

Attending a court to give evidence for the employer is not “work” for the purposes of the ‘furlough’ scheme

By [Katherine Anderson](#)

3PB Barristers

According to a report in the [Nottinghamshire Law Society Civil Court User Bulletin No 5](#), HHJ Godsmark QC, on an application to vacate a trial on account of the Defendant's witnesses being ‘furloughed’, stated that, “*attending a court to give evidence for the employer is not 'work' and certainly not work within the meaning of the furlough scheme*”.

The litigation concerned *Fottles v Bourne Leisure*, a case in which a member of the public who suffered a fall during a circus activities class brought a personal injury claim which was allocated to the fast track and listed for trial on 8 June 2020. The defendant intended to rely on evidence from three witnesses who were its employees and had been placed on ‘furlough’.

The defendant’s solicitors had considered the Government guidelines relating to the furlough scheme at that time, which stated:

“You cannot ask your employee to do any work that:

- *Makes money for your organisation or any organisation linked or associated with your organisation;*
- *Provide services for your organisation or any organisation linked or associated with your organisation”.*

They understood those guidelines to mean that an employee providing a witness statement, attending trial, or dealing with other matters associated to a claim where they had only become a witness due to their employment, would be classed as ‘providing services’ for their employer and, by extension, this meant that the three employees could not be contacted whilst on furlough for the purposes of seeking their attendance at court. Because the defendant would therefore be significantly prejudiced if the trial proceeded, the defendant’s

solicitors applied to the court to vacate the trial. The claimant's solicitors argued that the trial should proceed.

HHJ Godsmark QC allowed the application to vacate but indicated that this was *not* on the grounds that the defendant's witnesses were furloughed. He reasoned, apparently:

"It is suggested that for the Defendant's solicitors to contact a furloughed witness or call them to give evidence constitutes asking the furloughed employee to do work that makes money for, or provides services for, the solicitors acting for the Defendant employer. Those solicitors being an organisation linked or associated with the Defendant and they will charge for their time in dealing with the witness.

I ruled that attending a court to give evidence for the employer is not "work" and certainly not work within the meaning of the furlough scheme. Further, being contacted by an employer's solicitor to arrange attendance at court is not asking a furloughed employee to do any work which makes money or provides services in breach of the scheme.

Participating as a witness (for employer or anyone else) in the justice system is not a breach of the terms of the furlough scheme."

Comment:

From 1 July, employers will be permitted to bring furloughed employees back to work for any amount of time, and on any work pattern. In the same way as before, during hours which an employer has recorded their employee as being on furlough, they cannot ask their employee to do any work for them that makes money for their organisation or any organisation linked or associated with their organisation or provide services for their organisation or any organisation linked or associated with their organisation, but the employee can take part in training, volunteer for another employer or organisation or work for another employer (if contractually allowed).

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Katherine Anderson

Barrister
3PB

0330 332 2633

katherine.anderson@3pb.co.uk

3pb.co.uk