WRIGLEYS
SOLICITORS

EMPLOYMENT LAW BULLETIN

AUGUST 2020

Welcome to the Wrigleys Employment Law Bulletin, August 2020.

This month has seen the first changes to the Coronavirus Job Retention Scheme come into force, with employers now being expected to contribute towards the cost of their furloughed workers. In our first article, we recap the way the furlough scheme is changing as it draws to a close, we look at the mechanics of flexible furlough and 'unfurloughing' staff, and we clarify the new rules on calculating notice pay and redundancy pay for staff who have been furloughed.

HMRC has published further details of the Job Retention Bonus of £1,000 which employers who have furloughed staff and retained them until 31 January 2021 may be able to claim. We explore how employers will qualify for the bonus.

The ECJ has recently considered the factors which will indicate that someone is a self-employed contractor rather than a worker. We look at the detail of the ECJ's response to a UK employment tribunal's questions in ***B v Yodel Delivery Network Limited***.

In ***Hill v Lloyds Bank PLC***, the EAT considered whether it would have been a reasonable adjustment for the bank to promise that a disabled employee would not have to work with certain managers in future, with an agreed pay-out in circumstances where the promise was not kept.

Our question of the month for August covers the tricky and topical issue of consulting staff during the current crisis, including the logistics of redundancy consultation.

Like many organisations, Wrigleys has switched from face to face to online events and we have been delighted by the number of delegates engaging with our series of webinars on Equality and Flexibility in the Workplace. Earlier this month we were joined by barrister Robin White to discuss transgender rights and discrimination. Robin was the first practising employment and discrimination barrister to transition from male to female. If you missed this illuminating webinar, you can access the recording by registering here. Our upcoming webinars are detailed below. We hope to see you there!

We are always interested in feedback or suggestions for topics that may be of interest to you, so please do get in touch.

Forthcoming webinars:

- **Employment law update series: Equality in the workplace - disability and reasonable adjustments**
  1 September 2020, Webinar
  For more information or to book

- **Employment law update series: Equality in the workplace - atypical working, zero hours and ethical issues**
  6 October 2020, Webinar
  For more information or to book

Recorded webinars:

- **Employment law update series: Flexible working: Part I - building a balanced society**
  16 June 2020, Webinar
  For more information or to view

- **Employment law update series: Flexible working: Part II - re-organising and flexible working**
  7 July 2020, Webinar
  For more information or to view

- **Charities & social economy webinar series : Restructuring your organisation from the inside out**
  22 July 2020, Webinar
  For more information or to view

- **Employment law update series: Equality in the workplace - transgender discrimination**
  4 August 2020, Webinar
  For more information or to view

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Flexible furlough, unfurloughing, furlough pay and redundancy pay

Key changes to the Coronavirus Job Retention Scheme and how to calculate termination payments for furloughed staff.

It is now approaching five months since the Chancellor of the Exchequer Rishi Sunak announced the creation of the Coronavirus Job Retention Scheme (the 'Scheme'). In the next three months, the Scheme will be changing as it winds down and support for employers comes to an end. In this article, we recap the way the Scheme is changing as it draws to a close, we look at the mechanics of flexible furlough and 'unfurloughing' staff. We start with a look at the new rules on calculating notice pay and redundancy pay for furloughed staff.

Calculating termination payments for furloughed staff

On 31 July the Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay) Regulations 2020 came into force. These Regulations make clear that the calculation of a week's pay for the purposes listed below* must not take into account any decrease in pay as a result of being placed on furlough.

*This reasoning applies to the calculations for:

- statutory redundancy payments;
- notice pay;
- compensation for the employer's failure to provide a written statement of reasons for dismissal;
- calculation of compensation for unfair dismissal (i.e. 'basic' and 'compensatory' awards); and
- assessment of whether an employee is to be taken as being kept on 'short time' working for a week (which occurs if the employee's pay for the week is less than 50% of their usual week's pay).

For the purposes of calculating statutory redundancy payments and the basic award for unfair dismissal, the calculation is subject to the statutory cap on a week's pay (currently £538).

These changes will have important ramifications for employers who dismiss employees who are, or have been, furloughed and means employees will not be disadvantaged by lower pay rates during periods of furlough leave.

Recap: changes to the Scheme from 1 August

Important changes to the level of funding available via the Scheme began on 1 August.

The changes to the Scheme are:

- From 1 August, employers need to pay employer's National Insurance Contributions and pensions contributions on the amount of furlough pay paid to furloughed employees;
- From 1 September, funding for wages from the Scheme will decrease to 70% of pre-furlough wages (with a monthly maximum of £2,187.50 on the grant available for each employee); and
- From 1 October, Scheme funding for wages will decrease to 60% of pre-furlough wages (with a monthly maximum of £1,875 on the grant available for each employee).

The government have confirmed that furloughed employees must still get at least 80% of their pre-furloughed wages or £2,500 a month (whichever is the lower), so employers will need to

make up the difference until the Scheme closes. At present, there is no indication that there will be any extension to the Scheme, which is due to end on 31 October.

For employers who are utilising the new flexible features of the Scheme, the caps outlined above will be proportional to the hours not worked by the employee.

Bringing staff back to work

Since 1 July employers have been able to bring employees back to work on a flexible basis where the employee will work some hours a week and be furloughed for the rest.

Bringing staff back to work (whether on flexible furlough or returning to pre-furlough terms) will be a change to their working terms and conditions, following the initial change to place the employee on furlough. In this respect, usual employment law rules apply and employers should seek written agreement from the employee to any changes to their terms. In some cases, employers may be able to unilaterally change the terms if there is an express contractual right to allow them to do this, but in most cases employers will not have this right.

It is important to note that we consider here only the basic mechanics of bringing a furloughed employee back to work. Employers must also consider wider issues such as whether it is appropriate to bring an employee back to work for health and safety and personal health reasons, e.g. if the employee is a frontline member of staff and is subject to shielding or otherwise has health concerns about returning to work, or whether the employer's business can actually continue (i.e. whether other changes will come about through any redundancy or restructuring). We recommend that employers seek specific legal advice on these key issues.

Moving an employee on to flexible furlough

Moving an employee on to flexible furlough requires written clarification on:

- What are the employee's new hours and days of work. If this is expected to vary from week to week this should be clearly set out;
- The employee's pay whilst flexibly furloughed. Any hours worked must be paid at the employee's usual rate. In order to be eligible for the CJRS grant, any hours not worked during which the employee is considered furloughed should be paid at 80% of usual pay or more and any pay reduction for furloughed hours must be agreed to by the employee in advance of any such period of reduced pay; and
- Any other changes to the employee's terms and conditions. This might include location of work, for example.

In addition, employers placing a worker on flexible furlough should reserve the right to end the employee's furlough status. The three main ways this will occur are:

- The employer can no longer claim a grant in respect of the employee under the Scheme (e.g. because the Scheme comes to an end or the employee is no longer eligible because of changes to the Scheme rules or the employee resigns);
- The employer gives the employee notice that their furlough will end and that they will come back to work; or
- The employer terminates the employment.

Unfurloughing an employee

Ideally an employer should have reserved its rights to end a period of furlough leave on a specified period of written notice or to end furlough leave when the Scheme closes. To unfurlough an employee before the end of the Scheme, the employer should provide this notice and confirm that the employee's pre-furlough terms and conditions will be reinstated from a

specified date.

In addition, it is good practice for an employer to set out any measures it has or will be taking to accommodate the employee's return to work. For example:

- an employer should provide information on what it has done to make the employee's place of work safe to return to and/or measures taken to adjust the workplace to reduce the risks of coronavirus transmission;
- where appropriate, employees may be required to attend training to inform them of these measures. If so, it would be a good idea to inform the employee of this requirement as part of the notice; and/or
- if the employee has been unfurloughed but will be required to work entirely from home or flexibly from home and the office, this should be clearly notified. Where contracts do not already allow for this arrangement, employers should consult with staff to agree these changes.

Wrigleys' comment

The coming months are going to be a crucial time for individual employers as they make efforts to move towards bringing staff back to work, whilst ensuring that it is safe and practicable to do so.

Unfortunately, many employers and organisations have closed and many more will continue to be vulnerable as the UK begins to transition out of lockdown. It is therefore as important as ever that employers take care to meet their obligations and follow guidance to ensure as much risk mitigation is done as possible, not only to protect the health and wellbeing of staff, but to protect themselves from potential legal liabilities.

How can employers ensure they qualify for the £1,000 Job Retention Bonus?

Employers cannot claim the Job Retention Bonus where the employee is under notice of termination of employment before 1 February 2021.

In early July, the Government announced its intention to incentivise employers to retain furloughed employees until the end of January 2021 by paying a "Job Retention Bonus". Further details of this scheme, which is part of the Government's Plan for Jobs, have now been published.

Broadly speaking, the bonus will be a one-off payment to employers of £1,000 in respect of every employee they have properly claimed for under the Coronavirus Job Retention Scheme (CJRS) and who remains continuously employed through to 31 January 2021. However, there are important eligibility criteria which employers should be aware of before they rely on being able to claim such bonus payments.

Eligibility for the Job Retention Bonus

Employers can only claim the bonus in relation to an employee if all of the following apply:

- The employer made an eligible claim in respect of the employee at any time during the course of the CJRS;
- The employee is continuously employed by the employer until 31 January 2021;
- The employee is not serving a contractual or statutory notice period that started before 1 February 2021;
- The employee earns on average at least £520 a month between 1 November 2020 and 31

January 2021; and
- Some pay was paid to the employee in each of those three months and was reported via Real Time Information (RTI) to HMRC.

As with CJRS claims, the bonus can be claimed in respect of office holders (such as company directors), agency workers and those on zero hours and fixed term contracts as long as they are paid through PAYE payroll and meet the eligibility criteria.

What might stop the Job Retention Bonus being paid to employers?

Aside from the eligibility criteria above, it is important to note that bonus payments will not be made where HMRC believes there is a risk that fraudulent, inflated or incorrect claims have been made under the CJRS, or where HMRC has requested information from an employer which has not been provided.

Employers must also have maintained up to date and accurate RTI records and payments for all their employees (whether furloughed or not), continue to be enrolled for PAYE online and have a UK bank account.

The Job Retention Bonus and TUPE transfers

Employers who have recently taken on, or plan to take on, employees via TUPE, business succession or following a compulsory liquidation should not assume that they inherit the right to claim the Job Retention Bonus in relation to furloughed transferred employees.

TUPE transfers and business successions on or before 31 October 2020

The new employer can only claim the bonus in respect of a transferred employee if the new employer has itself successfully claimed for that employee's wages under the CJRS. A new employer cannot therefore rely on a period of furlough while the employee was with the old employer.

TUPE transfers and business successions after 31 October 2020

Where the transfer takes places after 31 October 2020, the new employer will not be eligible for the Job Retention Bonus in respect of any transferring employees.

Tax implications of the Job Retention Bonus

The Job Retention Bonus will be taxable. The employer must include the amount received in bonus payments as income when calculating taxable profits for corporation tax or self-assessment.

Next steps for employers

Employers hoping to benefit from bonus payments should ensure that their payroll information and RTI records are up to date and that any requests by HMRC for missing information are promptly complied with.

We have previously covered HMRC's approach to furlough fraud. Since the Finance Act 2020 was passed on 22 July, there has been in place a 90-day period during which employers can self-report inaccurate CJRS claims without incurring penalties.

Further guidance will be published by HMRC by the end of September and it is expected that employers will be able to claim bonus payments in February 2021.

ECJ provides directions on determining a 'worker' for the purposes of the Working Time Regulations

Court identifies significant factors for a tribunal to consider when determining employment status.

Determining the precise nature of the relationship between individuals and the organisation they work for is a particularly tricky area of employment law. In part this is because definitions provided in law are open to interpretation and different laws protect different intersecting groups of individuals. This is complicated further where some of the laws describing a worker are based on an underlying European Directive.

For example, a 'worker' is defined in several places in UK legislation, including the Employment Rights Act 1996 (ERA 1996) and Working Time Regulations 1998 (WTR). The ERA1996 is entirely a work of domestic legislation, but the WTR transposes into UK law various protections and rights for workers and employees derived from the EU Working Time Directive (WTD). Because there are differences between the definition of 'worker' in the WTR and the concept of 'worker' status in EU case law, it can be difficult to precisely identify who qualifies for the rights and protections granted under the WTR.

In a recent case, an individual brought tribunal claims under the WTR against a courier business, which led to a referral to the European Court of Justice (ECJ) for clarification on the definition of 'worker' for the purposes of the WTD and WTR.

Case: ***B v Yodel Delivery Network Limited***

B worked as a parcel delivery courier for Yodel under a courier services agreement which stipulated he was a self-employed independent contractor. Under this arrangement, B used his own vehicle to make deliveries and his own mobile phone to communicate with Yodel. B was not required to deliver parcels personally and he was able to substitute someone else to do the work, although Yodel retained the right to veto the substitute if they did not have the adequate level of skill and qualification for the job. B remained personally liable for any acts or omissions of any substitute.

The services agreement allowed B to work for other delivery services (including rivals), stated that Yodel was under no obligation to provide work and that B was not required to accept any parcel for delivery. B was required to deliver the parcels he had accepted to deliver for Yodel between the hours of 7.30 am and 9 pm. B was able to choose the time of delivery of each parcel and their order of delivery to suit him, subject to any fixed time delivery requirements. B received a fixed rate of pay, which varied depending on the place of delivery of each parcel.

B brought claims under the WTR against Yodel and the question arose whether he was a 'worker' for the purposes of the WTR and the WTD. In particular, the tribunal asked several questions of the ECJ to ascertain whether the interpretation of the WTR by UK courts is compatible with EU law.

The ECJ noted that a 'worker' is not defined in the WTD, but that the ECJ has ruled upon the concept. Referring to EU case law, the ECJ highlighted that the essential feature of an employment relationship for WTD purposes is when a person performs services for and under the direction of another in return for pay. The fact that a person might be classified as an 'independent contractor' under any national law did not prevent that person being classified as an employee under EU law if his or her independence was merely a legal fiction created to disguise the employment relationship. In contrast, an individual who had the ability to choose the type of work and tasks they performed, the way in which work or tasks were performed, the time and place of work, and the freedom to recruit their own staff were features typical of an

independent contractor for the purposes of the WTD.

Applying this specifically to the case at hand, the ECJ noted that B had significant freedom in relation to how he worked for Yodel. However, it was for the tribunal to examine the consequences of this freedom and consider whether, despite the discretion afforded to him, B's independence was not merely hypothetical. The ECJ noted that the tribunal would also need to ascertain whether a subordinate relationship existed between B and Yodel.

The ECJ made clear that an individual will not be a worker if they:

- are genuinely independent;
- are not in a subordinate relationship with their client; and
- have discretion to:
  - use subcontractors or substitutes to perform the service;
  - accept or not accept the various tasks offered by the client;
  - provide services to any third party, including direct competitors of the client; and
  - fix their own hours of work within certain parameters.

Having regard for those factors the ECJ indicated that, based on the documentary evidence, B's independence did not appear to be fictitious and that there did not appear to be a relationship of subordination. However, it will be for the employment tribunal to make the final determination on the facts.

Conclusion

Although the Brexit deadline is pending, the guidance from the ECJ in this case on the definition of worker will continue to apply specifically in relation to the protections and rights of workers under the WTR. In particular, this means the case is of most interest to claims relating to rules on working hours and rest periods (including the maximum 48 hour working week) and holiday pay.

As with all cases concerning employment status, caution is advised as these cases are all fact-specific and so it is difficult to apply the decision to wider situations, but the issues highlighted by the ECJ will be familiar to those who have followed employment status case law. In addition, the ECJ mirrored UK courts and tribunals' emphasis on the need to look behind the stated relationship laid out in any contractual documentation and consider the real world effect of those terms and conditions to determine whether the key issues of freedom and flexibility are borne out or if they were merely hypothetical.

Reasonable adjustments: should an employer have guaranteed no contact with alleged bullying managers?

Recent case suggests a reasonable adjustment may take the form of an undertaking.

When an employer is subject to the duty to make reasonable adjustments under the Equality Act 2010 (EqA) it can be tricky to determine precisely whether an adjustment is 'reasonable' to make. The main factors which determine if an adjustment is reasonable are the extent to which it is practicable, the costs of implementation and how it will impact on the employer's activities. These are assessed in the context of the employer's size and financial and other resources. The tribunal will also consider whether adjustment would actually help the employee to overcome the relevant disadvantage and enable them to remain in the role.

Compliance with the duty to make reasonable adjustments often involves the employer and employee working together to make suggestions about how the employee's significant

disadvantage due to a disability can be overcome. Typically, adjustments will focus on changes to the tasks undertaken by the employee, the place and times of work, and the provision of special equipment, but a recent case presented an employer with a more unusual proposal from their employee.

Case: ***Mrs S Hill v Lloyds Bank PLC***

Mrs Hill had been employed by the bank for more than thirty years when she had an extended period of sick leave due to stress, which she said was caused by bullying and harassment she received at work from two of her managers.

Mrs Hill and her managers agreed that they did not want to work with each other again and Mrs Hill returned to work. However, on her return Mrs Hill was anxious that at some point in the future she may have to work with the same managers again. This caused her to feel dread and fear such that she felt physically sick. The prospect of working for one of the managers left her in a constant state of fear, which left her feeling exhausted.

As a result, Mrs Hill's union representative requested an undertaking from the bank that Mrs Hill would not at any point in the future be required to work with or under the two managers, and that if she did the bank would pay her the equivalent of a redundancy payment. The bank refused to give this undertaking on the grounds it was not possible to give any guarantees about whether Mrs Hill would work under either manager (both were senior and may one day rise to be regional or division managers, for example) and that no redundancy payment could be made because breach of the undertaking did not create a situation where Mrs Hill's role would be made redundant.

Mrs Hill brought a claim against the bank for failing to make reasonable adjustments on the grounds that it refused to give the undertaking. The tribunal at first instance upheld the claim and awarded a compensation sum to Mrs Hill. The bank appealed.

On appeal a key question before the EAT was whether the undertaking proposed was a 'reasonable' adjustment. The bank argued that it was unreasonable to give the undertaking as it would have been a 'special benefit' given for an indefinite period for an event that had not occurred and may not ever occur. As well as being unreasonable to agree to make a redundancy payment in a non-redundancy scenario, the bank said the arrangement was unreasonable because the arrangement would likely see Mrs Hill leave the bank, which went against the whole point of reasonable adjustments which was to keep individuals in work.

The EAT dismissed the bank's arguments and saw no reason why an undertaking of this type could not be given. The EAT pointed out that by their very nature reasonable adjustments are often indefinite (e.g. a permanent change to working environment or place of work) and amounted to 'special benefits'. The EAT also held that it could see no reason why a payment mechanism could not be used to reinforce the assurances being sought so that Mrs Hill could work with confidence that the bank was sufficiently motivated to prevent Mrs Hill from working for those managers again.

The EAT noted that many reasonable adjustments had financial implications and that in Mrs Hill's case, the overall purpose of the arrangement was to keep her in work.

Comment

The somewhat attention-grabbing conclusion that an undertaking secured by financial consequences for failure to meet the undertaking has been found to be capable of being a reasonable adjustment in principle may cause employers concern. However, the appropriate circumstances in which such an arrangement may arise appear to be narrow.

There are going to be limited circumstances in which a tribunal is likely to conclude that securing a promise that something will not happen by way of a financial incentive is reasonable. Indeed, the nature of the undertaking in this specific case means it is unlikely to succeed outside of large employers where staff might be managed in such a way as to avoid certain people from working together.

However, as the tribunals in this case have made clear, although the proposal in this case was something of a novel concept, such an arrangement shares many characteristics common to more usual reasonable adjustments in that it is a special arrangement which may last an indeterminate period of time that carries financial implications for the employer.

The takeaway point is that employers need to carefully consider any adjustments proposed by their employees. The simple fact that a proposal is out of the ordinary to what an employer might expect or have seen before will not automatically make it unreasonable.

Question of the month: how should we consult with employees during Covid-19?

Some key legal considerations for employers carrying out formal consultation processes.

Many of our clients have asked if they can carry out consultation with staff during the pandemic, including queries on the implications of furlough, shielding and health and safety concerns on the usual individual and collective consultation processes. In this article, we consider the key legal aspects of this question and provide some practical advice for achieving meaningful consultation during Covid-19.

Must consultation be face to face?

There is no legal requirement for consultation with employees to be face to face. It will of course be possible for some employers and employees to agree socially distanced meetings in person which comply with employer risk assessments. However, in some circumstances, employees and their representatives will be understandably reluctant to attend face to face meetings while there continues to be a high risk of Covid-19 transmission through sustained face to face contact. In those cases, it may be reasonable to make arrangements for remote meetings or calls (see more on remote meetings below).

Consultation and representation during furlough

Consultation is not counted as "work" for the purposes of the Coronavirus Job Retention Scheme and employees can take part in redundancy consultation, disciplinary and grievance processes while on furlough. Acas has published useful guidance on running disciplinary and grievance procedures during Covid-19.

Trade union representatives and employee representatives can also carry out their duties while on furlough as they will not be performing services or generating revenue for the employer.

A matter of trust and confidence

Employees can resign and bring constructive dismissal claims if they believe that their employer has, without reasonable and proper cause, behaved in a way which is calculated or likely to destroy or damage the trust and confidence between employer and employee.

While it is always risky for employees to take the step of resigning, and perhaps particularly so in the current economic climate, employers should be aware that acting unreasonably in a

consultation process could trigger such a claim. For example, undertaking a disciplinary process without enabling the employee to participate remotely or without making allowances for unreliable technology could feasibly found such a claim in current circumstances.

Processes ending in dismissal

When carrying out a process which may end with an employee's contract being terminated, employers need to ensure that the process is reasonable in all the circumstances. Employers should be aware that employees with two or more years' service can bring a claim for unfair dismissal on the basis that the process followed was not fair. (It is important to note that other claims can be brought in relation to alleged failings in processes without two years' service.)

The impact of the current pandemic on dismissal processes and decision-making will be part of the employment tribunal's assessment of whether the dismissal was reasonable in all the circumstances and ultimately whether the dismissal was fair or unfair. It is therefore essential that employers ask themselves during any relevant process whether it is reasonable at the moment to take a particular step or to expect employees, their representatives or companions to comply with certain requirements.

The right to be accompanied to meetings

The Acas Code of Practice continues to apply to disciplinary and grievance procedures. Employees going through such processes still have the statutory right to be accompanied by a trade union official or representative or a willing colleague.

There is no statutory right to have a companion at a redundancy consultation meeting. However, it is best practice to allow an employee facing potential redundancy to be accompanied to individual consultation meetings and your organisation's redundancy policy may include this right regardless of the statutory position.

In normal times, it may be reasonable to extend the right to be accompanied beyond the statutory right, for example where the employee has a particular disability or does not speak English as a first language. In the current crisis, it may be reasonable to allow employees who are working from home or furloughed because of health concerns to be accompanied by a family member. This could also be a reasonable adjustment to the process which the employer has a duty to make for a disabled employee under the Equality Act 2010.

You will need to give careful thought to how meetings with the employee and their companion will work at the moment. This should include a means for the employee and the companion to confer with each other privately.

Employers should not assume that employees or their companions have access to technology to enable them to take part in remote meetings. Employers should discuss what will be possible with employees to establish the best way forward. It may be reasonable to arrange a socially distanced face to face meeting with the relevant parties, particularly if employees are now attending the workplace for work. Hybrid arrangements where some parties are present in person and others are joining remotely may also be a good solution.

Health and safety related claims

Employees who refuse to attend work or take (or propose to take) appropriate steps to protect themselves or other persons in circumstances of danger which they reasonably believe to be serious and imminent are protected from detriment or dismissal for taking this action. It is possible that an employee who has refused to attend a face to face consultation meeting because of health and safety concerns and later been dismissed or subject to a change of terms could attempt to bring such a claim.

Employees might also bring whistleblowing claims based on the same circumstances. In order to do so, they would need to show, broadly-speaking, that they had disclosed information showing that a legal obligation was being breached or was likely to be breached, or that someone's health and safety was, or was likely to be, endangered. They would also have to show that they reasonably believed that it was in the public interest to make the disclosure.

There is no length of service required to bring whistleblowing or health and safety related claims of this kind. The normal cap on unfair dismissal compensatory awards (the lower of £88,519 or 12 months' gross pay) is lifted where dismissal is found to be for these reasons.

Discrimination claims

Employers have a duty to make reasonable adjustments, including to processes, ways of working, and physical features of a building which put a disabled employee at a disadvantage compared to colleagues without their disability.

Employers should consider the individual circumstances of disabled employees involved in consultation processes and make adjustments to the process where it is reasonable to do so. What is reasonable will depend on the employer's size and resources as well as whether the proposed adjustment will actually assist in overcoming the disadvantage. It is likely that insisting that all employees attend face to face meetings will put employees who have been shielding (and potentially disabled) at a disadvantage because of the disproportionate impact on them of catching Covid-19.

It is also possible that some forms of remote consultation could indirectly discriminate against employees with protected characteristics. For example, women (who are statistically more likely to have primary caring responsibilities) may be disadvantaged by inflexible arrangements for online meetings while they have childcare responsibilities.

Employers should not assume that any particular means of remote consultation will avoid such disadvantages. Employers should discuss with employees their proposals for conducting remote consultation and respond to any concerns raised on a case by case basis.

For further information, please see our previous article on discrimination risks and Covid-19.

Collective redundancy consultation

If an employer is proposing to dismiss as redundant 20 or more employees at the same establishment over a period of 90 days or less, it will need to consult collectively with a trade union (where a recognition agreement is in place) and/or with elected employee representatives. Collective consultation must begin at least 30 days before the first dismissal where there are between 20 and 99 potential dismissals; it must begin at least 45 days before the first dismissal where there are 100 or more potential dismissals.

It is sometimes overlooked that "dismissals" for these purposes include those employees who are dismissed and re-engaged on new terms and those who accept voluntary redundancy. Employers who have not been able to reach agreement with their workforce and are unilaterally imposing a change of terms should ensure they allow enough time to comply with collective consultation obligations, including sending the statutory information to employee representatives at least 30 / 45 days before the first dismissal.

If there is no recognised trade union in place for the affected employees, the employer will need to consult with a standing staff forum with the remit to consult on redundancies or the employer will need to consult with employee representatives specially elected for the redundancy consultation. In the latter case, the employer will need to facilitate fair elections, allowing as far as possible for a

secret ballot. It is possible that online voting systems can be utilised for this purpose, but employers should ensure that these comply with their data security rules and find ways to include those who cannot access these systems.

As in normal times, employers should ensure that they take steps to include employees on various types of leave in their consultation, including those on furlough, maternity / paternity / shared parental leave and sick leave. It is possible that remote consultation will in fact be more effective at including these employees than the usual methods, as long as there are good lines of communication established at the outset with employees on leave.

Reasonableness is once again the watchword. Although the current circumstances may hamper normal ways of working, this does not mean that employers can escape their legal obligations to consult collectively. Employers should take what steps they reasonably can to comply with their obligations in the circumstances. The consequences of failing to carry out collective consultation can be very expensive. Employment tribunals can make protective awards of up to 90 days' gross pay for each affected employee where there have been failings. If a failure to consult is found, the more an employer has tried to comply with the requirement to consult collectively, the lower the protective award will be.

Trade union procedural agreements / information and consultation agreements

Before entering into a consultation process, employers should check the requirements for such processes set out in any relevant trade union procedural agreements and/or information and consultation agreements. These are likely to include stipulations for how meetings will be organised and information shared. It would be sensible to discuss and agree with the trade union or employee representatives how procedures will be adapted due to the implications of Covid-19.

Whole staff meetings

Speaking to the whole staff, or to large groups of staff, at the same time will often be the starting point in a redundancy or changing terms process.

Clearly, the current rules on mass gatherings, and social distancing measures in the workplace will impact on the ability of employers to speak to large groups face to face. They will also change the way employee representatives are able to speak to those they represent.

Many employers have already been making use of video conferencing technology to hold team meetings. It may well be that this can be adapted to address large groups on the business reasons for a proposed process. Employers should do what is reasonable to ensure that as many staff as possible can engage with these meetings. Re-running these video conferences at different times can help to maximise the number of staff who can engage in this way, helping to reach those employees on different forms of leave or with different working patterns.

Employers should also share information provided in the meeting in written form (either by email or by post) and consider recording the information-giving part of the video conference so that staff can access it later if they encounter any technological or other interruptions. It should be made clear to participants at the outset if the video conference is being recorded.

Employers should enable employees to raise questions and comments as part of these meetings just as they would if they were holding a face to face meeting. Using "hand-up" buttons and written Q&A functions can help to manage contributions from employees. Employers should make clear from the outset that, where answers cannot be provided in the conference, follow up responses will be made available.

We are living through extremely difficult times for both employers and employees and there is unfortunately no sure-fire way of avoiding all problems arising from consultation processes during

Covid-19. However, careful forward-planning, having an open-minded approach to adapting normal processes and seeking legal advice when necessary will give employers the best chance of engaging positively with employees, running fair processes and minimising the risk of complaints and claims.

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