



## **Virtual Redundancy Consultation during Furlough**

**6 October 2020**

As the Coronavirus Job Retention Scheme (**CJRS**) comes to an end on 31 October 2020, many organisations may be contemplating redundancies, particularly as the new Job Support Scheme (**JSS**) requires a more significant contribution to wages from employers. Further to our previous briefing on the 10 key considerations for redundancy consultation, this article gives 5 additional points to bear in mind when consulting with furloughed employees as well as a brief update on the CJRS Job Retention Bonus.

### **1. Can you consult with furloughed employees and make them redundant?**

The updated CJRS guidance confirmed that employees on furlough can be made redundant. The guidance also clarifies that trade union or other employee representatives participating in collective and individual consultation will not break their furlough as long as they do not undertake revenue generating activities for their employer.

The guidance does not specifically say that you can consult with employees during a furlough period. However, provided the employee is not making a profit for the employer or providing services, redundancy consultation during a period of furlough is most likely to be permissible, particularly given the clear guidance regarding the permitted participation of trade union and employee representatives. If an employee is on flexible furlough and in the workplace for some of his/her working week, you could consider whether some or all of the redundancy consultation can take place in person on days when the employee is working (with appropriate social distancing).

### **2. Effective Virtual meetings**

You can consult with employees about their potential redundancy at a virtual meeting on platforms such as Zoom and Teams. Effective communication at such meetings will be vital to ensure a fair and meaningful consultation takes place, particularly where employees may already be feeling isolated working at home and anxious. Ensure that all participants in virtual meetings have access to suitable equipment, such as a laptop or PC to facilitate the meeting.

As mentioned in our previous briefing, employees have a statutory right to be accompanied by a work colleague or trade union representative at the final consultation meeting and the appeal meeting. Whilst this is not strictly speaking required at earlier consultation meetings, we recommend that the right of

accompaniment is permitted at all redundancy consultation meetings as a matter of good practice. Consideration may be given to:-

- How you can implement 'break out' conversations to allow the employee to speak with his/her representative before, during and after the virtual consultation. Video meetings are more tiring than in-person meetings. So perhaps consider a break after 45 minutes.
- Providing managers with a guidance note for the consultation meeting to ensure all the relevant factors are discussed.
- Setting clear protocols in writing in advance of the meeting with all participants about how the consultation will be conducted.
- Measures to ensure the platform for hosting is secure and compliant for data protection purposes.
- Asking the employee (and his or her companion, if applicable) to attend the meeting from a private and quiet room, where they will not be disturbed and their position can be discussed confidentially.
- Reminding the employee that recording the meeting is not permitted. It is very easy to click record on platforms such as Teams or Zoom and much easier for employees to set a mobile device to record a virtual meeting than an in-person meeting within the workplace.

### **3. Is it unfair to make employees redundant when the new JSS starts on 1 November 2020?**

It is difficult to give a generic answer to this question. This is because the fairness of any redundancy dismissal depends on all the circumstances at the relevant time. Specific legal advice should be sought on any individual case. Given that employers will be required to make a significant contribution to employee wages under the new JSS, it is not necessarily unfair to make employees redundant instead of placing them on the new scheme. Cost savings may be necessary in the immediate / short term. Therefore, some businesses may not consider the JSS a viable option for certain roles and a genuine redundancy situation may arise.

### **4. Statutory Redundancy Pay**

The CJRS guidance is clear – the scheme cannot be used to cover the Statutory Redundancy Payment. Furthermore, the Government introduced new legislation on 31 July 2020 in GB that ensures employees are entitled to receive statutory redundancy pay based on his/her normal wage and not the reduced furlough rate. The same legislation was introduced here by the NI Executive on 13 August 2020 under the Employment Rights (NI) Order 1996 (Coronavirus, Calculation of a Week's Pay Regulations (NI) 2020 (**the Week's Pay NI Regulations**)).

## 5. Notice

The CJRS guidance is clear that you can continue to claim under the scheme for a furloughed employee who is serving out his/her statutory or contractual notice. However, payment in lieu of notice cannot be reclaimed under the scheme because it is a discretionary payment and the grant can only be used “to continue the employment of employees”.

The position on notice pay during furlough is complicated. It depends on whether the employee is entitled to contractual notice or statutory minimum notice in his/her contract of employment. Statutory notice is one week for every year of service, up to a maximum of 12 weeks’.

If the employee’s contractual notice period is at least one week more than the statutory minimum period of notice, they can be paid notice at their furlough rate of pay. For instance, an employee who has 2 years’ service and a contractual notice period of 4 weeks’, could be paid notice pay at their reduced furlough rate.

If the employee is only entitled to statutory minimum notice in his/her contract, the notice pay will be based on a complex calculation of a “week’s pay” under the Week’s Pay NI Regulations. This essentially means that the employer is required to ‘top up’ the notice pay to the employee’s usual pay, even if this is more than can be recovered from the CJRS.

### **CJRS Job Retention Bonus**

In other news, last Friday 2 October, the Treasury issued a Direction with details of the Job Retention Bonus, which can be found [here](#). In addition, the Government has also produced a more user friendly guidance note with useful worked examples of employees who trigger the bonus, which can be found [here](#). There are no surprises in the Direction or the Guidance and the main points can be summarised as follows:-

- The Job Retention Bonus is a £1,000 one-off taxable payment to the employer for each eligible employee furloughed and kept continuously employed until 31 January 2021. The employer does not have to pay this money to the employee.
- The employer will be able to claim the bonus between 15 February 2021 and 31 March 2021. Further guidance is expected on how to claim.
- To be eligible for the bonus, the employer must have paid a salary of at least £1,560 (gross) to the employee throughout the tax months between 6 November 2020 and 5 February 2021.

**This article does not constitute legal advice and specific advice should be sought in respect of particular cases.**