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Coronavirus (COVID-19): redundancy guide

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

Throughout the COVID-19 pandemic people professionals needed to rapidly adapt their practices and procedures to suit the current situation and ensure their business continuity and viability. Part of the overall response may unfortunately have included redundancies, or other cost-cutting measures.

Since March 2020 the Coronavirus Job Retention Scheme has been available to help businesses deal with the economic consequences of the pandemic. This allowed organisations to 'furlough' employees, that is, place them on a temporary leave of absence. The scheme ended on 30 September 2021, meaning some employers may have to consider redundancy procedures.

The Coronavirus Job Retention Scheme and redundancy procedures

The usual rules around redundancy have not changed through the pandemic. However, during the availability of furlough and other UK Government assistance, employers should have borne in mind some additional considerations as part of their usual processes. Employment tribunals [cases](#) are starting to emerge where employers perhaps misunderstood the interface between redundancy and furlough and handled matters incorrectly (see our [COVID case law page](#) for examples).

If employers are considering making previously furloughed staff redundant there are some additional considerations to be borne in mind, such as:

- **Logistical issues** surrounding redundancy consultation processes, especially if this takes place remotely.
- Employees' assertions that redundancy **pooling and selection criteria** were unfair. In particular, organisations that have selected staff for redundancy based purely on

the fact that they were furloughed, may risk claims of unfair selection, unfair dismissal or discrimination. The extent of the risk will depend on the reasons for staff being placed on furlough in the first place, and the selection process used.

- **Claims concerning salary.** 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. For furlough periods after 1 December 2020 the furlough grant cannot be used towards a contractual or statutory notice payment or redundancy pay. 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 also be an **unfair dismissal**, if the employer did not properly consider alternatives, including retaining the employee on furlough or any other government scheme available.

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, continue to apply. This is irrespective of whether staff were furloughed or not. One of the primary issues to bear in mind when undertaking redundancy consultation processes with staff who have been furloughed, will be the obvious logistical issues which are likely to arise if consultation takes place remotely. Redundancy consultation meetings will still need to take place individually and/or collectively. Employers must consider how best to enable this, which could include an online 'town halls', online meetings or telephone calls. They may also need to build extra time into the consultation process to allow for any logistical issues which may arise.

There is no statutory right for employees to be accompanied at redundancy consultation meetings but it is good practice for employers to allow this under their redundancy procedure. Employees can 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.

If the collective consultation is triggered because there are 20 or more redundancies in a 90 day period, the employer must ensure that they consult collectively with the appropriate Trade Union or existing staff representatives. Employers must also meet the 30-day (or 45-day for 100 or more redundancies) deadline for commencing consultation. However, the effect of the pandemic, including hybrid working or working from home, 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.

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. While 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 furlough was introduced, along with other UK Government support, 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 has 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. Employers should take time to explain the reasons for the redundancy and why it's a hard business decision, and consult around the possible actions that were taken to avoid redundancy and facilitate redeployment. Employees should be told that everyone knows their contribution to the business was valued and that redundancy selection is in no way a reflection on them personally.

Managers should 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 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 and process at an early stage.

In the case of a redundancy process involving previously furloughed employees, these

requirements remain. The guidance is clear that usual employment law and employee rights will apply, including protection from unfair dismissal and discrimination. So employers must 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. The furlough criteria may not 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 principal 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 or disability, 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 were furloughed.
- Third, as mentioned above, there has already been case law surrounding whether selecting someone for redundancy when they could remain on furlough may result in the ensuing dismissal being unfair. Employers will not have to address this issue if (taking their financial position into consideration) they waited until the furlough scheme ended, and/or the organisation waited until contributions to staff costs decreased before effecting any redundancies.

After furlough

Employers will continue to deal with the legacy of furlough for some time.

Employees who were made redundant may argue that it was unfair to implement redundancies when the furlough scheme was available. In return employers can allege they had a genuine redundancy situation as that workload and need for employees had

diminished and they still had to pay NICs, pension, full holiday pay top-ups and possibly increased payments for hours not worked. From 1 August 2021, employers contributed 20% of the furlough salary, until the end of the scheme.

Tribunal cases concerning these and other aspects of furlough are still working their way through the system. Examples can be found on our case law [page](#).

Employers faced with such claims will need to consider whether they applied the redundancy selection and consultation processes properly despite furlough and, if they did not, they may need to take specific advice and budget for a possible settlement agreement (see below).

There is a potential grey area; if employers could claim furlough for employees where it has already been decided that their roles will be redundant later on. This seems to be contrary to the underlying purpose of the furlough scheme to help employers retain the workforce. If employers merely delayed inevitable redundancies there is at least a risk that it could be regarded as contrary to the purposes of the scheme.

Employers should therefore 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 government guidance confirmed that any furloughed employees who are made redundant retain their usual redundancy rights and protection from dismissal. Employers should also follow the normal rules and procedure, including notice periods and consultation.

Employers must make a decision, as to whether furloughed employees can return to their duties and if not, it may be necessary to consider redundancy after all other options are exhausted. 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 have been on furlough for redundancy may give rise to an unfair or discriminatory dismissal.

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.

Employer's choice

In some cases, the restructuring may already have taken place or be underway. Some employers may have already known that employees were very unlikely to be needed after the furlough scheme ended. Those who have proceeded with redundancies before September 2021 may have been influenced by the fact that from July 2021 employers had to contribute 10% towards furlough salary, rising to 20% in August and September 2021 (plus NICs and pension contributions).

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 (£544 per week from 6 April 2021). For those made redundant on or after 6 April 2021 the maximum statutory redundancy pay is £16,320. Employers may offer more generous contractual redundancy payments.

Redundancy and settlement agreements

Some employers may offer formal settlement agreements either as an alternative to redundancy, or before commencing the redundancy process. Some specific issues can arise if settlement packages are offered in the context of furlough.

Redundancy consultation periods can be up to 45 days (if more than 100 staff are facing redundancy) and conducting consultations whilst many staff have been on furlough leave is difficult. Settlement agreements may be considered as a possible way to avoid a lengthy redundancy consultation procedure, especially if a large number of redundancies are needed in a short space of time.

Offering settlement agreements as an alternative to full redundancy consultation process is not without risk or cost. Settlement agreements are only binding if both the employer

and the employee agree, and a number of criteria are met.

Employers should bear the following in mind:

- For a settlement agreement to be binding the employee must have had legal advice before agreeing the settlement package. Whilst solicitors can provide legal advice remotely, the legal advice still has to be paid for and employers often have to foot the bill.
- An enhanced redundancy payment will probably need to be offered to agree to the settlement package. This entails calculating redundancy entitlement, based on age, length of service and a week's pay (based on the employees' full salary, rather than the furlough rate).
- Any settlement offer should be at least what the employee would receive if a full redundancy process was followed and most employers then offer an additional payment tax free as a termination payment.
- The amount on offer depends on whether there is a clear redundancy situation, and no realistic prospect of unfair dismissal claims or if there is an exposure to claims because there is not a genuine redundancy situation or there has been discrimination or unfair selection for redundancy.
- Managers should be familiar with how to initiate a protected conversation to try and avoid dialogue being used as evidence in a potential tribunal claim. Protected conversations can be via a video conference call with appropriate advance notice and preparation.

For further information on settlement agreements see our [Settlement and compromise agreements Q&As](#).

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 was made redundant while on furlough will be entitled to a statutory redundancy payment if they have two years' continuous employment, as well as any contractual redundancy entitlement.

Statutory redundancy payments are based on years of service, age and a week's pay. Statutory redundancy payments must be calculated based on an employee's pre-furlough salary. This was confirmed by UK Government guidance. The pre-furlough salary for a week's pay is currently capped at £544 (previously £538) which means that employees who earn more than this will just have their calculation based on the £544 figure.

Any calculation of any statutory redundancy pay, or statutory notice pay must also 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 also applies. For example, in a claim for unfair dismissal basic awards for a badly handled redundancy or 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 furlough legislation does not affect any agreements about 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.

If employers must make redundancies they should follow the normal rules including notice periods and consultation.

Employers cannot claim the furlough grant during a furloughed employee's period of contractual or statutory notice. (Employers were previously able to claim for a furloughed employee serving a statutory notice period before the 1 December 2020.)

Therefore, employers who are thinking about dismissing for redundancy must accept that both redundancy payments and full usual notice pay will be payable by the employer in full rather than allocating a portion of the furlough grant towards the notice part of the payment.

Employers cannot reclaim actual redundancy payments or payments in lieu of notice under the furlough scheme. Payments in lieu of notice should be calculated based on pre-furlough pay.

There are some complex legal arguments surrounding notice, especially regarding the distinction between contractual and statutory notice pay.

Reclaiming amounts

Claiming the furlough grant during notice periods ended from 1 December 2020.

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. Unless any further guidance emerges employers claim a furlough grant for the cost of any annual leave taken during the notice period, of up to 80% 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.

Previously furloughed employees who are facing potential redundancy may also experience stress and anxiety and be concerned about their future. The UK Government schemes to date provided for reduced income which is a source of reduced wellbeing in most cases. Employers should aim to support the mental health and wellbeing of employees after government schemes have ended. More information is available in our guide on [mental health support during COVID-19](#).

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