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Coronavirus (COVID-19): redundancy guide

Understand how the COVID-19 pandemic and the closure of the Coronavirus Job Retention Scheme impacts on redundancy procedures

The coronavirus (COVID-19) pandemic poses a significant threat to people's health and wellbeing as well as huge disruption to businesses. People professionals will need to rapidly adapt their practices and procedures to suit the current situation but also to ensure their business continuity and viability. Part of this response may unfortunately have to include redundancies or other cost cutting measures. The nature of the virus will mean that employers may need to consider adapting their usual redundancy procedures, taking into account the Job Retention Scheme (known as furlough) and the new Job support scheme that replaces the furlough scheme. Below, we have outlined how these schemes affect redundancy procedures.

For more specific questions relating to coronavirus, visit our [Coronavirus hub](#).

The Coronavirus Job Retention Scheme and redundancy procedures

In March 2020, the UK Government announced the implementation of the Coronavirus Job Retention Scheme, to help businesses deal with the economic consequences of the Coronavirus (COVID-19) pandemic and consequent lockdown measures. Details of the scheme are set out in HMRC Guidance Notes (for both [employers](#) and [employees](#)), a [Treasury Direction](#), and [periodic updates](#). The Scheme aimed to help employers whose operations have been severely affected by coronavirus until it ends on 31 October.

The Scheme allowed organisations to 'furlough' employees, ie place them on a temporary leave of absence. Under the first phase of the scheme (that concluded at the end of June 2020) employers could reclaim up to 80% of furloughed staff wage costs from HMRC, subject to a cap of £2,500 per month. A further flexible phase of the scheme has been operational between 1 July and 31 October. During this phase employees can be partially furloughed, combined with part-time working. Employers need to pay for any working time but can still claim a grant for periods of furlough, subject to certain conditions. Employers need to pay employers' NI and pension contributions from August onwards and contribute 10% and 20% towards furlough pay in September and October

respectively. Employees had to agree to being furloughed (and to any decrease in salary). They also had to be furloughed for a minimum of three weeks, and could not carry out any work for their employer during the first phase of the scheme but after 1 July any pattern of working could be agreed and any furlough periods can be claimed for in blocks of at least 1 week.

The usual rules around redundancy have not been changed. However, whilst the furlough scheme is in place (until the end of October) and other government assistance is available, there are some additional considerations to be borne in mind, such as:

- **Logistical issues** which will need to be overcome if redundancy consultation processes take place remotely with staff who are furloughed.
- Organisations will have to think carefully about ensuring that redundancy **pooling and selection criteria** are fair. In particular, if an organisation is proposing to select staff for redundancy based purely on the fact that they are furloughed, there is a risk that this approach may give rise to an unfair or even discriminatory redundancy process and/or dismissals. The extent of the risk will depend on the reasons for staff having been placed on furlough in the first place, and the selection process that was used to do this.
- Staff are entitled to be paid their full salary during their notice period even if they have only been receiving the relevant percentage of furlough pay during furlough, although this depends on whether the notice period is contractual or statutory. Redundancy pay should be based on full salary not furlough pay. Any outstanding annual leave should also be paid at the full rate of pay.
- Redundancy dismissals may be an **unfair dismissal**, if they take place in circumstances where an employer did not properly consider alternatives, including retaining the employee on furlough or the Job support scheme if possible and the Job retention bonus explained below.

The duty to explore all alternatives (part of the overall duty to seek to avoid redundancies altogether) includes taking into account the Job Retention Bonus of £1,000 which the government is offering to UK employers for every furloughed employee who remains continuously employed until the end of January 2021. This is a one-off payment to encourage firms to retain formally furloughed workers.

An important point to bear in mind is that new government guidance is being published and updated on a regular basis. This means it is important for businesses to keep matters under close review and always read the latest guidance before beginning any processes.

Redundancy situations

For many organisations placing staff on furlough, redundancy may be considered at some stage in the months to come such as when the furlough scheme ends on 31 October 2020 or in the period after its conclusion. If so, the usual rules around redundancy processes, including around what constitutes a genuine redundancy situation and a fair process, will still apply. Organisations should also take care to ensure they follow any of their own policies and procedures when doing so.

The government have confirmed that employers can still make furloughed employees redundant whilst the furlough scheme is operational but have urged employers to avoid making redundancies if they can.

As the scheme nears its an end on 31 October a new scheme, the [Job support scheme](#) will come into operation on 1 November. Employers will be required to consider their next steps - whether or not employees can be brought back to work, whether to utilise the Job support scheme or whether redundancies may be necessary. In such cases, the usual employment law rules would apply in relation to the substantive and procedural fairness of any such redundancy process. Where redundancies are necessary ACAS, the CBI and the TUC have issued a [joint statement](#) urging employers to following five principles including fairness and genuine consultation.

On 9 October 2020 the government announced an [extension to the Job Support Scheme](#) that would apply if a business is forced to close, as part of any local or national restrictions. Under the six-month Job Support Scheme Expansion for Closed Businesses, the government will pay two-thirds of employees' wages, up to a maximum of £2,100 per month. Under the scheme, from 1 November, employers will not be required to contribute towards wages and only asked to cover NICs and pension contributions. Employers are advised to consider whether they can utilise this scheme as an alternative to redundancy if their business legally has to close. Initial guidance on the operation of the scheme can be found in the [government factsheet](#).

Redundancy consultation

The usual obligation to consult staff both individually and collectively about any redundancy proposals and allow them to comment on these before they are finalised, and rules about what a fair consultation should entail, will continue to apply irrespective of whether staff are or have been furloughed or not. While the furlough scheme is still in operation one of the primary issues to bear in mind when undertaking redundancy consultation processes with staff who are furloughed, will be the obvious logistical issues which are likely to arise from consulting with staff remotely. Redundancy consultation meetings will still need to take place individually and/or collectively. Employers will therefore have to consider how best to enable this, which could include an online meeting or telephone call. They may also need to build extra time into the consultation process to allow for any logistical issues which may arise.

Employees should still be given the right to be 'accompanied' to redundancy meetings (if that is your normal practice), even if such meetings are carried out remotely and/or virtually.

Employees and staff representatives will still be allowed to 'accompany' colleagues to redundancy meetings even if they themselves are furloughed, as the [updated employer's guidance](#) on the Coronavirus job retention scheme confirms that 'whilst on furlough, employees who are union or non-union representatives may undertake duties for the purpose of individual or collective representation of employees or other workers.'

If the collective consultation is triggered because an employer will be making 20 or more redundancies in a 90 day period, the employer will need to ensure that they consult collectively with the appropriate Trade Union or existing staff representatives, and that they meet the 30 day (or 45 day for 100 or more redundancies) deadline for commencing consultation. However, the effect of the pandemic, including current ongoing advice that people should work from home where they can, may mean that there are practical difficulties with appointing representatives in the normal way and/or undertaking full consultation. These issues could be more pronounced where there is no recognised Trade Union or existing staff representatives (meaning an election has to take place before consultation can begin). Employers should take every step to ensure consultation takes place, adapting the process to suit their own particular context.

Part of consultation should always include assessing whether there are any other alternatives to redundancy.

Employers should bear in mind that the furlough scheme is due to come to an end on 31 October 2020; and consideration should be given to how this may impact on the timeframe for any redundancy consultation period (whether that be on an individual or collective basis). More information is available in our [returning to the workplace guide](#).

The law provides a rarely used defence for employers who have failed to collectively consult. Employers have to prove 'special circumstances' which made it not reasonably practicable to comply with the collective consultation requirements. Whilst unusual, the pandemic does not give employers an automatic excuse to avoid consultation. The defence applies to failures to consult at all, failures to consult in good time or to provide the required statutory information for consultation. The fact that the Coronavirus Job Retention Scheme has been introduced, along with the temporary suspension of wrongful trading provisions for company directors, makes it harder for employers to rely on the special circumstances defence. It therefore seems unlikely that the current situation would qualify for the defence and employers should continue to comply with their redundancy consultation duties to the greatest extent possible.

Compassion during a redundancy situation

A redundancy situation can have a significant impact on the morale, mental health and wellbeing of both those employees who are subject to such process (whether they ultimately leave the organisation or not) and other employees in the organisation. Fears about job security and income loss have risen during the pandemic and research indicates that many people's mental health has been negatively impacted during this time. This is especially true of some groups, including young people and those who already had a mental health condition prior to the pandemic. The economic climate and predicted large-scale increase in unemployment will further exacerbate some people's concerns about finding another job. More information on supporting the mental health and wellbeing of employees during coronavirus can be found in our [guide](#).

Although it may be impossible to avoid redundancies during this difficult time, it is important that every employer approaches a redundancy process with compassion and treats everyone with dignity, respect and kindness. Handling redundancy in a humane and compassionate way can make a significant difference to how people cope with the process. It will also have an impact on other employees in the organisation, who can be affected by the unsettling experience of seeing their colleagues being laid off and feeling their own job security is at risk - this is sometimes referred to as 'survivor syndrome'.

Regular, honest and two-way communication throughout the redundancy process is vital so that employees don't rely on the grapevine to hear about what's happening. Take time to explain the reasons for the redundancy and why it's a hard business decision, and the actions that were taken to avoid redundancy and facilitate redeployment. Make sure that everyone knows their contribution to the business was valued and that redundancy selection is in no way a reflection on them personally.

Be prepared to deal fully with people's feedback and concerns, and ensure that the information given out is clear, and understood by those concerned. Giving notice is a difficult task and managers should be trained to handle redundancies with sympathy and clarity. They should feel confident to have supportive and sensitive conversations with people, listen with empathy and signpost anyone who needs further wellbeing support to the right resources. Employers should remember that being responsible for such processes can be a stressful experience too, and provide support to managers and HR professionals.

Being selected for redundancy can have a significant detrimental impact on someone's mental health, regardless of their previous health history and personal resilience. Immediate and ongoing support should be available to the individual wherever possible to support their health and wellbeing. This could include a range of options, including access to occupational health services, counselling and other services via an employee assistance programme (EAP) if this is available. Some EAPs provide continued support for employees who have been redundant for up to three months after employment has ceased, so try to make this available and that people know how to access it. If the

organisation does not have access to these services, employers should provide information on external sources of help and support.

Where possible, outplacement advice should also be offered to leaving employees to maintain their morale and help them find alternative employment. Employees may need support to undertake effective job search, including the opportunity for employees to refresh their interview skills, redraft CVs, use social media and other channels for job seeking and make effective applications.

Redundancy selection process and criteria

A key consideration in any redundancy process will be the criteria by which staff are pooled, and selected, for redundancy. To be fair, selection must involve the fair application of objective selection criteria to a reasonably constituted pool of employees. The selection criteria and process must not be directly or indirectly discriminatory in any way. Staff should be consulted about the selection criteria / process before these are finalised.

An employee cannot be made redundant or put on notice of redundancy if they are on the new Job support scheme.

In the case of a redundancy process involving furloughed (or previously furloughed) employees, these requirements remain. The Guidance is clear that, for furloughed staff, usual employment law and employee rights will apply, including protection from unfair dismissal and discrimination. So employers will have to be careful to ensure that selection pools and criteria are fair, objective and reasonable; are not directly or indirectly discriminatory; and that staff are consulted about them before they are finalised.

Automatically selecting employees for redundancy purely on the basis that they have been furloughed could be problematic for a number of reasons:

- First, the question of whether being on furlough would be a fair basis for selection for redundancy will depend on how staff were selected for furlough to begin with, what the process and criteria used were, and whether these were fair in the circumstances and remain a fair basis on which to select for redundancy. It is likely that an employer would have to reassess the fairness of pools and selection criteria (and consult staff about this) at the point that redundancies became necessary, to ensure that any ensuing redundancies were not substantively or procedurally unfair.
- Second, if staff have been put on furlough because they have caring responsibilities, or are shielding for health reasons, subsequently pooling and/or selecting these employees for redundancy is likely to constitute indirect discrimination based on sex, disability or age. If the principle reason for furloughing staff is that they have child-care responsibilities, a health condition or are more vulnerable to COVID-19

because of their age, it will be important that the employer ensures that they are not placed at greater risk of redundancy by virtue of the fact that they have been furloughed.

- Third, as mentioned in above, there remains something of a grey area around the question of whether selecting someone for redundancy when they could remain on furlough may result in the ensuing dismissal being unfair. Employers need to consider whether it would be reasonable in the circumstances (taking their financial position into consideration) to wait until the furlough scheme came to an end, and/or the organisation was able to claim decreased staff costs under the scheme, before effecting any redundancies. This assumes that the reason for the redundancy was or is coronavirus. If it was unrelated this is less likely to apply; but should still be considered.

Employers should bear in mind the duty to explore other alternatives to redundancy and look for suitable alternative employment at all stages of the process.

Redundancy dismissals

The guidance indicates that employees may be made redundant while on furlough, or afterwards. The [note for employees](#) states *your employer can still make you redundant while you're on furlough or afterwards* and the [note for employers](#) states *when the government ends the scheme [employers] must make a decision, depending on [their] circumstances, as to whether employees can return to their duties [and] if not, it may be necessary to consider termination of employment (redundancy)*. The Guidance is clear that, whilst on furlough (and afterwards), employees still retain their usual employment rights, including in relation to redundancy rights and protection from dismissal.

It is therefore crucial that employers only effect redundancy dismissals where:

- there is a genuine redundancy situation, and
- they have followed a fair redundancy procedure (including in relation to consultation, selection, searching for suitable alternative employment, etc.) according to the usual employment law rules.

As discussed above, automatically selecting staff who are (or have been) on furlough for redundancy may give rise to an unfair or discriminatory dismissal. A dismissal effected whilst an employee is on furlough (in circumstances where it may be possible for that employee to remain on furlough rather than being made redundant) may also be unfair. The latter will depend very much on the particular circumstances of the case, including the size, resources and financial position of the employer.

Employees being made redundant are still entitled to redundancy pay (if they have two or more years' service), their contractual notice period (or pay in lieu), and any accrued but

untaken annual leave (or pay in lieu). We deal with this in more detail below.

Redundancy payments

Employees with two years' continuous service are entitled to statutory redundancy payments based on a multiplier of:

- half a week's pay for each year of employment up to age of 22;
- one week's pay for each year between the ages of 22 and 40;
- one and a half week's pay for each year over the age of 41.

There is a maximum of 20 years' service which can be taken into account and a statutory maximum limit on the week's pay (currently £538 per week). For those made redundant on or after 6 April 2020 the maximum statutory redundancy pay is £16,140. Employers may offer more generous contractual redundancy payments.

Redundancy and furlough pay

The guidance is clear that employees' redundancy rights, and other employment rights, will not be affected by being furloughed. So, any employee who is made redundant whilst on furlough will be entitled to a statutory redundancy payment if they have two years' continuous employment, as well as any contractual redundancy entitlement. Furloughed employees who are made redundant will receive redundancy pay based on their normal wage.

Statutory redundancy payments must be calculated based on an employee's pre-furlough salary. This was confirmed by the Government on 30 July with [legislation](#) coming into force on 31 July. The legislation does not apply to employers who had already made redundancy or notice payments before 31 July.

The furlough scheme ends on 31 October. Therefore, calculation of any statutory redundancy pay, or statutory notice pay based on pay on or before then must ignore any reduction in wages resulting from the employee being furloughed.

If employees' pay varies, or they have no normal working hours, then pay is normally averaged over the previous 12 weeks. If this period includes at least one week of furlough then the averaging must be based on full rather than reduced pay.

For other claims a week's minimum pay applies such as claims for unfair dismissal basic awards, and failure to provide written particulars the employees' normal (non-furlough) salary should be used.

The calculation of any contractual redundancy entitlement will depend on the contractual terms governing that payment (and subject to any valid contractual variation made

before the employee was furloughed). The new legislation does not affect enhanced contractual redundancy pay as it only applies to basic statutory redundancy pay entitlements.

Notice periods

Employees who are made redundant whilst on furlough are entitled to notice of termination in accordance with their contracts. The Government have confirmed that statutory notice pay during the notice period is also payable at the rate of the employee's full contractual normal salary not their wages under the furlough scheme.

There were some complex legal arguments surrounding this, especially regarding the distinction between contractual and statutory notice pay. The new rules permit employers to pay a lower rate of pay for contractual notice periods, as long as these notice periods are at least one week longer than the statutory minimum period. Note that employers cannot reclaim any payment made in lieu of notice under the furlough scheme.

Reclaiming amounts

Even where an employee has been furloughed before being made redundant under the furlough scheme, employers cannot reclaim the cost of:

- statutory redundancy payments
- contractual redundancy payments
- payments in lieu of notice or untaken annual leave
- extra compensatory payments for termination of employment.

Employers are likely to be able to reclaim a portion of:

- the cost of notice pay for any notice period whilst on furlough; and
- the cost of any annual leave taken during the notice period

Both these items are only claimable for up to 80% (or 70% or 60%) salary subject to the relevant monthly cap.

Holiday: Furloughed employees who are made redundant are entitled to be paid in lieu for any accrued but untaken leave (bearing in mind that annual leave continues to accrue during furlough leave). Employers will not be able to reclaim payments in lieu of annual leave under the furlough scheme. They can claim a furlough grant for the cost of any annual leave taken during the notice period, of up to 80% (or 70% or 60%) salary subject to the relevant monthly cap. This leave will have to be topped up by the employer to the rate of the employees full (pre-furlough) salary.

Job Support Scheme

The Job Support Scheme (JSS) will begin on 1 November 2020 and run for six months. Its aim is to help employers who can support employees in viable jobs doing some work but are unable to offer employees (including those previously furloughed) their normal hours of work. The employer will continue to pay its employee for time worked, but the burden of hours not worked will be split between the employer and the government (through wage support) and the employee (through a wage reduction), and the employee will keep their job.

A key difference compared with the Job Retention Scheme (JRS) is that the JSS will not provide wage assistance for an employee who is doing no work at all.

Neither the employer nor employee needs to have previously used the Job Retention Scheme to use the JSS. Employers using the JSS will also be able to claim the Job Retention Bonus if they meet the eligibility criteria.

Employers need to pay employees for the hours they work, which must be at least one-third of their normal working hours for the first three months of the scheme. The employer must also pay the employee for one-third of the amount of 'lost hours' - ie the remaining hours the employee would normally work, but is not working. The government will pay a third of the hours not worked, up to a maximum cap (£697.92). This will ensure employees earn a minimum of 77% of their normal wages.

The government has expanded the JSS to support businesses across the UK required to close their premises due to coronavirus restrictions, and will pay two-thirds of employees' salaries (or 67%) up to a maximum of £2,100 per month. Businesses will only be eligible to claim the grant while they are subject to restrictions and employees must be off work for a minimum of seven consecutive days.

The Job Support Scheme and its extension can therefore provide an opportunity for employers, who may be facing ongoing difficulties or restrictions on normal operations, to avoid redundancy. Employers should therefore, prior to making any role redundant, carefully assess whether this scheme could provide an alternative to a redundancy situation. Where an employer does not make use of the scheme they should take detailed notes on their decision. Care should be taken when identifying which employees are placed onto the scheme.

Employees who are working under the Job Support Scheme or its extension may also experience stress and anxiety and be concerned about their future. The scheme will also provide for reduced income which also may be a source of reduced wellbeing. Employers should aim to support the mental health and wellbeing of employees whilst the scheme is in operation and beyond.

More information will be added to this guide when further information is available from the government.

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