Preparing to trade in a post-pandemic economy: options available to employers facing uncertain times

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Contents

1. The aim of the webinar (and this accompanying handout) is to remind employment practitioners of some key elements of the legal regulation of redundancy.

2. This handout is divided into the following topics:

   i. Responses to questions received during the webinar

   ii. An overview;

   iii. Key considerations for a fair redundancy process;

   iv. Potential traps and pitfalls for employers;

   v. Additional factors to consider, particularly relating to maternity, disability and those returning from furlough;

   vi. Responding to complaints within a redundancy process.

Questions received during the webinar

Here is a selection of the questions received during the webinar, and the answers to those questions.

Q: Should an employee be given an unredacted (with names) of the selection matrix in ET proceedings?

A: See the cases of *Eaton v King*[1] and *British Aerospace v Green* [2]. The employer need only show that it set up a good system of selection which had been reasonably applied; it will not necessarily be expected to justify each mark give unless there are overt signs of conduct which mar the fairness of the marking. The tribunal will not want to be involved in over-minute analysis of the marks given. The tribunal may refuse disclosure of the marks applied to other employees (depending on the way the Claimant's case is put).

If you have a relatively small pool in your redundancy exercise then practically speaking it may be easier/quicker to simply disclose the documents rather than argue the point; in a larger exercise you are more likely to argue against disclosure so as to avoid the additional time/cost which would come with providing the other scores.

Q: Do you think helping an employee to find a role with a similar, unrelated company is helpful or does the alternative have to be within the company/ group?

A: From an employee relations point of view it would be good practice, but there is not an obligation from a 'fair dismissal' point of view.

Q: What's your view on whether the option of furlough alone is enough to create a reasonable alternative to redundancy, rendering it unfair?

My view is that the option of furlough cannot operate as a bar to fair redundancy: if there is little real prospect of the employee being needed when the furlough ends then the employer would be entitled to move ahead with the redundancy process rather than waiting (particularly given that funds under CJRS are public funds).

[1] 1995 IRLR 75
[2] 1995 ICR 1006

Overview

3. Redundancy is an important factor for any employer when considering the reorganisation of business structures. Its relevance in the current economic climate is obvious. Such has been the effect of the COVID-19 pandemic on economies around the globe that employers are inevitably going to have to make changes (if they have not already done so) to their workforces. Whilst job retention schemes have largely delayed significant lay-offs, as those schemes come to an end there is likely to be a turbulent period ahead for employers and employees alike.

4. The focus here is on redundancy dismissals – and the processes which lead up to them. Those familiar with dealing with redundancy processes will already know the importance for employers of having a human resources strategy to support any given workforce. One can but imagine how intense the past 12-months is likely to have been for those working in human resources type roles.

5. The origins of the current law on redundancy can be found in the Redundancy Payments Act 1965, which created the right for qualifying employees to be made a redundancy payment on being dismissed by reason of redundancy. The basis for having such a scheme is multi-layered and may involve the notion of social mobility, a right of 'property' the job and compensation for long service. As ever in employment law, things have moved on considerably and we will attempt to touch on some of the key elements as they are currently.

What is a redundancy?

6. The statutory definition of redundancy is at s.139(1) ERA 1996:

> *"For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to:*
>
> *(a)the fact that his employer has ceased or intends to cease:*
>
> *(i)to carry on the business for the purposes of which the employee was employed by him, or*
>
> *(ii)to carry on that business in the place where the employee was so employed, or*
>
> *(b)the fact that the requirements of that business —*
>
> *(i)for employees to carry out work of a particular kind, or*

(ii)for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish."

7. This covers three broad scenarios:

   i. Closure of the business

   ii. Closure of the workplace

   iii. A diminishing need for employees to do available work

8. The ways in which a redundancy can arise are varied. The most common example that springs to mind is a company struggling for money that decides to make cuts and reduce headcount, or close a site completely. Other examples include:

   i. Asset investment/march of the machines. During the pandemic companies may have used the closure time to invest in computer systems, employee assistance etc; meaning that they may no longer need the staff to carry out the work they previously did

   ii. Moving to online communication with customers, which means there is a reduction in the need for face-to-face staff

   iii. Automation of processes, such as online booking forms which were previously carried out with a paper diary updated by a human

   iv. Situations where work has not diminished but fewer employees are needed due to a reorganisation which results in more efficient use of labour

   v. Outsourcing/engaging independent contractors to do the work (although be aware of potential TUPE implications)

9. There is no requirement that the respondent needs to be in financial trouble, or that there has been a downturn in the work coming in. As Burton J said in *Kingwell and ors v Elizabeth Bradley Designs Ltd*[3]:

   "It can occur where there is a successful employer with plenty of work, but who, perfectly sensibly as far as commerce and economics is concerned, decides to reorganise his business because he concludes that he is overstaffed. Thus,

[3] EAT 0661/02

even with the same amount of work and the same amount of income, the decision is taken that [a] lesser number of employees are required to perform the same functions. That too is a redundancy situation."

10. Indeed, s.139(6) ERA 1996 provides that the cessation or diminution can be "for whatever reason".

11. Temporary closures or cessations are also caught by the definition of redundancy – they are provided for by s.139(6). This may be particularly relevant where businesses are looking at making redundancies whilst temporarily closed during lockdowns. A temporary closure for refurbishment is not likely to be considered temporary cessation of a business, but where a business ceases for a significant period (even if there is an intention in the future to open the business again) that is sufficient to satisfy the definition of redundancy – see *Whitbread PLC v Flattery & ors*[4] (temporary closure for refurbishment).

Closing the place of work – how is it affected by mobility clauses?

12. When closing a workplace some confusion can arise as to the place of work for an employee with a mobility clause in their contract – are they to be treated as employed at the place where they actually work, or at all places where they could be required to work?

13. An example: an employee ('X') who works in Southwark in London, but with a clause that they may be required to work elsewhere in London if the needs of business so require. If the workplace in Southwark closes but the remainder of London continues without reduction, does that amount to a diminution in the requirement for employees at X's place of work? How should one define the 'place' where the employee works, when they can be required to work anywhere?

14. The answer is in *High Table Ltd v Horst & ors*[5] where the Court of Appeal stated that the 'place' where an employee is employed should be determined primarily by a consideration of the factual circumstances pre-dismissal. If the employee has worked in only one location during his or her employment then there is no reason to widen the place where they were employed merely because of the existence of a mobility clause.

15. Mobility clauses will continue to be relevant for:

[4] EAT 287/94
[5] 1998 ICR 409, CA

i. Avoiding a redundancy situation (if the employer seeks to enforce a mobility clause rather than dismissing an employee. If the employee refuses then it could give rise to a conduct dismissal rather than a redundancy dismissal)

ii. Offering alternative employment, either to extinguish the right to a redundancy payment, or as part of the 'reasonable steps' expected by the tribunal as part of a fair dismissal.

Redundancy or reorganisation?

16. As mentioned above, a redundancy does not require a financial crisis or downturn in work at an employer. So how is the distinction drawn between redundancy and reorganisation? Not all reorganisations are redundancies. Likewise, the fact that there is a reorganisation does not mean that there is no redundancy.

17. Redundancy has a technical legal definition, whereas reorganisation does not.

18. What is crucial is whether the restructuring essentially entails a reduction in the number of employees doing work of a particular kind as opposed to a mere repatterning or redistribution of the same work among different employees whose numbers nonetheless remain the same.

19. It is a matter of the tribunal analysing the facts in the individual case – there is not a huge amount to be gained by looking for comparable reported cases, as the common thread is that each case must be decided on its own particular facts.

20. The key issue for employers is to make sure that at the ET stage they plead some other substantial reason (reorganisation) as an alternative to redundancy, so as to avoid being caught out by failing to prove the reason for dismissal.

21. Situations which often give rise to the most difficulty for employers are:

i. Reallocation of duties

ii. The same work being done under different terms and conditions

iii. The same work being done by a different kind of employee

iv. Work changing, but remaining work of the same particular kind

v. Redeployment

22. There is a wealth of case law and guidance on these situations which goes beyond the scope of this talk; one overarching theme is that they are often fact-dependent so an employer ought to seek specialist advice if faced with a potential redundancy situation which is not straightforward.

When collective consultation is required – recent developments

23. Before we begin, we need to separate out collective consultation versus individual consultation.

24. Collective consultation requirements are imposed where "*an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less"* (s.188(1) TUL(C)RA 1992).

25. Collective consultations must begin at least 30 or 45 days before the first of the dismissals takes effect (the time depends on the total number of redundancies proposed).

26. A recent CJEU case potentially increases the scope of cases in which collective consultation is required. *UQ v Marclean Technologies SLU*[6] concerned the question of whether the EU Collective Redundancies Directive was engaged in circumstances where an employee dismissed for redundancy was able to point to other similar dismissals at a later date which, when added to her own, exceeded the threshold number required to constitute a 'collective redundancy' and thus trigger the employer's duty to collectively consult.

27. Under Article 1(1)(a) of the Directive, 'collective redundancies' are defined as occurring where a threshold number of dismissals 'for one or more reasons not related to the individual workers concerned' are effected within a period of either 30 days or 90 days, depending on which calculation method the Member State has chosen to use.

28. The ECJ held that, in relation to a contested dismissal, the relevant reference period is the period of 30 or 90 consecutive days which includes that dismissal and which contains the greatest number of dismissals effected by the employer for one or more reasons not related to the worker. It rejected the argument that Article 1 should be interpreted so that the 30- or 90-day reference period occurs either exclusively before or exclusively after the contested dismissal. In other words, if the threshold number of dismissals is reached at any point across the 30- or 90-day period, the Directive applies in respect of those

[6] Case C-300/19

dismissals, and dismissals that occur before or after the given dismissal count towards the threshold.

29. Before the *UQ* case the understanding had been that for dismissals effected in batches it had been thought that the duty to consult only arises when the employer is proposing to dismiss at least 20 employees for redundancy and that, if fewer dismissals are proposed, any additional dismissals which are contemplated or take place subsequently — even if within 90 days of the employer's original proposals — do not count. However, the ECJ's decision would appear to mean that employers are required to look both backwards and forwards from an individual dismissal to determine whether the threshold number of redundancies is met over the reference period.

30. Even prior to the *UQ* case, in cases where the numbers might be critical as a result of the employer staggering the dismissals involved employers could expect the tribunal to scrutinise the evidence carefully to see whether there was a possibility of the numbers being massaged in an attempt to evade the triggering of obligations under S.188.

31. The scope of collective consultation (with whom to consult and what to consult about) is contained within TUL(C)RA 1992 and is beyond the scope of this handout.

The four pillars of a fair redundancy

32. When considering whether a dismissal for redundancy is fair or unfair for the purposes of an unfair dismissal claim, the tribunal is almost certain to consider the following key matters:

    i. Determine the pool from which selections will be made

    ii. Choosing and applying selection criteria

    iii. Individual consultation

    iv. Efforts to find alternative employment

33. This note will now consider each in turn.

Pillar i: Determining the pool from which selections will be made

34. The employer has a reasonably wide discretion when drawing the pool from which redundancies will be selected. The range of reasonable responses test applies. So long

as the employer has genuinely considered the drawing of the pool, and has not made an obviously irrational decision, the tribunal will be slow to interfere due to the risk of falling into the substitution mindset[7].

35. Factors for the employer to consider when drawing the pool include:

    i. Whether other groups of employees are doing similar work to the group from which selections are made

    ii. Whether employees' jobs are interchangeable

    iii. Whether the employee's inclusion in the unit is consistent with his or her previous position

    iv. Whether the selection unit was agreed with any union

36. Potential pitfalls arise where:

    i. there are employees whose roles are interchangeable, or who routinely cover work of colleagues in other roles (e.g. drivers doing the job of warehousemen[8])

    ii. The employer is considering a pool of one (as the employee is more likely to be aggrieved, and experience shows that litigation often follows when there is a pool of one disgruntled employee)

    iii. Where there are multi-site redundancies: the question arises about whether those at separate sites are to be considered in a single pool.

Pillar ii: Selection criteria

37. Much hand-wringing often takes place about what criteria to use to score those in they pool of potential redundancy.

38. Some general guidance:

    i. Seek to use objective criteria, which is verifiable by reference to data (e.g. attendance, efficiency, appraisal scores)

[7] See the principles set out by Silber J in Capita Hartshead Ltd v Byard at para 31
[8] Blundell Permoglaze Ltd v O'Hagan EAT 540/84

ii. Avoid criteria which requires the personal opinion of the selector (e.g. "which employees will keep the company viable" "who is the most committed")

39. Some degree of subjectivity or judgement is allowable and the employer ought not avoid subjectivity completely, particularly where that leads to bizarre and unexpected results. As Underhill J (as he then was) said:

> *"The goal of avoiding subjectivity and bias is of course desirable but it can come at too high a price; and if the fear is that employment tribunals will find a procedure unfair only because there is an element of "subjectivity" involved, that fear is misplaced*[9]*"*

40. As to the scoring which takes place, a tribunal will rarely re-score the people in the pool for selection. So long as the criteria are not inherently unfair and they are applied in a reasonable fashion the tribunal ought not subject the criteria or their application to over-minute scrutiny[10].

41. Determining the assessment period is something which has particular relevance to issues such as maternity, parental leave, disability and, in the current climate, furlough or other leave.

42. Equality of treatment is obviously essential; employers must avoid short cuts or irregularities. Getting the selection criteria right forms part of that equal treatment.

43. When developing selection criteria, employers must seek to avoid discriminating against its employees. The possibility of indirect discrimination, discrimination arising from disability and a failure to make reasonable adjustments are likely to loom large at this stage.

44. Employers should avoid simply churning out pre-existing redundancy processes, even if those processes have been 'successful'. Selection criteria must be adapted and modified so that they are fit-for-purpose in any given redundancy process. Employment practitioners will recognise that commonplace criteria such as length of service or attendance must be used very carefully, given their obvious potentially discriminatory effect.

45. To give a brief example as to the level of thought required with each given criterion, take that of 'attendance'. Generally speaking:

[9] Mental Health Care (UK) Ltd v Biluan and anor EAT 0248/12
[10] British Aerospace PLC v Green 1995 ICR 1006

i. Absences related to conditions amounting to disability should be excluded, as should considerations that would adversely impact on a disabled employee.

ii. Any period of maternity leave must be discounted.

46. In relation to the former, it would be all too easy to make assumptions about the impact a particular medical condition has had without taking the time to explore it properly. Redundancy processes often happen quickly, because an employer may be required out of necessity to make changes quickly. But it is incumbent on employers to find out what the up-to-date medical position is and to ascertain what the real effects of any (potential) disability are.[11] This takes time, particularly at the moment where health professionals may be engaged with matters related to the COVID-19 pandemic, and an employer should seek to allow for such time in any redundancy process.

47. In relation to the latter, the point is obvious. But where an employee on maternity leave is involved in a selection process, care must also be taken not to overcompensate in case a male in the same selection pool is discriminated against on the grounds of sex. In *Eversheds LLP v De Belin*,[12] the EAT upheld a tribunal's decision that a law firm discriminated against a male lawyer on the ground of his sex. One of the criteria used relating to financial performance was that of unbilled work in progress. Mr De Belin scored the lowest on this criterion (0.5); Ms Reinholz (who was on maternity leave and therefore had no unbilled work in progress) was awarded a notional score of 2. Overall, Mr De Belin scored 27 points and Ms Reinholz scored 27.5 (and so the score awarded for unbilled work was critical). The tribunal found that the employer had over-compensated for Ms Reinholz's absence. The tribunal concluded that the employer should have chosen a historical period relating to this element of financial performance when Ms Reinholz was at work so that a proper score could be attributed to her.

48. Nonetheless, whilst caution must be exercised for obvious reasons, dismissing someone with a protected characteristic does not necessarily reverse the burden of proof. In *Maksumiyuk v Bar Roma Partnership*,[13] it was held that it was not possible to infer *prima facie* pregnancy discrimination just because the (only) employee who was dismissed by

[11] *Beynton v Saurus General Engineering Limited* (unreported, 1999)
[12] [2011] IRLR 448
[13] [2012] EqLR 917

(purported) reason of reason of redundancy, was selected for redundancy a few days after she had told her employer that she was pregnant. The EAT found:

> "Here, the Claimant could not hope to show that she had been dismissed or selected for redundancy for her pregnancy unless she could show (a) there was no genuine redundancy and (b) the criteria for redundancy lacked proper objectivity; or (c) the scoring of the matrix was itself not objective but was influenced by pregnancy. It was not sufficient for her simply to establish that she was dismissed and was pregnant to the knowledge of the employer."

Pillar iii: Individual consultation

49. In the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representatives[14].

50. Three key principles for individual consultation[15]:

    i. Where no consultation about redundancy has taken place with either the trade union or the employee the dismissal will normally be unfair, unless the industrial tribunal finds that a reasonable employer would have concluded that consultation would be an utterly futile exercise in the particular circumstances of the case.

    ii. Consultation with the trade union over selection criteria does not of itself release the employer from considering with the employee individually his being identified for redundancy.

    iii. It will be a question of fact and degree for the industrial tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy.

51. Consultation with individuals will generally arise once they have been at least provisionally selected, and will be for the purpose of explaining their own personal situations, or to give them an opportunity to comment on their assessments

[14] Per Lord Bridge in Polkey v AE Dayton Services Ltd [1987] 3 All Er 974, HL
[15] Taken from Mugford v Midland Bank PLC [1997][IRLR 208 at para 41

52. What must the consultation include? While there are no invariable rules, guidance has been given by the High Court as follows[16]:

> *"Fair consultation means:*
>
> *(a) consultation when the proposals are still at a formative stage;*
>
> *(b) adequate information on which to respond;*
>
> *(c) adequate time in which to respond;*
>
> *(d) conscientious consideration by an authority of the response to consultation."*

53. Another way of putting the point more shortly is that fair consultation involves giving the body consulted a fair and proper opportunity to understand fully the matters about which it is being consulted, and to express its views on those subjects, with the consultor thereafter considering those views properly and genuinely.

54. There are potential benefits to the employer of engaging in a genuine 2-way consultation process, including:

    i. The possibility of employees providing alternative (or additional) cost-saving ideas

    ii. A reduced risk of litigation

    iii. A more engaged and content workforce, which is likely to be a more efficient/effective workforce

Pillar iv: Alternative employment

55. Although alternative employment may be thin on the ground in a post-COVID landscape, there still remains an important duty on an employer who seeks to avoid a finding of unfair dismissal. The tribunal's expectation is that the employer will take reasonable steps to find the employee alternative employment instead of dismissing them.

56. This may include looking for alternatives within the wider group of companies (see *Vokes v Bear Ltd)*[17].

[16] R v British Coal Corporation & anor, ex parte Price & ors [1994] IRLR 72 at para 24
[17] [1973] IRLR 363

57. The potential pitfalls and traps for the unwary are the making of assumptions at this stage. There are many employees who would consider/accept more junior posts rather than being made redundant; we have seen many cases over the years where a dismissed employee has complained that they were not informed about all vacancies before dismissal, and given an opportunity to apply for the roles they believed they could do.

58. Likewise an employee may view this as an opportunity to transfer to a different department with the business; employers ought to avoid pigeon holing employees as being skilled in only one particular role or area.

59. In addition to the general 'fairness' requirements when considering suitable alternative employment, it is also worth being reminded that certain employees have to be given preferential treatment for redeployment. For example, women on maternity leave are entitled to be offered a suitable vacancy and will be treated as automatically unfairly dismissed if they are not.

60. Regulation 10 of the Maternity and Parental Leave Regulations 1999 reads as follows:

> ***Regulation 10 - Redundancy during maternity leave***
>
> *(1) This regulation applies where, during an employee's ordinary or additional maternity leave period, it is not practicable by reason of redundancy for her employer to continue to employ her under her existing contract of employment.*
>
> *(2) Where there is a suitable available vacancy, the employee is entitled to be offered (before the end of her employment under her existing contract) alternative employment with her employer or his successor, or an associated employer, under a new contract of employment which complies with paragraph (3) and takes effect immediately on the ending of her employment under the previous contract).*
>
> *(3) The new contract of employment must be such that-*
>
> > *(a) the work to be done under it is of a kind which is both suitable in relation to the employee and appropriate for her to do in the circumstances, and*
> >
> > *(b) its provisions as to the capacity and place in which she is to be employed, and as to the other terms and conditions of her employment, are not*

substantially less favourable to her than if she had continued to be employed under the previous contract.

61. Similar provisions apply to persons on adoption leave[18] and shared parental leave.[19]

62. In *Sefton Borough Council v Wainwright*,[20] the EAT considered the importance of these Regulations. In this case, the Council deleted two posts and created a single new post. The post was ringfenced for one of the two post-holders whose jobs had gone. The selection was to be by way of competition. Ms Wainwright was on maternity leave.

63. On the correct application of the Maternity and Parental Leave Regulations 1999, the EAT held that Ms Wainwright had the prior right to be offered the new job without having to interview for it. The Council had made the decision to delete the two existing posts and thus both employees were redundant. Regulation 10 was thereby triggered. HHJ Eady QC said:

> *"Here, the protection is afforded to women on maternity leave because of the particular disadvantage that they suffer in engaging in a redundancy selection process and competing for whatever jobs remain… In order to afford the Claimant the protection she was entitled to under regulation 10 once her position was redundant…the Respondent was obliged to assess what available vacancies might have been suitable and to offer one or more of those to the Claimant. She should not have been required to engage in some form of selection process."*

64. It is important to note that Regulation 10 was triggered when the decision was taken to delete the two posts. An employee on maternity leave is not entitled to preferential treatment in the selection for redundancy, as considered above in *De Belin*. The EAT also held that Regulation 10 applies on restructuring where new roles arise.

Statutory redundancy payments – commercial considerations and the impact of COVID

65. For the purposes of determining entitlement to a redundancy payment there is a statutory presumption that the reason for termination was redundancy (s.163(2) ERA 1996).

[18] Regulation 23, Paternity and Adoption Leave Regulations 2002
[19] Regulation 39, Shared Parental Leave Regulations 2014
[20] [2015] IRLR 90

66. ERA 1996 sets out minimum redundancy payments to be made to employees; where there is more generous provision in the contract of employment then that will prevail. In the paragraphs below the relevant parts of the statutory calculation are considered.

Calculating statutory redundancy pay

67. The statutory calculation is at s.162 ERA 1996; it is a familiar calculation which can also be done via the gov.uk website at https://www.gov.uk/calculate-your-redundancy-pay. In short, an employee is entitled to:

    i. one and a half weeks' pay for each complete year of service after reaching the age of 41

    ii. one week's pay for each complete year of service between the ages of 22 and 40 inclusive, and

    iii. half a week's pay for each complete year of service below the age of 22

68. This is subject to a maximum of 20 years' service (s.162(3)) and a cap on the amount of a week's pay (s.227 ERA 1996).

69. Calculating a weeks' pay is simple for employees whose pay does not change with hours worked, or amount of work done. For them a week's pay is determined in accordance with their contractual entitlement.

70. For employees whose salary varies with the number of hours worked or the amount of work done, and for employees with no normal working hours, a week's pay is calculated using an average of earnings in the 12 weeks pre-termination (ss. 221(3), 222 and 224(2)).

Particular issues in the current climate

71. There are some issues that may well arise due to the impact COVID-19 has had on business, in particular:

    i. Calculating redundancy payments for employees who have been absent due to furlough, sickness, temporary lack of work, temporary closure of the business

    ii. Calculating redundancy payments for employees who have recently had a change in hours and pay

Absence from work

72. When determining the amount of a week's pay for statutory redundancy calculations ss.223(1) and 224(3) provide that you should only count the weeks only those hours when the employee was actually working and the remuneration payable for, or apportionable to, those hours.

73. If an employee was not entitled to pay and was not paid for one of the 12 weeks pre-termination then that week does not count and an earlier week must be brought in instead s.223(2). Examples would be temporary lay-off, or no work provided for zero-hours workers.

74. Weeks in which 'no remuneration was payable' covers situations where no remuneration was legally required to be paid. This includes circumstances where an employee agrees to work for no pay, or where his or her contractual remuneration was effectively whatever sum the company could afford to pay, which may be nil[21].

Unusually low earnings (employee not on furlough/claiming under CJRS)

75. If an employee earns something for work during the week, even if the earnings are abnormally low, that week counts as one of the 12 weeks.

Unusually low earnings – employee on furlough/CJRS

76. The *Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay) Regulations 2020 SI 2020/814* modify the calculation of a 'week's pay' for the purposes of statutory redundancy pay and certain other statutory payments. The purpose of the modification is to ensure that employees furloughed under the CJRS receive statutory payments based on their normal wages, rather than the reduced furlough rate.

77. Put simply: employees who are furloughed or flexibly furloughed under the CJRS scheme will have a 'week's pay' calculated based on their full wages, rather than reduced wages under the scheme.

[21] See Secretary of State for Employment v Crane 1988 IRLR 238, EAT.

Changes in pay

78. If an employee accepts a genuine variation in wage just before the calculation date, the amended wage is the wage upon which the redundancy pay will be calculated.

79. It will be necessary to draw a distinction between temporary reductions in hours, and permanent contractual changes. An example of a temporary reduction is *Friend v PMA Holdings Ltd,* where employees' hours were cut during the three-day week caused by the miners' strike in early 1974. The hours were not increased before the employees were made redundant some months later. The EAT ruled that the employees had not agreed to a variation of their original contract and that their redundancy payments should be based on their wages under that contract.

80. It may be that an employer takes a decision to reduce hours of all staff in an attempt to avoid redundancy. If that amendment is agreed to by staff, and is permanent, then the business would benefit if it were to make redundancies later on down the line, as the contractual redundancy payments would be reduced. So the business has the opportunity to benefit twice from agreements to reduce salaries or hours: once by having a salary saving following the changes; and again with a cost saving if/when redundancies take place.

81. Of course, businesses will need to be mindful of the potential for adverse publicity, particularly if they have taken funds from CJRS, made pay cuts to affected staff and then made lower redundancy payments on termination due to those pay cuts.

82. Businesses will also need to consider whether any representations were made to employees at the time that pay cuts were agreed to: was it agreed to be a temporary measure? Did the employer represent that this would avoid the need for redundancies?

Furlough

83. This handout will not discuss the detail of the Coronavirus Job Retention Scheme or Job Support Scheme. The success (or otherwise) of these schemes will be measured in due course in far weightier tomes. Here, the (brief) focus is on the overlap between those employees who were put (or otherwise remain) on furlough and any resulting redundancy dismissals.

84. COVID-19 (and the temporary support measures brought into support employment) has led to the term 'furlough' becoming part of common parlance overnight. Anecdotally, it

would seem that also commonplace (amongst employees) is the mistaken belief that simply because such schemes exist that employers cannot make redundancies.

85. The reality is that redundancy law has not been affected in any significant way. It is sadly inevitable that employers who made use of the schemes may also have to reduce headcount by reason of redundancy if they have not already done so. Employers should consider the alternatives to making redundancies, including the use of the aforementioned schemes if they remain available, but the mere existence of these job support schemes does not prevent employers from making redundancies.

86. When the COVID-19 pandemic took hold in Spring 2020, many employers moved quickly to furlough employees, often without any sophisticated selection processes. Employers subsequently going through a redundancy process will need to ensure its fairness. This may well pose a challenge when determining if and how to account for matters impacted by a period of furlough in determining selection pools and scoring matrices. While tribunals might be sympathetic towards less-than-perfect practices that occurred in the Spring and Summer of 2020, it is likely that far more scrutiny will be placed on what happens subsequently.

87. There may be a natural correlation between the roles that were furloughed and the roles that are being looked at for the purposes of a redundancy situation, but a sensible approach would be to carry out an entirely fresh review of the business and to disregard the fact that an employee was on furlough in any redundancy selection process. This may help employers in a number of ways, particularly so as to shift the focus away from decisions made at the hurry-up at the start of the pandemic, and to avoid discriminating against certain categories of employees. For example, if employers furloughed staff with caring responsibilities, it is highly likely to have impacted more greatly on female employees. Likewise, the requirement to 'shield' during the pandemic is likely to have affected some of those regarded as disabled for the purposes of the Equality Act. Starting again, from scratch, in a redundancy process may help to avoid the bear trap that awaits those employers who simply seek to dismiss those who may have been out of the business for a period of time on furlough.

88. In the event that an employer seeks to carry out a redundancy process at a time when some of its workforce remains on furlough, thought needs to be given to the mechanism by which employees are consulted with. As has already been said, the law relating to redundancy has not changed. If an employer needs to consult either collectively or

individually, that requirement remains, whether employees are furloughed or not. That may mean having to carry out consultation remotely, with all the usual considerations (and safeguards) required to be made. In such circumstances, employers should be particularly conscious of the requirement to remain compliant for data protection purposes (such as who may be present and whether covert recording may be carried out).

Dealing with complaints during a redundancy process

89. It is common for employees to raise complaints during any redundancy process. Employment practitioners will be familiar with advising employers of the respective merits of dealing with complaints by way of a separate grievance process or whether (if the complaint is intrinsically linked to the redundancy process) it could be dealt with as part of the redundancy process.

90. Generally speaking, both *might* be reasonable, but the much will depend on the timing and nature of the complaint. Complaints of discrimination and/or whistleblowing should be dealt with in particular detail and with particular care.

91. Some employers will have high levels of employees on furlough or working from home. It may be necessary to deal with complaints remotely, depending on the situation prevailing at the time.

92. An employee who is on furlough can still raise a grievance and take part in an investigation and hearing. Should that be the case, employers should consider the specific Acas guidance on disciplinary and grievances procedures during the coronavirus pandemic. Plainly, grievance procedures should be carried out in a way that follows public health guidelines around social distancing and the reopening of workplaces.

93. By way of gentle reminder:

    i. Deal with a complaint promptly.

    ii. Make sure that an employer has given due consideration to the manner in which it might deal with a complaint *before* the redundancy process commences. This may help ensure an employer has allowed time for such a process to be carried out during the redundancy timetable.

iii. Deal with each constituent part of the complaint;

iv. Ensure that the person investigating and/or dealing with the grievance is experienced in dealing with complaints (or at least is otherwise sufficiently supported in doing so). Decisions relating to redundancy are often made at a senior level of any given organisation. If a complaint is made about a redundancy process that goes to the very root of that process, the person dealing with that complaint should be senior enough to be able to do something about it.

v. If a complaint is made that relates to a protected disclosure and/or a protected characteristic, make sure that the appropriate policies are followed.

vi. Ensure a robust appeal process is provided.

vii. Remind employers of the statutory definition of victimisation.

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