Coronavirus Job Retention Scheme – how does it fit with the existing law on lay-offs and short-time working?

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The government has now provided details of the 'Coronavirus Job Retention Scheme' which was first announced on 20 March 2020. The scheme aims to provide financial support for employers to cover 80% of the wages of staff who have been temporarily sent home because there is no work:

https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme

Although the scheme represents an extraordinary development, from a public spending point of view, and the government has, for example, amended the Working Time Regulations 1998 to relax the rules on carrying over annual leave – the scheme has not – as yet - transformed the face of employment law as we know it.

For example, as the information published by the government makes clear, when employers are making decisions in relation to the process, including deciding who to offer 'furlough' to, equality and discrimination laws will apply in the usual way.

As the information published by the government also makes clear, employers should discuss with their staff and make any changes to the employment contract by agreement. The existing law in relation to contractual variation continues to apply.

Employers have a general right at common law to tell employees not to turn up for work (although some contracts of employment may provide otherwise) but they do *not* have a general right to decide, unilaterally, not to pay their employees, or to reduce their employees' hours and pay them less, because work is not available. Employees can be placed on 'furlough', laid off without pay, or put on short-time working, where there is a specific term in

their employment contract allowing the employer to do so. Parties may agree to alter the employment contract terms so that the 'furlough' or lay-off or short-time working is by mutual agreement, e.g. where the only alternative is redundancy. If an employer has no contractual right to 'furlough' or lay-off employees or introduce short-time working, a failure to pay wages during a period of 'furlough', lay-off or short-time working would amount to a breach of contract. Whether or not an employer has a contractual right to 'furlough', lay-off or introduce short-time working is a question that would ultimately be decided by an employment tribunal (or court) in any given case.

Given the obvious advantage of the 'Coronavirus Job Retention Scheme' – the financial lifeline that it could offer – it follows that many employers and their staff will seek to agree a period of 'furlough' whereby they can access that scheme. However, in circumstances where that scheme is not available (e.g. the employee/worker was not on the PAYE payroll on 28 February 2020) employers and employees/workers might still prefer to agree a period of temporary lay-off as an alternative to dismissal. Similarly, given that financial assistance is not available under the 'Coronavirus Job Retention Scheme' where the employee or worker does any work for the employer during the 'furlough' period, there may be circumstances where it the parties consider it to be in their mutual interest to agree a period of short-time working.

The provisions of the Employment Rights Act 1996 governing lay-offs, short-time working and guarantee payments, as at the date of writing, remain un-amended and in force. They are complex, and this article should not be relied upon as a comprehensive explanation of the relevant law.

The statutory scheme under the Employment Rights Act permits an employee to apply for redundancy and claim redundancy pay where they have been laid off or kept on short-time working, in the circumstances prescribed by the scheme.

The scheme applies where the employee's pay is dependent upon their being provided with work to do by the employer, which means that piece workers, whose remuneration varies according to the amount of work done, may be expected to fall under the scheme, as well as employees whose contractual terms either expressly or impliedly allow the employer to lay them off without pay or introduce short-time work. The scheme permits an employee to apply for redundancy and claim redundancy pay if they have been laid off or kept on short-time working for four or more consecutive weeks (as defined), or for a total of six or more weeks in a period of 13 weeks, where no more than three of the weeks have been consecutive.

There is a prescribed process for making claims, whereby an employee must give a notice of intention to claim ("NIC") according to a strict time limit, and there are other strict requirements for how the NIC is to be presented to the employer, for example, it must be given in writing. In addition, an employee is not entitled to a redundancy payment by reason of being laid off or kept on short-time working unless they terminate their contract of employment (i.e. resign) by giving the requisite period of notice. The scheme provides for the employer to counter-notice if it intends to contest liability to pay a redundancy payment and, again, there are strict requirements in relation to how this must be done, for example, the counter-notice must also be in writing, it must be given to the employee within seven days of service of the employee's NIC, and it must state, as a minimum, that the employer intends to contest any liability for a redundancy payment.

If all the prescribed circumstances apply, the employee will be eligible for a redundancy payment as if they had been dismissed for redundancy. The same qualifying conditions apply in these circumstances - for example, the employee must have at least two years' qualifying service. Where the employer has served a counter-notice, the issue of the employer's liability to pay a redundancy payment may fall to be decided by an employment tribunal. At this stage, the employer will have a defence available if, *at the date of service of the employee's NIC*, it was reasonably expected that the employee would, not later than four weeks after that date, enter into a period of employment with the same employer of at least 13 continuous weeks during which they would not be laid off or kept on short-time for any week. The criterion here is what was reasonably to be expected *at the date of service of the employee's NIC* – not whether business has improved by the date of the tribunal hearing. In addition, the 'period of employment' that the employee is expected to enter into must be employment under the same contract of employment. The law is unclear as to whether an employer can defeat a claim under the lay-off and short-time working scheme by making an offer of suitable alternative work.

The Employment Rights Act also provides for a statutory scheme for guarantee payments aimed at employees (as defined) who are laid off. The statutory scheme offers some, limited wage protection: the current maximum is £29 a day (from 6 April 2019) with entitlement limited to five days in any period of three months. To qualify, an employee must have been continuously employed by the employer for at least one month. The statutory scheme applies where employees are piece workers who are not paid if there is no work, or where the employer has a contractual right to lay off without pay: the statutory provisions relating to guarantee payments do not in themselves give employers any right to lay off employees. There are certain excluded categories of employees.

The scheme applies where the employer fails to provide work on a day on which the employee would normally be required to work under their contract, and the failure must be caused either by a diminution in the requirements of the employer's business for work that the employee is employed to do, or by some external occurrence that affects normal working – which could well be interpreted to cover situations arising out of the Covid-19 pandemic. Employees cannot claim in relation to days on which they were not normally required to work, for example, in relation to any day on which they would have been on holiday in any event, or off sick. There are other circumstances in which an employee will not be able to make a successful claim, for example if the employee has unreasonably refused an offer of suitable alternative work or has not complied with reasonable requirements to ensure that their services are available. Guarantee payments are payable only in respect of 'workless days' i.e. days (as defined) on which an employee is provided with no work at all – so they are not available to employees in situations of short-time working.

Guarantee payments are calculated according to a statutory formula. The three-month periods are treated as rolling periods meaning that, for any one day of lay-off, a guarantee payment will be available if, looking back over the previous three months, the number of guarantee payments was less than the maximum of five. Any contractual payment to an employee in respect of a workless day goes towards discharging the employer's liability to pay a guarantee payment, and *vice versa*. An employee may bring a claim in the employment tribunal for the whole or part of a guarantee payment they believe their employer has failed to pay; in relation to such claims, strict time limits apply. Employees who are dismissed for asserting their statutory rights also have protection under the Employment Rights Act.

Claims for statutory guarantee payments may overlap with claims for statutory redundancy payments based on lay-off: if a lay-off lasts long enough, the employer may be liable to pay guarantee payments and a redundancy payment in respect of the lay-off. The fact that an employee has received statutory guarantee payments from their employer does not prevent them from claiming that they were laid off on the days for which they were paid.

Employment law advisors will need to have regard to all of these provisions as these extraordinary times continue to unfold.

Whilst every effort has been made to ensure the accuracy of this article as of the date of writing (31 March 2020) it should not be relied upon as legal advice in respect of any particular case and no liability is accepted in respect of the same.

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