and administrative resources), the employer acted reasonably in treating redundancy as a sufficient reason for dismissal. There is a degree of risk that a tribunal would consider it unreasonable to dismiss where an employer has made redundancies during the period when the government grant covered most of the employee costs (i.e. up to August 2020). Much will depend on the particular financial and organisational circumstances of the employer at the time. If, for example, an employer is permanently closing part of its business or a role is being eliminated, this may be entirely reasonable. Where an employer is still in decent financial shape though and is making employees redundant where there is less of a clear justification, there is more of a risk.

The CJRS continues in effect until 31 October 2020. Between 1 August 2020 and 31 October 2020, the amount of the government grant will taper downwards and employers will therefore have to make a financial contribution to furloughed employees' pay. If an employer makes redundancies on the basis that it simply cannot afford to make the required top-up to 80% of pay, this may mean redundancies are fair despite the option of furlough.

In order to reduce the risk of unfair dismissal claims, employers should consider furloughing as an alternative to redundancy for each type of role they consider redundant and document their reasons why it would not be suitable in the particular circumstances.

In addition to considering furlough, employers should also consider other ways of avoiding redundancies during the collective consultation. This could include things like reduced hours schemes, pay cuts, or sabbaticals. The reasons why these were rejected should be documented.

WHAT ARE THE RISKS OF GETTING IT WRONG?

It is important that consultation is carried out properly. Representatives of the employees (or sometimes the employees themselves) can present a complaint to an employment tribunal if there has been a failure to comply with any of the rules on information or consultation, or on the election of representatives. Employment tribunals can make a "protective award" of up to 90 days' gross uncapped pay for each dismissed employee (i.e. a quarter of the Company's annual wage bill for the affected employees).

A failure to provide notification of the proposed redundancies to the Secretary of State is a criminal offence and may result in the employer being liable for a fine not exceeding £5,000.

Unfair dismissal claims may arise out of redundancies where the furlough scheme was still available as an alternative. Discrimination claims may also arise out of selection where furloughed workers are selected where, for example, they were furloughed due to childcare responsibilities or shielding. The current climate means that there is no ready job market for employees to move into new roles. They will be unable to mitigate their losses easily. This means that any unfair dismissal and discrimination compensation is likely to be higher.

WHAT IS THE LONG-TERM IMPACT OF COLLECTIVE REDUNDANCIES IN THE ERA OF COVID-19?

The true cost of a flawed collective consultation process extends beyond the defence and compensation of Employment Tribunal claims. Businesses that survive can be impacted by reputation and culturally by a rushed or insensitive redundancy process. Large scale redundancies can have a 'scarring' effect on employee relations and the culture of a business, which in turn will affect its ability to motivate and retain its remaining workforce or attract talent in the future as the economy revives.

KEY CONTACTS

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